DEVELOPMENT OF COMMERCIAL ARBITRATION LAW

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Ever since the decision of the Asphalt case in 1915, there has been extraordinary activity in the furtherance of statutory provisions for commercial arbitration, and considerable pressure has been placed upon the courts to change certain judicial doctrines that have limited the scope of common law arbitration in the past. In general we have been exhorted to consider how excellent and serviceable is arbitration in England and in other countries of the civilized world, as compared with arbitration law in the United States, where we have for the most part only the inadequate common law provisions of three hundred years ago that have not been extended by legislative action or judicial interpretation. There is a real basis for this effort in behalf of more comprehensive arbitration laws for commercial purposes. In England and in the civil law countries commercial arbitration is in fact much better adapted to the needs of business men than in American jurisdictions. In spite of this deficiency and in spite of this considerable agitation to remedy it, we are now confronted with an extraordinary situation in which we find that many of our states do not feel abused by the limited arbitration they have enjoyed and that they refuse to adopt statutory provisions to correct these deficiencies. We find, further, that even those of our states that have done most in extending the scope of their arbitration laws have nevertheless refused to adopt some of the main features of commercial arbitration as it obtains in other countries.
It will be conceded that there are four characteristics of English arbitration law of such importance that they should be considered when those who proselyte in this country point out the merits of English arbitration and urge us to persevere to a similar accomplishment. (1) The English Act does not require that a submission to arbitration comply with any form in order to come within the statute, but any submission to arbitration is presumed to be predicated upon the arbitration statute rather than upon the common law. This gives their act the broadest possible application. (2) According to the English statute no detailed requirements for the conduct of arbitration proceedings are set forth, but the procedure is left to agreement by the parties or the discretion of the arbitrators, subject only to the protection of the parties from inadequate, unfair, or fraudulent proceedings in each particular case. (3) Their statute provides that questions of law may be submitted to the courts upon the application of either party, and hence that the arbitrators necessarily pass final judgment only on questions of fact. (4) Their statute enacts that future disputes as well as those which have already arisen between the parties may be submitted to arbitration irrevocably.

If we consider the arbitration statutes in America with respect to these characteristics, we find that none of our statutes adopts all four provisions. Unless our conditions justify such a difference, may it not be that we are embarked upon an impossible task if we hope to secure all the benefits of commercial arbitration in England while we refuse to adopt some of the basic principles upon which their law is predicated? Theoretically it is possible that provisions differing from the English act will secure even better results in America; but perhaps we should remember that their legislation is predicated on the common law and the same legal system that obtains in America, while their statute has been drawn only after an experience of some two hundred years in seeking adequate provision for commercial arbitration by legislation.

The present Uniform Arbitration Act, adopted by the Commissioners on Uniform State Laws and approved by the American Bar Association, not only fails to give a thorough-going system of commercial arbitration equal in scope to that of the English act, but it is even less comprehensive and serviceable than the statutes that obtain in certain of our states at present. For instance, the Asphalt case which started the recent arbitra-

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6 (1889) 52 & 53 Vict. c. 49, §§ 1, 2.
7 Ibid. §§ 7-11.
8 Ibid. § 19.
9 Ibid. §§ 1, 2, 27.
tion movement involved a contract to submit future disputes to arbitration; the Federal court's refusal to enforce that provision called forth severe condemnation of our "mediaeval laws." Yet the same result would be reached under our Uniform Arbitration Act, since it makes submission irrevocable only in the case of existing disputes.11 One would think that a uniform arbitration act would adopt provisions for adequate commercial arbitration in the several states. We find, however, that many who urge the present uniform act do not feel that it will in fact become uniform throughout the country, and they do not regard it as an adequate solution for the present needs of commercial arbitration. They advocate it on the ground that it is the best they can hope to secure in many jurisdictions, and that while some of its provisions are bad and should not become uniform, still it may result in some advantage to commercial arbitration in states which thus far have adopted practically no legislation on the subject.12 Certain it is that the reasonable needs of business men will not be satisfied unless commercial arbitration is applicable uniformly throughout the country; it is equally certain that there can be no actual uniformity until agreement is reached on the basic elements of an arbitration statute. May it not be that this extraordinary diversity is due in part to a lack of legal analysis of the historical development of the present elements of arbitration law, or to a misunderstanding of the exigencies of commerce in America today and the effect of commercial arbitration upon private rights? The purpose of this paper is to examine the historical development of arbitration in England and America in order to fix upon certain basic features of statutory arbitration that will merit adoption in the several states.

I.

It seems likely that arbitration became part of the common law through the work of the Ecclesiastical courts, since we find authority for arbitration from the seventh century in canon law, and since we know that, in Bracton's time especially, the canon law governed much of the litigation that is now handled by our regular courts. There was a partially developed system of arbitration in Roman law, both during the classical period and under Justinian.13 There is apparently no germ of arbitration in Anglo-Saxon law, and the idea of arbitration is not one which the King's courts would favorably entertain at the time

11 Uniform Arbitration Act, § 1.
13 Buckland, Textbook on Roman Law (1921) 527-28; Radin, Handbook of Roman Law (1927) 308.
we find it making its appearance. Perhaps the main purposes of the King's justice were political and financial, in consolidating and unifying the kingdom and in bringing fees into the royal treasury. According to Ashe's Tables, the earliest case involving arbitration is Y. B. 21 Ed. III, f. 15. So far as the early cases in the Year Books go, there is no indication of the source of arbitration except that it obtained among the people for the settlement of disputes and that the courts undertook to fit it into the regular common law system of the time. This is significant in the entire approach to arbitration. Commercial arbitration did not develop in the common law as a formulated plan of reformed judicial or extra-judicial justice. At least in England today, arbitration is very much a part of the regular judicial system employed and developed by the courts and having much of the sanction and method that obtain in the regular courts. But in the early common law, arbitration was entirely a matter of private arrangement for which there was no authority except the personal authority of the parties to the agreement, and for the enforcement of whose awards there was no machinery except the regular actions of the common law which every subject had for the settlement of his private affairs.

(a) Agency. The doctrine of revocability as found in the Year Books and enunciated in Vynior's Case is based upon the authority given to the arbitrators and the consequent power to withdraw that authority. At that time there could be a valid oral submission in certain matters, but in other disputes, particularly those involving land, the submission to arbitration, was not valid at all unless it were by deed. Also, of course, an executory oral contract was not enforcible and consequently the revocation of an oral submission violated no enforcible contract. Where submission is by deed, however, the case is different, since one could make an obligation by deed and have an action in debt for its non-performance. The question, then, was whether a submission to arbitration by deed was of such nature that it could be revoked. It should be understood that it was never held that such revocation could be done with impunity, because damages could always be had for it. The trouble has been, however, that the courts would award only nominal damages for such breach in the past, for they considered that there could not be serious damage to a litigant in forcing him to submit his case to their "nice courts." This was less significant in the early days when submission to arbitration was accompanied by a bond and the

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14 8 Co. 80a and 81b (1609); also reported in 1 Brownlow & Goldesborough 64, and 2 Brownlow & Goldesborough 290.
15 This is Professor Williston's phrase; cf. his testimony in op. cit. supra note 5, at 120.
courts allowed full recovery on the bond where there had been revocation.

It is contended, however, that the courts should not have approved the revocation of the submission at all and that Coke's analogies to the right of revocation in the case of other delegations of authority were unsound. The doctrine of agency as applied to submissions to arbitration is declared to be fallacious; hence the claim that the submission is revocable, as in the case of agencies, is considered unfounded.\(^{16}\) The unfortunate confusion here is due to the use of the word "agency" at all in this connection. Coke does not employ the word in his report of the case and it does not appear in the reports of Brownlow and Goldesborough.\(^{17}\) Indeed, the idea of agency as a separate branch of the law which contains a group of principles involving a certain uniformity and interrelation is very modern. The term agency does not appear in Viner's Abridgment, and Professor Hammond, in his edition of Blackstone, says:

"If older books of English law are examined, no such words as principal and agent will be found in them."\(^ {18}\)

Professor Mechem defines agency as a term that "indicates the relation which exists when one person is employed to act for another."\(^ {19}\) Or, if our present conception of agency is getting away from that of identity or representation between principal and agent, then we have Professor Seavey's definition:

"Agency is a consensual relationship in which one (the agent) holds in trust for and subject to the control of another (the principal) a power to affect certain legal relations of that other."\(^ {20}\)

Under either theory of modern agency the submission did not further the interests of the principal, nor did it give the principal any right to control the agent. Since it was a purely private arrangement, the arbitrators had to get their power to act somewhere; they got it from the parties, and, like other powers, it was revocable; but it was not subject to modification so as to give the parties control of the arbitrators, as in agency. By the power granted in the submission, the arbitrators were authorized in their own right to judge the dispute impartially and not as agents of either or both parties thereto. The agency

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\(^{16}\) See 1 Brownlow & Goldesborough 64, and 2 Brownlow & Goldesborough 290.

\(^{17}\) Ibid.

\(^{18}\) 1 BLACKSTONE, COMMENTARIES (Hammond's ed. 1890) 719.

\(^{19}\) 1 MECHEM, TREATISE ON THE LAW OF AGENCY (2d ed. 1914) § 23.

\(^{20}\) Seavey, The Rationale of Agency (1920) 29 YALE LAW JOURNAL 859, 868.
concept was not developed at the time the doctrine of revocability in arbitration contracts was evolved. Agency has no direct bearing upon Vynior's Case and it seems unfortunate that it should be discussed in connection with the development of the doctrine of revocability in arbitration agreements. Sir Edward Coke speaks about revoking certain powers; it is knocking down a man of straw to point out that an arbitrator is not an agent in the modern sense.

This conception of basing rights upon powers voluntarily granted by individuals was far more significant in the early law than it is today. Thus, in procedure, in many cases one could wage his law or have trial by battle in case he was accused of crime, while he could not be tried regularly by a jury in the courts as we understand criminal trials today unless he voluntarily elected to submit to jury trial. And indeed when trial by battle was repealed in some measure in England, they had to use peine forte et dure to try a man at all. It is true that in submission to arbitration the other party to the contract has an interest in having the agreement carried out and he has a contract right to enforce it, but the rule is that a power must be coupled with the interest of the grantee of the power to be irrevocable. It is easy enough to give instances in which several parties may have such an interest in the carrying out of a contract as the parties to the arbitration have, and where either party may still revoke the authority although he will be liable in damages on the contract. Thus, wherever joint owners of land undertake to build upon it and employ a contractor to execute the work, either party may countermand the authority of the contractor to build the building and can prevent him from doing further work on the property, although he will be liable in damages for breach of contract both to the contractor and to the other co-owner. At common law the authority of the arbitrator was based upon the submission, and since this was purely a private contract in any case, such submission could be revoked like powers generally, unless there was a public policy against it which took it out of the general rule of powers not coupled with an interest. Early common law arbitration did not regard the proceedings as a form of trial nor as a means of avoiding trial through negotiators who were the agents of the parties. It regarded arbitration as a partial substitute for trial secured through the formal grant of a power.

21 "The accused might ask for, and, in John's reign, get by payment, the right to be tried by a jury. His strict right was to prove his innocence in one of the orthodox ways—battle, compurgation, or ordeal." 1 Holdsworth, A History of English Law (1st ed. 1903-9) 153.

22 1 Mechem, op. cit. supra note 20, § 579 et seq. In particular, see Black v. Harsha, 7 Kan. App. 794, 54 Pac. 21 (1898).
to arbitrators in the submission. The arbitrators could act only as long as their power remained unrevoked and their award, if made, was enforced by common law actions only. We must now consider whether submission to arbitration by private contract under a power to arbitrate delegated by the several parties was regarded at common law as such a delegation of authority as should be revocable, or whether it was considered as an exception to the general rule. Vynior's Case has usually been considered as the controlling authority which decided that submission to arbitration was revocable.²³

(b) Revocability of submission. What, then, is the ratio decidendi of Vynior's Case? Few principles of the modern law have continued without change for three hundred years; yet we are told that Vynior's Case has such extraordinary vitality that its doctrine alone has limited the development of arbitration in commercial disputes in all common law countries. Are we to conclude that no one can fairly defend the case upon its merits except perhaps the old Scotchwoman who defended the devil himself on the ground that "Ye canna deny he is vurra persistent"? The pleadings are simple. Robert Vynior brought an action against William Wilde on a bond for a hundred pounds and demanded twenty pounds' damages in addition for violation of the bond. The bond had been given by the defendant to insure his complying with an arbitration agreement which was made to cover disputes between him and plaintiff regarding the amount due for certain repair work on buildings. The defendant pleaded no award and the plaintiff rejoined that the defendant had revoked his authority to submit the matter to arbitration. The plaintiff set forth that such revocation was a violation of the defendant's agreement to "stand to and abide the award." To this the defendant demurred, and the court gave judgment for the plaintiff to recover both his bond and his alleged damages, setting forth three grounds for the decision.

The first ground is that,

"although William Wilde, the defendant, was bound in a bond to stand to, abide, observe, etc., the rule, etc., of arbitration, etc., yet he might countermand it, for one cannot by his act make such authority, power or warrant not countermandable which is by the law or of its own nature countermandable."²⁴

And then Coke goes on to give the instances of a letter of attorney to make livery of seisin or to sue an action, in both of which the power is revocable. Thus, Coke explains, where there is a suit on a bond given for a submission to arbitration, the

²⁴ 8 Co. 81b, 82a.
submission is revocable, although the bond is forfeited, because, while a party has the power to revoke, he has broken the condition of his bond by such revocation. The second point deals with the adequacy of notice to the arbitrator of a revocation of submission. The third point is really the first point with some variations. Coke points out that although the submission finds its authority in the very bond upon which the plaintiff is suing, nevertheless the defendant may revoke the submission in the bond and still be liable on the bond for such revocation. It is quite true that the recovery on the bond in this case does not prove that the submission itself was revocable, since there could be a recovery on the bond even though the defendant had neither the right under the contract nor the legal power to revoke his submission. It might well be that the plaintiff would rather have recovery on the bond than an action at law to enforce the arbitration agreement, and this was particularly true at the time of this case, when the actions for the enforcement of contracts were but meagerly developed. Thus the case itself is a decision merely on the liability on the bond, and the opinion of the court to the effect that the submission is revocable is not necessary to the decision.

In modern times, Vynior's Case has generally been regarded as the original and controlling authority for revocability. This is unfortunate, since, as we have seen, the decision covers only recovery on the bond. This error has perhaps had no serious effects, since Coke's dictum that submission to arbitration was revocable correctly represents the common law at that time (1609). Cases and text writers immediately following Vynior's Case did not rely on it (as they came to do later), but based their decisions and statements on the Year Book cases themselves.

Of the cases cited in Coke's report of Vynior's Case in support of the doctrine of revocability it is submitted that Y. B. 28 Hen. VI, f. 6b, pl. 4, clearly decides that submission to arbitration was revocable; and the cases of Y. B. 21 Hen. VI, f. 30a, pl. 14, and Y. B. 5 Ed. IV, f. 5b, pl. 2, strongly indicate that this was the rule, although, as in most Year Book cases, they do not amount to what we in modern law would consider a straight decision on the point. The abridgement of Y. B. 5 Ed. IV, f. 5b, pl. 2, found in BROOKES, Arbitrement 35 and the abridgment of Y. B. 49 Ed. III, f. 8, pl. 14, in STATHAM, 13a, bear out the same conclusion. The other cases cited by Coke in support of the doctrine of revocability are not particularly in point, and cannot be used except in so far as they make some mention of the practice of arbitration at common law.

In SHEPPARD'S TOUCHSTONE, under the heading of "Repugnancy," we find discussed the principle of waiving a condition of an obligation where that condition is considered contrary to public policy. This passage is quoted in support of the doctrine of revocation in many of the leading English cases, and the reference made here is to 7 Hen. VI, 44 and to 21 Hen. VII, 24 and 30. There is no reference to Vynior's Case. March and
(c) Ousting the jurisdiction of the court. There have been many charges that the courts took an unfriendly view toward arbitration, inasmuch as they upheld the revocability of submission. It is submitted that the earliest cases show no unfriendliness nor any will to preclude the fullest use of arbitration. In *Vynior's Case* itself there was recovery in the sum of 100 pounds with 20 pounds' damages on the bond. This was a large sum in those days and probably was much in excess of any fair recovery on the cause of action itself. It is surely absurd to say that the courts precluded the efficacy of submission to arbitration by admitting its technical revocability at a time when bonds were enforceable in their face value regardless of actual damages. It was the usual rule at the time of *Vynior's Case* to make the submission upon a bond, and suit upon the bond in a large sum was amply sufficient to insure arbitration. It seems clear, therefore, that the doctrine of revocability was a sound doctrine of powers in private contract and that the court's recognition of the doctrine did not indicate any unfriendliness toward arbitration. It is to be remembered further that at the time of *Vynior's Case* the entire law of contract was in its infancy and no such general rights of recovery upon promises as obtain today were then to be had. The almost invariable practice was to insure performance of any agreement through putting the obligee under bond. Then if he failed to perform, you had a straight suit upon the bond, which was made sufficiently large to protect you fully. When the courts allowed recovery on the bond they had done all that in practice was reasonably needed to make arbitration effective. It seems clear that if in fact the courts were jealous of their jurisdiction or were suspicious of arbitration, or for any other ulterior motive wished to prevent its efficacy, they would have declared directly that such agreements were against public policy and held any bond made as security for the performance of such an agreement a nullity. It was of course perfectly possible for the court to do this where it felt that the object of the bond was immoral or illegal or for any other reason was not to be countenanced by the law.

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Kyd, the early leading authorities upon arbitration, while they quote *Vynior's Case* with respect, also make direct reference to the Year Book cases upon which *Vynior's Case* is based. *March* (1648), under the title "Whether the authority of arbitrators be countermandable or not," refers to Y. B. 5 Ed. IV, f. 3b, pl. 2, and Y. B. 28 Hen. VI, f. 66, pl. 4, discussing them in detail. It will be recalled that these are indeed the two leading Year Book authorities for the doctrine. In the margin, however, March also refers to 21 Hen. VI, f. 30, pl. 14; 49 Ed. III, ff. 8, 9, pl. 14; 18 Ed. IV, f. 9; 8 Ed. IV, ff. 9, 10, pl. 9; *Brooke*, Arbitrement 35. It is only after citing these authorities and quoting two of them that the author refers to *Vynior's Case* at all.
In modern times the doctrine of revocability is most generally based upon the principle that the courts cannot approve irrevocability, since it "ousts the jurisdiction of the court." Even to the present day this is so, and the old doctrine upon which Vynior's Case rested—namely, that of delegated powers,—has been ignored. In fact, this theory of ousting the jurisdiction of the court is not referred to in any of the early cases and certainly has no conscious bearing upon Vynior's Case. The doctrine appears in Kill v. Hollister for the first time without the citation of any authority. Once asserted in that case, however, it is constantly quoted in subsequent cases. It is submitted that the introduction of this new doctrine into the law, based neither on court decisions nor on statute, is explained by the passing of the Statute of Fines and Penalties in (1687) 8 & 9 William III. This statute precluded the recovery of the face value of bonds where they had become single unless the actual damages justified it. Under this statute and subsequent developments through the cases it has become the settled doctrine of the law that the court will look behind the sum stated in the bond, and while one may still sue on the bond and the obligor is liable up to the full amount of it, the court will not require him to pay in the particular case more than the estimated actual damages which the plaintiff has suffered. In view of this change in the law, it was no longer possible for parties to insure submission to arbitration. The courts in fact held that they would give only nominal damages on the theory that there could be no actual injury in forcing people to litigate in the King's own courts of justice. Litigation in the King's courts was assumed to be a high privilege and great advantage; and to recover damages because one had to try his case there was a little more than the courts could understand. Regardless of

27 1 Wils. 129 (1746). Kill v. Hollister involved a contract to submit future disputes to arbitration and it has sometimes been said that the doctrine of "ousting the courts of their jurisdiction" is incidental to contracts for the arbitration of future disputes rather than existing ones. It does not seem, however, that anything turns on this. Surely the courts are ousted of their jurisdiction in the sense intended by the use of this phrase whether the agreement be for existing or future disputes. It is merely a new phrase used in Kill v. Hollister in defense of the general doctrine of revocability where one elects to submit his dispute to some tribunal other than the regular courts when he has a common law right to the protection of the law. 2 A. & E. Enc. (2d ed. 1896) 570.

28 Of course this doctrine of ousting the jurisdiction of the courts originated, not in any arbitration case, but in Coke's treatise upon Littleton where we find a comment under "waste," Placitum 5, as follows: "If a man make a lease for life, and by deed grant that if any waste, or destruction be done, that it shall be redressed by neighbours, and not by suit or plea, notwithstanding an action of waste shall lie, for the place wasted, cannot be recovered without plea." Co. Littr. *696.
whether a rule of merely nominal damages is inherently fair or not, it is certain that any damages from such a breach of contract must be exceedingly speculative and that the plaintiff would have great difficulty in showing damages of any consequence. Hence, when plaintiffs came into court to enforce a submission to arbitration, they could no longer sue on their bond effectively, and it was felt that some added reason must be given to maintain the doctrine of revocability, since it could no longer be avoided by the use of the bonds. It seems that this is the origin of the doctrine of ousting the courts of their jurisdiction, and this doctrine should be attributed to the protection of the rights of the parties to the submission rather than to any unseemly cavilling by the courts themselves.

The courts' decision had not changed. They had held the submission revocable before and they continued to hold it so. The difference was that the legislature had so changed the law relating to bonds that the method of using a bond in submission was no longer effective. Nor had the situation so changed that the court could logically change the doctrine. It was still true that there was no developed system regulating arbitration tribunals as there is now in all countries. Hence the court had no further reason for making a power in the private law irrevocable when it was revocable before. As a matter of common law, the submission was based on a power which the grantor could revoke. The courts had no right to change this rule so long as arbitration proceedings were not regulated and the parties' only effective protection against an unfair or insufficient hearing by the arbitrators was in revoking the submission before the award was given. Common law arbitration was a system whose parts were highly interdependent. Many of the doctrines were strictly interpreted and exceedingly precise in their application. The statute of fines and penalties destroyed the working of the whole scheme. Quite reasonably it made some of the component rules seem ridiculous when used separately and in new relationships.

(d) Statutory development. We note that parliament recognized its responsibility in destroying common law arbitration, since the year after the Statute of Fines and Penalties it passed the first arbitration act, (1698) 9 William III, c. 15. This statute did not provide for court review on questions of law. It aimed to make the submission irrevocable by making it a rule of court and providing that one who revoked would be subject to punishment for contempt of court. Even within these narrow limits the act could not be used extensively, since the submission was still revocable until a rule of court enforcing it had been obtained. It is significant to note in the first act, as in all sub-
sequent arbitration acts in England, that no distinction is made between the submission of an existing dispute and any future dispute that may arise under a given contract. Both were held to be proper subjects for arbitration at common law and both were assumed to be subject to all the English arbitration acts. This distinction thus appears only in American statutes. We must recognize further that the act of 1698 did not enable the parties to compel testimony or secure witnesses in the arbitration proceedings, nor did it have any other provisions aiming to secure a fair and adequate hearing. If the reader should ask here why it was that the courts recognized arbitration when made a rule of court under this statute even though the rights of the parties were not protected in the proceedings, although they did not hold a submission irrevocable where similarly at common law there was no security for a fair hearing, the answer is two fold. First, the statute of 1698 did give at least remedial protection to the parties, since the arbitration award was an order of court and would not be enforced if it involved fraud or did not conform to the terms in the submission. Second, we must remember that this first inadequate provision for arbitration by statute was the act of the legislature and not of the courts. Consequently, when submission had been made an order of court in strict compliance with the statute, the courts enforced it as they were bound to do, but where the submission did not come strictly within the terms of the statute the courts held it revocable in keeping with the common law rule, since there continued to be no protection for the rights of the parties at the hearings, and the courts consequently had no reason to change the common law rule that they had always upheld.

In 1833 the statute of (1698) 9 William III, c. 15 was extended and reinforced by the statute of 3 & 4 William IV, c. 42, which provided that any arbitration agreement which had been made a rule of court,

"in any action now brought or which shall be hereafter brought by or in pursuance of any submission to reference containing an agreement that such submission shall be made a rule of any of His Majesty's Courts of Record, shall not be revocable by any party to such reference without leave of court."

Thus, until action was brought in connection with an arbitration proceeding, it was still revocable, and the doctrine of common law revocability persisted. Its greatest improvement, however, was a provision by which the parties had compulsory legal process to compel the attendance of witnesses and the production of evidence at arbitration hearings. Thus the rights of the parties at the hearings were protected and the basis of a fair hearing for arbitration purposes was secured. With this pro-
tection there would seem to be no objection to making the submission irrevocable, even on the original common law theory.

In 1854 came the Common Law Procedure Act, and section 17 of this act dealt with arbitration; but this too was insufficient to cover the usual case of voluntary submission in which the parties had not agreed that it might be made a rule of court. The previous arbitration act of 1833 applied only to cases where the arbitrator or umpire had been appointed, that is to say, where there had been a submission under an agreement that the submission might be made a rule of court. Section 7 of the act of 1854 provided further:

"Every agreement of submission to arbitration by consent whether by deed or instrument in writing not under seal may be made a rule of any one of the superior courts of law or equity at Westminster on the application of any party thereto unless such agreement or submission contain words purporting that the parties intend that it should not be made a rule of court."

This act made it possible for either party to make a submission irrevocable by applying to the court to make it a rule of court. The regular case of a private agreement to arbitrate without such application to a court was not yet covered, however.

The statutory relief for arbitration in England was completed by the statute of 1889, the first two sections of which made the following broad provisions:

"1. A submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the Court or a judge, and shall have the same effect in all respects as if it had been made an order of court.

"2. A submission, unless a contrary intention is expressed therein, shall be deemed to include the provisions set forth in the First Schedule to this Act, so far as they are applicable to the reference under the submission." 20

Thus at the present time nearly all agreements for arbitration come within the terms of the statute. The statute of 1889 was the first to provide for adequate court review of questions of law raised in the arbitration hearing itself, with the result that after that act statutory arbitration in England meant that the arbitrators could have final disposition on questions of fact only.

From this statutory development we can say briefly that the English acts have always covered both present and future disputes but that there was no provision for an adequate hearing through compulsory process for witnesses and testimony until 1883, and that there was no provision for court review on questions of law until 1889. Similarly, the early statutes gave

20 (1889) 52 & 53 Vict. c. 49, §§ 1, 2.
detailed regulations about how the submission must be made if it were to come within the terms of the act (usually by rule of court) and they also contained many regulations governing the proceedings. On the other hand, the statute of 1889 has the broadest possible provisions in presuming that every arbitration agreement is subject to the statute and contains only general provisions affecting the conduct of the proceedings. It may be interesting to refer to this later when we will consider American statutes on arbitration. Perhaps we are going through a similar development and in time may enact statutes like the English act of 1889. Since arbitration in this country is really in its infancy, we may expect to find that most of our statutes are similar to the English acts of 1698, 1833 and 1854 and that we will undertake the more developed form of arbitration found in the act of 1889 when we have had a corresponding experience with the operation of arbitration provisions in practice.

(e) Arbitration and condition precedent. We have, following the statute of 1833, however, a growing tendency to put common law arbitrations in the form of conditions precedent, by which the parties agree that no right of action shall arise under the contract until the arbitration proceedings provided for therein shall be completed. The courts have always held such provisions enforcible where they covered merely the determination of facts, as where the quantity or quality of certain material should be determined by a third person before the other should be liable to pay. The courts felt that these were not questions of legal liability but questions of fact purely, and did not, therefore, involve an exercise of the judicial function. This seems fair. It will be seen, however, how easy it is to shade over from such a determination of fact into a question of liability itself. Thus, in the building contracts, while the architect may determine what material is used as a question of fact, the quality and quantity of the material may be a determining issue in liability under the contract, and thus the decision of that point really involves the decision of liability itself. As is usual where the courts have a delicate question of law and fact to consider, many of the decisions are not reconcilable on either theory, and indeed there are decisions which several judges may all approve, although some of them will assert that the case decides merely that arbitration of questions of fact is enforcible as a condition precedent, while others will say that it decides that arbitration of complete liability under the contract may be enforced as a condition precedent. The crucial case for the English courts was Scott v. Avery, where the majority opinion seemed to decide that even liability under the entire contract could be

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30 Scott v. Avery, 5 H. L. Cas. 811 (1856).
determined by arbitration at common law, as an enforcible condition precedent to suit on the contract itself. Following this case the courts vacillated in their decisions, but since 1900 it has been clear that arbitration may cover liability itself in England when put in the form of a condition precedent. Most American courts have reached this result, but some of our states enforce the condition precedent only when the arbitration clause covers only questions of fact.

Historically the writer thinks well of the minority opinion in Scott v. Avery, although it is not law in England today. It would seem that when arbitration of legal liability under the contract is made irrevocable and enforced as a condition precedent, then in effect the common law right of revocation of submission is destroyed, while nothing is done to insure a fair hearing in the arbitration. The common law allowed revocation to prevent this very difficulty. Some urge that to enforce the condition precedent in any case is the lesser of two evils, and that the result is not so bad, since the courts can give at least partial remedial relief when suit is brought on the contract after the condition is performed. This is the present English view and it may be fair enough for them since their arbitration act is so broad that it catches most arbitration agreements, whether the parties so intended or not. At least it is not much worse than statutory arbitration itself under the act of 1698. In any case we must remember two things: (1) No other countries that have enforceable arbitration now make submission irrevocable unless the arbitration is subject to court regulation to insure a fair trial. (2) All statutory arbitration in England or America today does the same thing.

(f) The doctrine of judicial jealousy. In Scott v. Avery, Lord Campbell asserted that the doctrine of hostility to arbitra-

\[\text{\footnotesize\textsuperscript{[3]}}\text{3} \text{3} \text{WILLISTON, CONTRACTS (1920) 3010.}\]
\[\text{\footnotesize\textsuperscript{[3]}}\text{2} \text{Ibid. 3011-12. Professor Williston seems to indicate that all common law submissions to arbitration should be held irrevocable in the absence of some evidence of unfair practice or other similar ground for invalidity. He points out that the use of a condition precedent to accomplish this result is a rather technical method which it is hard to justify. Ibid. 3016. The writer agrees in the conclusion that the condition precedent is a technical doctrine used to accomplish the same general purpose as a direct provision for arbitration, but he feels that the courts are right in not holding submission to arbitration at common law to be irrevocable, especially since when the people, acting through the legislature, provide that submission to arbitration shall be irrevocable, they also make provision for a fair hearing and the protection of the rights of the parties at arbitration proceedings. No statute provides for irrevocability in submission without these protections.}\]
\[\text{\footnotesize\textsuperscript{[3]}}\text{3} \text{BURNHAM, Arbitration as a Condition Precedent (1897) 11 HARV. L. REV. 234.}\]
\[\text{\footnotesize\textsuperscript{[3]}}\text{4} \text{See ROSENBAUM, op. cit. supra note 4, at 61.}\]
tion at common law originated "in the contests of the courts of ancient times for expansion of jurisdiction—all of them being opposed to anything that would altogether deprive any one of them of jurisdiction." 33 Professor Williston quotes this statement in his work on Contracts, and says in introducing it: "It has been asserted and never denied that the hostility originated" in this contest of the courts for jurisdiction. This is based on the statement of Judge Hough in the Asphalt case:

"It has never been denied that the hostility of English-speaking courts to arbitration contracts probably originated (as Lord Campbell said in Scott v. Avery) 'in the contest of the courts in ancient times for extension of jurisdiction—all of them being opposed to anything that would altogether deprive any of them of jurisdiction.'" 36

Other judges and text-writers have assumed that since this allegation has not been denied it may fairly be taken to be true, although it is accepted without any evidence being set forth in its support. If the courts had been jealous of their jurisdiction or had wished to secure business for themselves to the exclusion of arbitration, they might well have ruled that a bond given to secure a submission to arbitration was against public policy, and void. Thus it seems that from the beginning the courts have based their attitude solely on the interpretation of common law rights, holding that one could not contract away his right to revoke where the provision for settling the dispute by arbitration did not have the sanctions of due notice and fair hearing. It has been the object of statutory arbitration to secure these very things, and it is difficult to see how the courts should be condemned for their wish to secure the protection of their own jurisdiction when business men and the people generally have insisted on such protection whenever they undertook to press for legislation. It is difficult to see the justice in attributing such unworthy motives to the courts in their development of arbitration law from the earliest times to the present. On the other hand, it is difficult to explain how a distinguished judge like the Lord Chancellor (Lord Campbell) should make such assertions and how other judges should let them pass unquestioned.

Perhaps the fairest view in criticism of this attack is to be found in Justice Story's opinion in the case of Tobey v. County of Bristol:

"It has been said at the bar, that in modern times, most nations, and especially commercial nations, not only favor arbitrations, but in many instances make them compulsive. But in considering this point, two circumstances are important to be

33 Scott v. Avery, supra note 31, at 853.
36 3 WILLISTON, op. cit. supra note 32, § 1719.
kept in view. In the first place, whenever arbitrations are made compulsive, it is by legislative authority, which at the same time, arms the arbitrators with the fullest powers to ascertain the facts, to compel the parties to submit themselves to examination under oath. In the next place, these arbitrations are never, or at least not ordinarily, made compulsive to the extent of excluding the jurisdiction of the regular courts of justice; but are instituted as mere preliminaries to an appeal to those courts, from the award of the arbitrators, if either party desires it, so that the law, and in many cases, the facts also, if disputed, are re-examinable there.” 37

Thus the issue of revocability of submission in the modern law seems to involve the general right of free contract in cases where the parties undertake to contract away their future rights without due safeguards. It is the view, therefore, that an irrevocable submission to arbitration by a private tribunal, without the usual means of securing testimony and compelling the attendance of witnesses and giving an impartial hearing which are secured by arbitration statutes, involves such a limitation upon the parties’ fundamental rights of appeal to the courts for protection that the courts will not enforce this submission before the award is actually made. This is particularly true where the parties to the contract of arbitration are hardly on a basis of equality, and one of the parties is able to dictate almost his own terms to the other. The other party might well be forced into an arrangement for arbitration which would be inadequate to protect his rights. There is a general principle in the law that contracts which in effect basically limit the personal freedom of the contracting parties are illegal and void. So are, for instance, contracts in restraint of trade in all their varied forms, contracts by public service companies limiting their liability for their own negligence, usury contracts under the old common law and, particularly, contracts limiting one’s right of recovery in a legal action to a particular court or to particular procedure.38 It is perhaps this last group of illegal contracts that is most similar to the contracts making submission to arbitration irrevocable. It might be said that contracts held illegal because they limit one to a particular court for suit are so held for fear of “ousting the courts of their jurisdictions.” No one has made such a charge in this case, however, and it seems no more proper in the case of arbitration. Certain inroads on this policy against limiting one’s action to a particular court have been made, but the doctrine holds in general, just as the doctrine of revocability in arbitration has been maintained. It seems that this is the sense in which the courts from earliest times have fixed upon the

38 3 WILLISTON, op. cit. supra note 32, at 3017.
doctrine of authority or power in the field of arbitration and have said that if a party is satisfied with the way in which the arbitrators proceed and approves of the kind of notice and hearing he actually has had and the award is made, then he is bound by it even though those proceedings would not have been considered adequate in a judicial sense. But the courts will not enforce a submission to arbitration if either party before the award for any reason, such as lack of hearing or lack of witnesses or lack of adequate process, determines that he does not wish to be bound by the award, but wishes to secure a decision of his rights in the controversy according to the law of the land and the established principles afforded by statute as well as the common law rules. This is an important right which the courts have protected in other instances as well as in arbitration proceedings.

II.

In addition to the study of its historical development in England we have our own experience with arbitration to draw from. In general, of course, common law arbitration came to us as it was developed in England, although we know that some American courts do not enforce arbitration as a condition precedent except where it applies to questions of fact only. On the other hand we have had arbitration statutes from 1750, if not earlier, in some jurisdictions, and in others from the formation of the states. They were of limited usefulness, however; first, because the required form of submission was too restrained to catch most of the cases in practice; and, second, because the needs and habits of our people in the early days were not conducive to the use of arbitration. Indeed there was no considerable use of arbitration or demand for more adequate statutes until the time of the Asphalt case in 1915. It is only since then that the more effective arbitration acts have been passed. We have already noted, however, the extraordinary diversity in these statutes. Perhaps we have worked out in experience a basis for agreement in respect to the four fundamental elements of an Uniform Arbitration Act which we set out to secure at the beginning of this paper.

1. The English statute is framed to include all arbitration agreements whether they were intended to comply with the act or not. It requires the submission to be in writing, as does our Uniform Act. Most of our state statutes also require a writing, but not a particular form acknowledged before a notary, like the limited and unfortunate statute in Massachusetts.39 It may be urged that the requirement of writing would not seriously pre-

vent arbitration agreements from coming under the statute, but it is submitted that this requirement serves no useful purpose.

There is one instance, however, in which a limitation on the form of submission could be approved as a matter of temporary expediency. Where it is felt that certain corporations might impose on individuals whose bargaining power, economic or otherwise, unduly limited their freedom of choice, then it might be provided that a clause covering arbitration of future disputes would have to be signed in the presence of a notary in order that the individual would realize fully the nature of his obligation and would not heedlessly waive his common law right to defend his claims in the courts. This same arrangement might be made to cover arbitration contracts involving organized labor or other groups that sometimes oppose effective arbitration statutes.

2. The Uniform Arbitration Act seems admirable in providing merely that the arbitrators shall have judicial powers in compelling testimony and securing witnesses, while the procedure of the trial is left almost entirely to the arbitration agreement or the discretion of the arbitrators, subject to the requirement that there be in substance a fair and impartial hearing. And the recent state statutes generally have similar provisions. In the past, however, an inclination to regulate arbitration hearings in detail has been the bane of American statutory legislation in this field.

3. Fortunately the present Uniform Act provides that questions of law may be reviewed by the courts. This is the view in the Illinois, Pennsylvania and Massachusetts Acts as well as in the English Act, but it is not the doctrine in New York, New Jersey, Hawaii, California and the federal courts, where the greatest impetus was given to the arbitration movement. There seems to be an unconscious feeling that if we allow the courts to pass upon questions of law they will interfere on other matters also and that the best plan is to let the arbitrators dispose of the whole matter. It is futile to regard arbitration as entirely independent of the courts. We must consider it an unregulated contract, as it was at common law, or make it an integral part of our present judicial system. The advantages of informality and

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40 The reader will notice that such a provision might well help to take care of all objections to making submission to arbitration irrevocable in all disputes, future as well as present. It would preclude any reasonable danger of one's agreeing to irrevocable arbitration through inadvertence or economic coercion.

41 The Georgia Arbitration Act, Ga. Laws 1855-56, 222-224, is a fair illustration of the prevailing characteristics of the best arbitration acts in America before 1880. Its provisions cover detailed regulations of this nature. See § 4 et seq.
freedom from unfriendly contest may be increased through conciliation as a preliminary stage in arbitration. 42 In his excellent work on arbitration in England, Mr. Rosenbaum points out that of all the litigation which arises in England less than three per cent is allowed to go to trial in the regular courts. 43 It is universally agreed that this splendid accomplishment would be impossible if it were not for commercial arbitration. And in turn more cases are disposed of by conciliation before the arbitration begins than by formal arbitration itself. The article by Mr. Reginald Heber Smith and other studies of conciliation abroad show that it is more effectively used as a part of the regular courts than independently of them. 44 A decision of the court on questions of law, however, has been shown to give increased efficiency in the disposal of arbitration proceedings. 45

Dean Pound has pointed out that extra-judicial plans for disposing of disputes have arisen from time to time and that in so far as they had a valid element to contribute they have been absorbed into the regular judicial system, i.e., equity, law merchant and special bodies like the Star Chamber. 46 We have had arbitration statutes since colonial days, but our people in their rural, agricultural relationships did not have occasion to use them extensively, and our courts were not burdened with litigation as they are today. Hitherto statutory arbitration as a separate system has been ignored or proven inefficient in prac-

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42 In its provisions for arbitration, the New York Chamber of Commerce has successfully opposed all resort to the regular courts by those who use its facilities for arbitration purposes. See REPORT OF THE COMMITTEE ON ARBITRATION OF THE NEW YORK CHAMBER OF COMMERCE (1917). Other commercial organizations have done a similarly excellent work in avoiding litigation in the courts in the form of any appeal whatever from the decision of the arbitrator or the use of legal provisions to compel compliance with the award. These achievements are worthy of praise. They do not in any way negative the importance of allowing the courts to pass on questions of law as a part of the statute. For instance such an avoidance of appeal to the courts is perhaps most notable in England where the provision for court review is most fully established.

43 Rosenbaum, op. cit. supra note 4.

44 The essential elements of freedom from bitter contention, privacy, and informality may all be expected in commercial arbitration, even though records be kept and there be an appeal to the courts on questions of law. As Mr. Rosenbaum points out, however, it is painting too glowing a picture to urge that arbitration proceedings which involve vast sums of money will always be free from a spirit of contentiousness. The elements of needless contention that are incidental to the atmosphere of trials in court may well be eliminated, but as long as human nature remains somewhat as it is today, persons may become disgruntled when they fail to get all they expected, whether you have arbitration, conciliation, or trials in the regular courts. See Rosenbaum, op. cit. supra note 4, at 55, 56.

45 Ibid. 53-56.

46 Pound, Justice According to Law (1914) 14 Col. L. Rev. 18.
COMMERCIAL ARBITRATION

After some two hundred years' experience in England and the experience from colonial days in this country, it seems clear from the legislative development that the full usefulness of arbitration lies in making it an integral part of the judicial system, by which it serves as a substitute for the preliminary stages of a court trial upon the election of the parties or upon order of court with their consent. The maturity of arbitration, like the maturity of equity, will be found in its complementary service to the other elements which now form our judicial system. It was only after this consummation was made that arbitration was able to do the extraordinary work that it now performs in England. It was less used and less efficient during the years when their statutes were similar to those in many of our states.47

Business men want arbitration which gives them experts to pass upon the facts, which are often far more important than the questions of law involved in commercial suits. They want relief from decisions by judges or juries who may be profoundly ignorant of the many technical elements in modern commerce, and they want freedom from requirements of common law procedure and rules of evidence in determining these matters. If they object to the courts, it seems that it is for these reasons and not because they feel the courts are inexpert or undependable in passing on questions of law. English experience shows conclusively that arbitration works much more cheaply and quickly when the arbitrators confine themselves to their specialty, that of passing on technical questions of fact in modern business.

4. It is submitted that under the Uniform Arbitration Act persons should be able to contract for the settlement through arbitration of future disputes as well as disputes that have already arisen. The Uniform Act as drafted in 1922 contained this provision, and it was largely through the efforts of the American Bar Association, which approved that act, that a similar provision was secured in the Federal Arbitration Act. Furthermore, the leading eastern jurisdictions that have recent arbitration acts cover future as well as present disputes, and the leading organizations of business men that have sponsored commercial arbitration all favor this provision. We must remember also that there was no distinction as to enforcibility between a contract for the arbitration of a present dispute and one referring to a future dispute under the common law, and that

47 It seems important to have the courts pass upon the law in order to avoid objections to an arbitration statute covering future disputes as in England. Perhaps persons who would hesitate to submit their rights to arbitration would feel less concerned in the matter if they knew that the regular courts could be appealed to on questions of law anyway, and that the questions of fact would be decided by an arbitrator that had been approved through their own contract.
in the whole history of statutory arbitration in England no such distinction has been made. The common law objection to irreversibility of submission is removed by the statutory provisions for a fair hearing in the arbitration proceedings. Finally, it will be seen that any effective uniformity in arbitration is impossible unless the statutes generally cover future disputes. Under an arbitration agreement made in New York a merchant has no assurance of enforceability for future disputes when his customers live in other states. We are put in a position of bad faith in the world of international commerce, since whatever our private theories may be, it will appear to those engaged in international trade that it is not fair for us to refuse to recognize the settlement of a dispute by arbitration that has been validly obtained in a foreign country when other countries under the doctrine of conflict of laws habitually recognize these settlements.

The opposition to this provision has been led by those who claim that small merchants or customers at an economic disadvantage may be coerced into signing such arbitration agreements with large corporations and that they are thus deprived of their rights to settle their disputes in the courts. It is inferred from this argument that such contracts might provide for arbitrators who are partial to the large corporations or perhaps antagonistic to labor unions or labor generally. There seems to be very little if any evidence in support of this opposition. It is an intangible fear that has coerced the American Bar Association and the Commissioners on Uniform State Laws into taking a reactionary view which is in conflict with their former position and to adopt a view that is out of harmony with arbitration legislation in this country generally, as well as in the other civilized countries of the world.

Surely in England there are poor persons who buy from large corporations, there are insurance companies that use high-powered salesmanship on the unwary individual of modest means, and there are labor unions that are quite as jealous of their rights as in America. Yet it does not appear that any of these persons or groups of persons at this time or at any previous time have been injured by English arbitration or have opposed its operation, although by statute for over two hundred years there has been a limited form for submitting future disputes to arbitration without the right of revocation and for nearly fifty years the English Arbitration Act has made this provision apply to arbitration agreements generally. We have had experience with the provision in New York and other eastern states on our own account and it does not appear that it has worked injury to rich or poor, capital or labor.

Mr. O'Connell and others who have appeared in opposition to this provision assert that the Illinois act has been in operation
for many years and has given general satisfaction although it
does not cover future disputes. If we grant this, it is merely
negative evidence. We know very well that we have had sta-
tutory arbitration in some states since early days, and although
these statutes have been still more limited, they have served the
actual demands of the time. On the other hand, those who favor
arbitration for future disputes point to its general effectiveness
from positive evidence in American jurisdictions as well as
elsewhere. It would seem that those who oppose it should
show specifically that it is injurious, rather than merely give
a single instance where the people have gotten on without it.

It seems especially unfortunate that the present Uniform Act
should fail to cover future disputes since the objections to this
provision can be cared for by exceptions, as in the present
Federal Arbitration Act. Thus the state arbitration acts would
cover future disputes to the advantage of commerce, while there
would be particular exceptions by which they would not apply
to insurance policies, labor agreements, or certain other con-
tracts, perhaps. It is reasonable to expect that persons or groups
excepted from the statute will soon wish to be included within
its terms. No doubt many—perhaps a majority—of the states
would adopt the Uniform Act without any exceptions to the pro-
visions making submission irrevocable in all disputes. It was
urged by those who favor the present act that an additional
statute might be passed by any state that wanted to cover future
disputes. The answer to this is that the only reason for
not having the act apply to future disputes is that certain
interests or certain individuals might be injured thereby; it
therefore follows a fortiori that if in general the provision is
advantageous it should be adopted, and these particular cases
should be excepted. It is of the first importance to make this
change in our present Uniform Act, inasmuch as the advantages
from uniformity throughout the country are peculiarly depend-
ent upon it. We will continue to hamper the effective disposal
of commercial disputes by arbitration in interstate commerce
as well as in international commerce if the arbitration award
is not recognized uniformly in the several states.

Discussion of Joseph Francis O'Connell before the American Bar As-