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Wesley A. Sturges

Richard E. Reckson

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Common-Law and Statutory Arbitration: Problems Arising From Their Coexistence

Arbitration as a means of settling disputes between parties is by no means a recent innovation in the law. Its use, however, gives rise daily to new and diverse problems. Dean Wesley Sturges, perhaps the country’s foremost scholar on the subject of arbitration, and a colleague, Richard E. Reckson, explore one of such problems—the relationship between common-law and statutory arbitration systems. The Article includes an analysis of the interchangeability of common-law and statutory enforcement remedies and the interchangeability of common-law and statutory remedies with respect to awards. The authors also include a discussion of the problems that arise where the parties invoke an arbitration statute but fail to comply fully therewith, and the possibilities of the award’s validity as a common-law award.

Wesley A. Sturges*
Richard E. Reckson**

I. COMMON-LAW AND STATUTORY ARBITRATIONS IDENTIFIED

Nearly all American jurisdictions have at least two general systems of arbitration. They are commonly designated as common-law arbitration and statutory arbitration.¹ Broadly presented, the two systems are distinguishable as follows: In common-law arbitration the arbitration agreement, the composition and selection of the arbitral board, the calling and conduct of the arbitral hearing, the award, and matters relating to its enforcement and im-

*Dean and Professor of Law, School of Law, University of Miami, Florida.
**Graduate Student, Harvard Law School.
¹ No general arbitration statute providing for arbitration thereunder has been found in Oklahoma, South Dakota or Vermont.
peachment are governed for the most part, if not entirely, by judge-
made common-law rules. In a statutory arbitration these matters
are ordered in more or less detail by a statute which frequently is
entitled or referred to as an arbitration statute. Most of the arbi-
tration statutes follow a common pattern of arranging a sequence
of steps to be followed in order to invoke and comply with the
statute. The initial sections are likely to prescribe the requirements
to qualify an arbitration agreement under the statute. Subse-
quent sections, in turn, prescribe in more or less detail concerning
the make-up and selection of the arbitral board, the calling and
conduct of the arbitral hearing, the making of the award and pro-
ceedings to enforce, vacate and correct the award. The several
sections of the statute are integrally related and are not a series of
independent provisions.

The arbitration statutes exact more formalities for an arbitration
agreement and for an award than are required at common law.
Both must be in writing to qualify under the statutes and in many
jurisdictions they must bear further formalities and provisions for
authentication. Under some statutes the agreement as well as the
award must be filed in court. At common law even an oral agree-
ment and an oral award are adequate for most arbitrations. Nei-
ther is required to be filed in any court:

Statutory awards generally are enforceable or impeachable by
returning them to court with a motion to confirm and enter judg-
ment, or to vacate, modify or correct. The corresponding remedies
with respect to common-law awards rest in plenary actions or suits,
or declaratory judgment petitions.

2. Several jurisdictions have one or more statutory provisions of limited
and specialized application to arbitrations. Some of them appear to apply
to common-law arbitrations; some appear to apply as well to statutory ar-
bitrations. They do not purport to serve as any part of a system of com-
mon-law or statutory arbitration. Included in this group of statutes are
provisions authorizing compulsory process to procure witnesses and evi-
dence for use in arbitrations; provisions authorizing the taking of deposi-
tions for such use; provisions restraining the authority of a partner to enter
upon a submission binding upon his firm; provisions restraining specific en-
forcement of submission agreements; and provisions defining criminal of-
fenses of arbitrators and parties arising from their conduct in arbitrations.
No American jurisdiction has all of these provisions.

3. See, by way of illustration, the view of the majority of the United
States Supreme Court upon the inter-relationship of §§ 1, 2 & 3 of the
Polygraphic Co., 350 U.S. 198 (1955); see also Sturges & Murphy, Some
Confusing Matters Relating to Arbitration Under the United States Arbitra-

4. Concerning common-law requirements that certain submissions and
awards be “in writing” in deference to the statutes of fraud, see STURGES,
COMMERCIAL ARBITRATIONS AND AWARDS §§ 69–75 (1930).
Both systems have a significant factor in common; namely, both are based upon a voluntary agreement of the parties to arbitrate. Accordingly, both of them are set apart from another and different process sometimes called "Compulsory Arbitration."

In some jurisdictions there are statutory provisions which single out and govern in varying detail the submission or reference to arbitration, by agreement of the parties, of civil causes pending in litigation between them. Accordingly, in some jurisdictions submissions of pending civil actions by the parties thereto may be made under these statutory provisions, or under the general arbitration statute of the jurisdiction or according to its common law.

In a few jurisdictions, disputed claims arising in connection with collective bargaining agreements between unions and employer relating to wages or other conditions of employment also are singled out for arbitration under a separate statute. Common-law arbitration of such causes in those jurisdictions does not appear to be displaced by such statutes.

II. ARBITRATION STATUTES CLASSIFIED

The arbitration statutes of the different jurisdictions vary considerably in their scope and in the details of their requirements. Perhaps the most useful general classification of them is that which counts in one group those statutes enacted prior to the New York 1920 Arbitration Law and in another those enacted since 1920. Such comparison will indicate how, and in what important respects, most of the more recent arbitration legislation has displaced or departed from the laws of the earlier type as well as from common-law arbitration.

The general pattern of the 1920 New York Law and similar legislation is readily distinguished from that of the earlier statutes

5. Arbitration presupposes the existence of a contract to arbitrate. If a party to a controversy denies the existence of the contract and with it the jurisdiction of the irregular tribunal, the regular courts of justice must be open to him at some stage for the determination of the issue. The right to such a determination, either at the beginning or at the end of the arbitration or in resistance to an attempted enforcement of the award, is assured by the Constitution as part of its assurance of due process of law. Judge Cardozo in Finsilver, Still & Moss, Inc. v. Goldberg, Maas & Co., 253 N.Y. 382, 389, 171 N.E. 579, 581 (1930).


in various particulars. Thus, only the 1920 New York type of statute embraces provisions to arbitrate controversies that may arise between the parties in the future as well as agreements of submission of disputed claims already existing between them. The earlier statutes cover only agreements of submission of existing controversies. 9

Statutes of the 1920 New York pattern provide that both classes of arbitration agreements, when executed in compliance with the statute, "shall be valid, irrevocable and enforceable." This is a general mandate of the legislature to the courts to make them so. This mandate alone overcomes common-law revocability of such arbitration agreements by notice. 10 These statutes also provide remedies to enforce such agreements which are precisely tailored to overcome common-law revocability and to overcome the com-

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9. This is true also of the general arbitration statutes enacted since 1920 in Nevada (1925), North Carolina (1927), and Utah (1927). The statute of each of these states was a draft of the Uniform Arbitration Act approved and recommended by the National Conference of Commissioners on Uniform Laws and approved by the American Bar Association. This draft was seriously at variance with the pattern of the 1920 New York statute in that it covered and recognized only agreements of submission to arbitration of controversies existing between the parties at the time. It did not cover any provisions for arbitration of future controversies which might arise between the parties. There was much disputation within the Conference and within the American Bar Association upon the expediency of including future disputes provisions under the statute as was done in the 1920 New York law. The draft statute finally emerged covering only agreements of submission of existing controversies. For further history of these matters, see Sturges, Arbitration Under the New North Carolina Arbitration Statute—The Uniform Arbitration Act, 6 N.C.L. REV. 363 (1928).

The Conference has since withdrawn its sponsorship of the former draft and, with the approval of the American Bar Association, has recommended a new draft of the Uniform Arbitration Statute of the same general pattern as the 1920 New York Arbitration Law. This new draft was adopted by the Conference on August 20, 1955 and was approved by the American Bar Association on August 26, 1956.

This draft is discussed by Professor Pirsig, Chairman of the Committee on Arbitration of the Conference, in his article entitled, The Minnesota Uniform Arbitration Act and the Lincoln Mills Case, 42 MINN. L. REV. 334 (1958). As Professor Pirsig pointed out, this draft, with some modification, was enacted in 1957 in Florida and Minnesota. He also has vouched for the fact that: "Basically, the act is a simplified and modernized version of the arbitration statutes of New York, first enacted in 1920 and adopted with various modifications in a number of other states." Id. at 334.

10. No specific remedy is provided to overcome common-law revocability by notice. It is difficult to imagine what remedy would be practicable to overcome such revocability. Quite clearly, however, the statutory declaration of irrevocability is mandatory and self-executing against a notice of revocation. Otherwise, the other sections of the statutes providing for irrevocability by action and more formal specific enforcement might be brought to naught by notice of revocation. For an illustration of how the statutory declaration may be self-executing to defeat revocation by notice, see State ex rel. Fancher v. Everett, 144 Wash. 592, 258 Pac. 486 (1927).
mon-law reluctance of courts of equity to order any enforcement of any arbitration agreements. In most of these statutes, these further remedies are explicitly provided as follows: (1) One who is made defendant in any action, suit or proceeding brought upon a matter embraced in an arbitration agreement between the parties, which qualifies under the statute, can, by application to the court, gain stay of trial of the action or proceeding pending arbitration; (2) A party aggrieved by the neglect or refusal of the other to go forward with arbitration under their arbitration agreement can, by motion to a designated court, obtain a general order against the other to proceed with arbitration as agreed; (3) A party aggrieved by the neglect or refusal of the other party to appoint arbitrators can, by motion to a designated court, obtain appointment by the court.

In some instances the foregoing provisions for enforcement of the arbitration agreement qualifying under the statute were grafted onto an earlier arbitration statute of the given jurisdiction.\textsuperscript{11}

\textsuperscript{11} This was true, for example, of the New York Arbitration Law of 1920 now consolidated with provisions of the earlier statute. See N.Y. CIV. PRAC. ACT §§ 1448–53. By this process of amending the new onto the old, various ambiguities and technicalities were grafted into the resulting statute. Thus, while future disputes provisions are adequate under most of these statutes if they are "in writing," the agreements of submission of existing controversies may require additional formalities of the old order. For example, under the New York law as enacted in 1920, a future disputes provision qualified under the statute if it were "in writing," but in order to qualify a submission agreement thereunder it must be "in writing, duly acknowledged or proved, and certified, in like manner as a deed to be recorded." N.Y. Laws 1920, ch. 925, art. 83, § 1411. There was, of course, no substantial reason to tie the submission agreement to the formalities of a deed of land qualifying for recordation. The section has since been amended, but even now the declared formalities for the submission agreement are more stringent than those for the future dispute provision or for common-law submissions. At present the prescription for a statutory submission agreement is that "it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent." N.Y. CIV. PRAC. ACT § 1449.

The Massachusetts legislation involved a similar grafting of the new upon the old.

In Arizona the grafting appears to have been so poorly done as to permeate the whole act (including the future disputes provisions thereunder) with ambiguities and burdensome technicalities. See Sturges, Arbitration Under the Arbitration Statutes of Texas, 31 TEXAS L. REV. 833, 834 n.3 (1953). This ineptness of legislative drafting is reflected to an extraordinary extent in the Florida statutes. The 1920 New York type of arbitration statute, as sponsored by the American Bar Association and National Conference of Commissioners, was enacted in 1957; it was carried in the 1957 Session Laws free and clear of the earlier act of that state. But alas, according to legend, since it did not expressly repeal the earlier act, both acts were carried into the 1957 revision of the statutes. This is the supreme in comingling and confusing the new and the old. The situation appears in FLA. STAT. §§ 57.01–09 (the "old"), 57.10–31 (the "new") (1959).
whereas in other instances, a completely new statute including the foregoing provisions and others was enacted.\footnote{12}

None of the foregoing remedies for the enforcement of statutory arbitration agreements is made available in the older arbitration statutes; at most a submission agreement qualifying under an earlier statute may be broadly declared therein as being "irrevocable."

In another important respect the group of older statutes differs from the 1920 New York type of statute. Many of the earlier statutes prescribe one or more of a varying miscellany of recitals and formalities to qualify submission agreements under the statute. Most of these requirements are beyond those required at common law for common-law submissions. Generally, as indicated above, even an oral submission is adequate at common law. Reasons for most of the additional requirements as prescribed for the statutory submissions, or for the variations thereof from statute to statute, are not apparent. The miscellany here referred to in the older statutes ranges through and includes prescriptions for acknowledgment of, or subscribing witnesses to, the submission agreement; that it name the arbitrators; that it state the number of arbitrators; that the parties designate themselves therein as plaintiff and defendant respectively; that it "concisely state" the matters in dispute; that the parties state therein "that they desire to leave the determination thereof to certain persons, naming them as arbitrators"; that the submission contain "a clear and accurate statement of the matters in controversy submitted"; and that there be "mutual bonds" to abide an award.\footnote{13} All of these and similar prescriptions in the older statutes have invited litigation. Who urged them into these statutes is not known. It is thought that a requirement that the submission be in writing and signed by the parties should be adequate. The writing will prove advantageous as a more efficient and enduring record of the event than the oral counterparts.

Several of the older statutes fashion the statutory arbitration after the course of an amicable action; parties desiring to arbitrate under the statute are to file a prescribed submission agreement with some court, or clerk thereof; thereupon the arbitration is to stand as under a rule of court.\footnote{14}

\footnote{12} This was true of the United States arbitration act.

\footnote{13} The Texas arbitration statute of 1846 exemplified a considerable number of this miscellany of technical formalities. See Sturges, Arbitration Under the Arbitration Statutes of Texas, 31 TEXAS L. REV. 833 (1953).

\footnote{14} See, e.g., MD. ANN. CODE art. 75, § 16 (1957), which provides for the submission of "any cause instituted in any of the courts of this State."
With respect to causes which may be submitted to arbitration under the statutes, it is to be emphasized that as the older statutes vary in their selection of civil claims which may be arbitrated thereunder and their exclusion of those not to be arbitrated thereunder, so do the statutes of the group following the 1920 New York type statute. There is no uniformity of exclusions in either group. Perhaps the most prevalent exclusion from both classes of statutes covers disputes over title to real estate. The most prevalent exclusion from the group of later statutes is the provision that the statute shall not apply to arbitration agreements between union and management involving wages or working conditions of employees. It should be observed that these exclusions generally do not purport to reach, or to restrict common-law arbitration of such matters arising between such parties, and in view of the almost universal ruling that common-law arbitration in the different jurisdictions is not displaced by their respective arbitration statutes, these limitations upon the applicability of a statute should not by any implication be held to preclude such causes from arbitration at common law.

Notwithstanding such important differences, the arbitration statutes do have various matters in common.

While the statute does not purport to embrace the submission of controversies not in litigation, it has been the practice for parties who desire to arbitrate thereunder to docket an action by consent and file their written agreement of submission. Thereupon a rule of court issues that arbitration be had pursuant to the agreement and that the award rendered have effect as provided in the statute. The statute was originally enacted in 1778. This practice was recognized by the court of appeals as early as 1837. See Shriver v. State, 9 Gill & Johnson 1 (Md. 1837). See also Caton v. MacTavish, 10 Gill & Johnson 192 (Md. 1838); Cromwell v. Owings, 6 Harris & Johnson 10 (Md. 1823).

Similarly, see the situation in Kentucky as set out in Carson v. Carson, 58 Ky. (1 Met.) 434 (1858).

15. This exclusion, worded as a proviso to the application of the given statute, usually reads: "provided, however, that the provisions of this act shall not apply to collective contracts between employers and employees, or between employers and association of employees, in respect to terms or conditions of employment."

A corresponding limitation is written in the U.S. arbitration act, 9 U.S.C. § 1 (1958). It covers "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."

16. It has been indicated more or less explicitly in at least two judicial opinions that this limitation upon the application or availability of the act is some sort of \textit{positive restraint upon the arbitrability of causes} arising between the parties to such collective contracts. This view seems unwarranted not only by the context of the statute, but it also seems to be too daring an assault upon the use of the arbitral process in the labor-management field. See Gates v. Arizona Brewing Co., 54 Ariz. 266, 95 P.2d 49 (1939); Local 1111, United Electrical Workers v. Allen-Bradley Co., 259 Wis. 609, 49 N.W.2d 720 (1951).
One group of these provisions covers, in varying detail, the initiation and conduct of the arbitral hearing, including explicit requirements designed primarily to assure the parties' right of hearing and process for obtaining witnesses and evidence.

Another group covers enforcement of the award by motion or like proceeding to gain court confirmation of the award and entry of conforming judgment; also counter proceedings in like fashion to vacate, modify or correct the award for causes frequently set forth in some detail in the statute. The enumeration of causes to impeach the statutory award found in many of the statutes is substantially a codification of common-law causes to impeach common-law awards. In a few statutes, however, the awards are made more vulnerable than common-law awards.17

The foregoing statutory procedures with respect to statutory awards tend to be somewhat more summary and expeditious for the moving party than corresponding plenary actions or declaratory judgment proceedings to enforce or to vacate, modify or correct common-law awards. Comparisons of these statutory procedures with the corresponding common-law procedures, including declaratory judgment proceedings, are further considered below.

III. ARBITRATION STATUTES DO NOT DISPLACE COMMON-LAW ARBITRATION

There is near consensus of American decisions on the precise point that the arbitration statutes of the different jurisdictions do not displace common-law arbitration.18 The statutes are regarded as adding another method of arbitration. Parties may choose one or the other. The following excerpt from an opinion by the Supreme Court of Indiana in 1867 with respect to its then existing arbitration statute is typical of the attitude of almost all of the courts in this connection:

The statute in no manner affects submissions which were valid at common law. It is an affirmative statute without negative words, and in no respect are its provisions of such a nature that they cannot have effect consistently with the validity of parol submissions. Such submissions were valid at common law, and as there is nothing in the statute which expressly, or by necessary implication, changes the law as it

17. See, e.g., PA. STAT. ANN. tit. 5, § 171 (1930).
18. No arbitration statute or other statute has been observed expressly abrogating or pre-empting common-law arbitration.

In some jurisdictions, moreover, the arbitration statutes expressly reserve the validity of common-law arbitration—i.e., of agreements, proceedings and awards which do not conform to the statute. See N.Y. CIV. PRAC. ACT § 1469; see also Sandford Laundry, Inc. v. Simon, 285 N.Y. 488, 35 N.E.2d 182 (1941).
previously existed upon that subject, they are still valid. The statute is merely cumulative.\textsuperscript{19}

The Colorado courts advanced like views with respect to the Colorado statute in effect in 1898.\textsuperscript{20} It provided that: "\textit{In order to make future arbitrations obligatory and binding upon the parties, they shall . . . make and subscribe a written article of agreement}" in the manner and form therein specified. It was urged that, in view of the above quoted portion of the statute, only submission agreements, arbitral proceedings, and awards rendered thereunder which complied with the statute were "obligatory and binding" in that state.\textsuperscript{21} This view was denied. Said the court:

We think that the sole object of the code provisions as to arbitrations and awards was to obviate the necessity of bringing a suit to enforce the award. They provided that if a certain prescribed method was pursued in the submission of controversies to arbitration, the award in writing might be filed in the office of the clerk of the district court of the county wherein the matter was pending and judgment be entered thereon. The act did not undertake either in terms or by implication to abolish common-law arbitrations. Both forms of procedure may exist as neither conflicts with the other.\textsuperscript{22}

The Supreme Court of Washington expressed a contrary view toward the 1881 statute of that state.\textsuperscript{23} That statute has been repealed since; the effect of the court's earlier views upon the later statute is not clear. The court declared and reiterated that the earlier arbitration statute supplanted common-law arbitration. It purported to draw this conclusion from the intent of the statute.\textsuperscript{24}

\textsuperscript{19} Miller v. Goodwine, 29 Ind. 46, 47 (1867).
\textsuperscript{20} Colo. Laws 1881, p. 59, \textsection 2. (Emphasis added.)
\textsuperscript{21} McClelland v. Hammond, 12 Colo. App. 82, 54 Pac. 538 (1898).
\textsuperscript{22} \textit{Id.} at 84-85, 54 Pac. at 539. This language was subsequently approved by the Colorado Supreme Court in Lilley v. Tuttle, 52 Colo. 121, 125-26, 117 Pac. 896, 898 (1911). See also Byrd v. Odem, 9 Ala. 755 (1846); Shaw v. State, 125 Ala. 80, 28 So. 390 (1899); STURGES, COM\textit{MERCIAL ARBITRATIONS AND AWARDS} \textsection 1 (1930).

While the arbitration statutes of some of the jurisdictions covered in the decisions have been amended or repealed and a new one substituted, since the dates of the respective cases cited, the subsequent legislation did not purport to change the views advanced by the courts in their cases vouching for the survival of common-law arbitration.

\textsuperscript{23} See Wash. Laws 1860, pp. 323-25, \textsection\textsection 1-11.
\textsuperscript{24} This opinion was first advanced in Dickie Mfg. Co. v. Sound Constr. & Eng. Co., 92 Wash. 316, 318, 159 Pac. 129, 131 (1916) as follows:

In the face of so complete an act as ours we are clear, and find this proper occasion to say, that common law arbitration does not exist in this state and that the plain purpose of our legislation was to clear much unsettled practice by codifying arbitration.

For further review of cases carrying expressions of this view of the Washington court, see STURGES \& STURGES, \textit{Some Confusing Matters Relating to Arbitration in Washington}, 25 WASH. L. REV. 16 (1950).
But suppose that the parties' arbitration agreement and the controversy involved thereunder qualify under an arbitration statute; is common-law arbitration thereby foreclosed? Can parties choose to have common-law arbitration notwithstanding?

The view of most of the courts that their arbitration statutes do not displace common-law arbitration seems more plausible and practicable than the foregoing position taken by the Washington court. Various considerations lead to this conclusion. Thus, as is pointed out above, in many jurisdictions one or more classes of controversies, such as controversies over titles in fee or for life in real property, or "labor controversies," are expressly exempted from arbitrability under the arbitration statute. The Washington statute in effect when its foregoing doctrine was declared expressly excepted controversies "as respect the title to real estate." Wash. Laws 1860, p. 324, § 1. Similarly, some arbitration statutes purport to enable arbitration thereunder of controversies which might be the subject of "an action," or of "a civil action," or of "a personal action,"—the inference being that other controversies are not arbitrable under the statute.

Regardless of the merits, if any, for excluding such causes from arbitrability under the statute, it is difficult to find any substantial basis within or without the arbitration statutes for sweeping away common-law arbitration of those controversies.

Again, the earlier arbitration statutes have not embraced provisions to arbitrate controversies arising in the future; they embrace, as pointed out above, only agreements of submission of existing controversies. The Washington statute was so limited at the time its foregoing doctrine was declared. Similarly, all of the arbitration statutes require, as a minimum, that the agreement of submission and the award be in writing to qualify thereunder. And, as pointed out above, in many cases additional recitals and formalities are prescribed; in some cases the agreement of submission must be filed in court. Arbitrations and awards under agreements having less formalities than those required by the statute (including oral agreements and oral awards) generally are valid at common law. Accordingly, the striking down of such common-law arbitrations and awards would appear to be arbitrary, serving no useful purpose.

It is doubted, moreover, that a legislature would outlaw common-law arbitration in any such broad fashion as declared by the Washington court. The parties' freedom of contract would, it is expected, enjoy greater legislative deference.

It remains to note a unique antic in this connection by the Washington Supreme Court. Whereas, by its declared view of long standing, common-law arbitration was pre-empted by its foregoing arbitration statute, nevertheless, common-law appraisement survived. This was ruled with respect to an arbitration of issues arising between union and employers and an award fixing wage rates to be paid. Said the court:

Even though the arbitration here did not, and could not, have conformed to the statute, and there is no common law arbitration in this state, it does not follow that there is no way by which employers and employees may settle their differences by mutually agreeing upon certain persons to make the adjustment. . . .

Thus far we have been using the term "arbitration," which was used in the agreement. But what was done here was neither a statutory arbitration nor a common law arbitration. It is what is referred to in the books as an appraisement.


The court offered no explanation as to why common-law appraisement
A California court gave an opinion in 1953 in *Crofoot v. Blair Holding Corp.*,²⁵ broad enough to require the conclusion that common-law arbitration is foreclosed in such a situation. While the precise decision upon the very point in issue is not criticized, the opinion as to the sweep of the statute in such situations seems too broad. The California arbitration statute followed the pattern of the 1920 New York arbitration statute.²⁶ In the foregoing case the parties, having several litigations pending between them, agreed in writing to the submission of the matters in controversy to arbitration. The statute was satisfied as to the manner and form of the submission agreement and as to the matters submitted. Arbitration was had and an award rendered. A statutory motion to confirm the award and enter judgment was opposed by the losing party. He objected, arguing that by the common law of California submissions to arbitration of causes in pending litigation did not empower the court in which they were pending to confirm an award and enter judgment unless the submission had been ordered by the court; that the submission here was without court order and, therefore, the statutory motion to confirm and enter judgment was misconceived. The arbitration statute did not require such court order on the submission. The court fittingly overruled the objection. It also observed, too broadly, it seems, as follows:

should survive when common-law arbitration should not. The case appears to have been the first and last judicial translation of the arbitration of any labor controversy into that bewitching category called appraisement. For further review of *Gord*, see Sturges & Sturges, *Some Confusing Matters Relating to Arbitration in Washington*, 25 WASH. L. REV. 16, 27–42 (1950).

Notwithstanding the considerations in the foregoing critique of the Washington Supreme Court in ruling the pre-emption of common-law arbitration (but not common-law “appraisement”) by the arbitration statute, it cannot be denied that the New York statute purports to do as much in one particular. N.Y. Civ. Prac. Act § 1448 limits classes of controversies which can be submitted and deals with parties who may be incapable of contracting themselves into arbitration. It is there written that “a controversy cannot be arbitrated, either as prescribed in this article or otherwise, in either of the following cases . . . .” (Emphasis added.) The disputed claims eliminated are those relating “to an estate in real property, in fee or for life.”

Neither the expediency nor reasonableness of this stricture upon either statutory or common-law arbitration is apparent. This stricture has been construed in ancient cases by the New York courts and narrowed, it seems, in the scope of its application in common-law and statutory arbitration alike. See Palmer v. Davis, 28 N.Y. 242 (1863); Wiles v. Peck, 26 N.Y. 42 (1856); Olcott v. Wood, 14 N.Y. 32 (1856).

²⁶. The act as amended in 1961 (Cal. Sess. Laws 1961, ch. 461) seems to have no special application in the *Crofoot* case.
Under the law as it presently exists there is no field for a common law arbitration to operate where the agreement to arbitrate is in writing. . . . We conclude that by the adoption of the 1927 statute, the Legislature intended to adopt a comprehensive all-inclusive statutory scheme applicable to all written agreements to arbitrate, and that in such cases the doctrines applicable to a common law arbitration were abolished.27

It is doubted that any legislature would knowingly enact such an abolition of common-law arbitration. Since, under the prevailing view, parties generally may choose common-law or statutory arbitration, it is not apparent why their choice should be foreclosed by entering upon an arbitration agreement which qualifies as to form and coverage under the statute. The parties' first step in exercising their choice is, of course, their consummation of their arbitration agreement. If that agreement does not meet the statutory requirements generally it will not engage the statute.28 If they accomplish an arbitration agreement which does qualify under the statute it seems best to conclude that they have elected to arbitrate under the statute unless they make clear their purpose, notwithstanding the makeup of their agreement, to have common-law arbitration instead. Parties may, of course, add evidence of their intent to proceed under the statute by, for example, including a recital to that effect in their agreement invoking it. Conversely, they may declare an intention in the agreement to invoke common-law arbitration in place of the statutory method. There seems to be no common-law or statutory restraints upon these declarations of intent by the parties.

In the Crofoot case, the parties explicitly indicated in their arbitration agreement their purpose to arbitrate under the statute. The court noted that the parties had, in their submission agreement, invoked "in at least three places," the application of the arbitration statute. Having done so, it seems clear that the losing party's resort to common-law requirements relating to submissions of pending actions in order to defeat the application of the statute was quite misconceived. In short, as the parties' agreement is the very warrant for their arbitration both at common law and under the statutes, so should their agreement be deemed the initial indi-

28. See, e.g., Smith v. Douglass, 16 Ill. 33 (1854); Boots v. Canine, 58 Ind. 450 (1887); Hawes v. Coombs, 34 Ind. 455 (1870); Williams v. Perkins, 83 Mo. 379 (1884); Key v. Norrod, 124 Tenn. 146, 136 S.W. 991 (1911); Carey v. Herrick, 146 Wash. 283, 263 Pac. 190 (1928); Steers, Arbitration at Common Law in Indiana, 5 Ind. L.J. 175 (1929).
cator in each case whether they have undertaken arbitration at common law or under the statute.

IV. INTERCHANGEABILITY OF COMMON-LAW AND STATUTORY ENFORCEMENT REMEDIES WITH RESPECT TO ARBITRATION AGREEMENTS

A. COMMON-LAW ARBITRATION AGREEMENTS

Under the common-law traditions of revocability and nonenforceability of common-law arbitration agreements, there has been little consideration in the cases of any questions as to the interchangeability of any common-law enforcement remedies, including declaratory judgment petitions, with statutory remedies provided in the arbitration statutes as reviewed earlier. And, as the statutory remedies have been held available only with respect to arbitration agreements complying with the arbitration statute, the noncomplying, common-law agreement traditionally has been deemed not to be specifically enforceable by any manner of means, namely, neither by action at law or equity suit, declaratory judgment proceeding, nor statutory processes under the arbitration statutes.

The view that common-law agreements should not be accorded any semblance of specific enforcement by courts of equity seems to have come down from quite ancient times as some original and fundamental tenet of equity jurisprudence.

1. Specific enforcement of common-law arbitration agreements—denied

This view appears to have been first rationalized into American case law in 1845 by Mr. Justice Story while on the United States Circuit Court for the District of Massachusetts, in Tobey v. County of Bristol. His commentaries as to why specific enforcement (involving the appointment of arbitrators) should be denied were volunteered following his declared conclusions that in the case before him the defendants had entered into no agreement with plaintiff for arbitration of plaintiff’s claims against defendants;


30. 23 Fed. Cas. 1313 (No. 14065) (C.C. Mass. 1845). See Morse, ARBITRATION AND AWARD 89–91 (1872). Morse accepted Story and his British cases.
that, what passed between the parties regarding arbitration was, at most, "a conditional consent to refer, provided the parties can agree upon the arbitrators"; that, in truth, the parties had not entered upon "any contract or agreement whatsoever." From this point he proceeded to take up the question of specific enforceability of a common-law arbitration agreement: "But supposing it to be otherwise, and here there was a real contract or agreement, not conditional but absolute, on the part of the commissioners [defendants], to refer the claims to arbitration, can such an agreement be enforced by a court of equity?"31

Mr. Justice Story began his answer to this question by reporting upon his research among the authorities:

No one can be found, as I believe, and at all events, no case has been cited by counsel, or has fallen within the scope of my researches, in which an agreement to refer a claim to arbitration, has ever been specifically enforced in equity. So far as the authorities go, they are altogether the other way.32

What were his authorities the "other way"? It seems fair to answer that, at most, judicial opinions in two or three earlier British cases had broadly declared that as of that date, a bill for specific performance either is not, or never has been, entertained by a court of equity. No reasons were assigned, and the general tenor of the statements is more by way of report than by reason and adjudication. Justice Story's cases are reviewed in the attending

31. Tobey v. County of Bristol, 23 Fed. Cas. 1313, 1319–20 (No. 14065) (C.C. Mass. 1845). (Emphasis added.) The cases on enforcement of arbitration agreements were divided by Justice Story into two classes as follows:

One, where an agreement to refer to arbitration has been set up as a defence to a suit at law, as well as in equity; the other, where the party as plaintiff has sought to enforce such an agreement in a court of equity. Both classes have shared the same fate. The courts have refused to allow the former as a bar or defence against the suit; and have declined to enforce the latter as ill-founded in point of jurisdiction.

Id. at 1320.

32. 23 Fed. Cas. at 1320. (Emphasis added.)
footnote. It is to be observed that no American cases and no text writers (British or American) were included.

33. Justice Story's authorities were as follows: Street v. Rigby, 6 Ves. 815, 31 Eng. Rep. 1323 (Ch. 1802). The plaintiff sued by bill in equity for an accounting and discovery upon liquidation of a partnership with defendant. Defendant pleaded in bar a general arbitration provision in the parties' articles of partnership. The plea was denied. In the course of an extended opinion, Lord Eldon is reported to have observed:

There is considerable weight, as evidence of what the Law is, in the circumstance, that no instance is to be found of a decree for specific performance of an agreement to name arbitrators: or that any discussion upon it has taken place in experience for the last twenty-five years. I was Counsel in Price v. Williams (3 Bro. C.C. 163; 1 Ves. Jun. 365) [30 Eng. Rep. 388 (Ch. 1791): a case, which justifies considerable doubts, whether the eulogia upon the domestic forum of arbitrators are well founded. That was a case before Lord Thurlow upon a bill for specific performance of such an agreement, sending parties to arbitrators, who might or might not be able to come to a decision; and Lord Thurlow was of opinion, that the Court would not perform such an agreement.

Id. at 818–19, 31 Eng. Rep. 1324–25. (Emphasis added.) The report of Price v. Williams as cited by Lord Eldon shows that the case was not an agreement for arbitration. Mr. Justice Story also commented that the report of Price v. Williams did not carry "any notice of this point; but," Mr. Justice Story continued, "there cannot be any serious doubt of the accuracy of Lord Eldon's recollection of the case." Tobey v. County of Bristol, 23 Fed. Cas. 1313, 1320 (No. 14065) (C.C. Mass. 1845). Mr. Justice Story next cited Gourlay v. Duke of Somerset, 19 Ves. 429, 34 Eng. Rep. 576 (Ch. 1815) and declared that Sir William Grant, "one of the greatest masters of equity of his age, expressly said, that a bill seeking to enforce the specific performance of an agreement to refer to arbitration, was a species of bill that has never been entertained by a court of equity." Id. at 1320. (Emphasis added.) According to the report of the case, Sir William Grant said:

I cannot find any case, in which an agreement to submit any matter to reference has been used in any other way than as an objection by the Defendant to the interference of the Court upon the subject-matter of such agreement. There is no instance of a Plaintiff seeking the interposition of the Court, and obtaining it, who has been held entitled to have any part of his relief administered to him through the medium of a reference, compulsory on the other party. A Bill seeking that, would be pro tanto a Bill to enforce the specific performance of an agreement to refer to arbitration: a species of bill, that has never been entertained.


It is deemed worthy of note, however, in connection with the foregoing cases regarding Lord Eldon's views and actions as reported in Waters v. Taylor, 15 Ves. 10, 33 Eng. Rep. 658 (Ch. 1807). He considered what effect should be given to a general arbitration provision in a contract of co-propriehonorship (hereinafter mentioned as being the deed of 1803). One party thereto sued the other seeking a variety of relief after charging defendant with various defaults of management of their joint affairs and seeking court appointment of a substitute. In short, it was not far from the traditional suit looking to appointment of a receiver to dis-
In the course of his opinion Mr. Justice Story also recorded his conviction that *equity should follow the law* by honoring the common-law tenets of revocability of arbitration agreements. And this, he thought, should vouch for the conclusion that specific enforcement should be denied in equity. He relied upon Lord Coke's place defendant as manager. Should Lord Eldon honor the arbitration provision in any way? While he mused that he might not decree specific performance of the arbitration provision, he would not refrain from reporting that he was "so strongly pressed" by the consideration that the parties, by their litigation, were calling down upon themselves "the most ruinous" and "infinite mischief" as to prompt him to act as follows: "I shall give them an opportunity to pause; and consider, whether they will press for my determination, or have their disputes determined by that more wholesome mode, which they themselves provided; and I recollect very few instances where this sort of recommendation has been given in vain." *Id.* at 20, 33 Eng. Rep. at 662. (Emphasis added.)

The parties went to arbitration and an award was returned. In reviewing the case after, and in light of, the award, Lord Eldon further observed:

"Whatever may be the law of this Court as to the capacity of parties by stipulation to deprive themselves of the right to resort to a Court of Justice in the first instance, and taking the law to be, that a man cannot bind himself to forbear to come here, until an arbitration has been had, in almost every line of this deed of 1803, upon which the suit is instituted, the parties have expressed the greatest anxiety to keep out of Court; if they could in any manner arrange their disputes by arbitration. *Mitchell v. Harris*, 2 Ves. jun. 129; 4 Bro. C.C. 311. *Street v. Rigby*, 6 Ves. 815. [One looks in vain for any expressions of this “anxiety” beyond the nonemotive inclusion of the general arbitration provision in the deed.] Accordingly I thought it within the scope of my discretion to give the recommendation, that has been given in every case, where it was proposed to make this Court the manager of any joint concern: giving the parties an opportunity of preserving themselves from the ruin, that must be the necessary consequence of an active interference of the Court. That led to arbitration...."

*Id.* at 23, 33 Eng. Rep. at 663. (Emphasis added.)

Mr. Justice Story does not appear to have taken account of this type of enforcement of the arbitration provision of Lord Eldon’s day.

In addition to the foregoing cases, Justice Story found that there are "several other cases bearing strongly on the same doctrine"—i.e., of no enforcement of arbitration agreements. *Tobey v. County of Bristol*, *supra* at 1320. He cited *Wilks v. Davis*, 3 Mer. 507, 36 Eng. Rep. 195 (Ch. 1817); *Blundell v. Brettargh*, 17 Ves. 232, 34 Eng. Rep. 90 (Ch. 1810); *Milnes v. Gery*, 14 Ves. 400, 33 Eng. Rep. 574 (Ch. 1807). "But a later case," to continue with Story’s opinion, "directly in point, is *Agar v. Macklew*, 2 Sim. & S. 418 [57 Eng. Rep. 405 (Ch. 1825)], where Sir John Leach utterly refused to decree the specific performance of an agreement to refer to arbitration." *Tobey v. County of Bristol*, *supra* at 1320.

It is very difficult to find in the opinion of the court in *Milnes v. Gery* any support for the “doctrine” declared by Justice Story. Instead, a different “doctrine” was voiced. In that case parties entered upon a *purchase and sale contract of certain lands, price to be determined by two persons*. Each party was to appoint one person and if the two so appointed failed to agree upon the price, the two should appoint a third to decide. Each party appointed a person but the two failed to agree upon a price. They also failed to agree upon the third person. *Thereafter the plaintiff brought*
parable as reported in *Vynior’s Case* of 1609\(^{24}\) for the substance of the law rule of revocability of arbitration agreements. “At all events,” to quote from Mr. Justice Story’s opinion,

> it cannot be correctly said, that public policy, in our age, generally favors or encourages arbitrations, which are to be final and conclusive, to an extent beyond that which belongs to the ordinary operations of

*his bill in equity for enforcement of the purchase and sale agreement and to have the court appoint a proper person or persons to make the valuation and price, or that it should be fixed in such other manner as the court should devise. The bill was denied on the ground that there was no contract of purchase and sale to enforce since the parties' method of fixing the price had been tried and had failed. Said the Master of Rolls:*

> I am satisfied, that, independently of all other objections, there is no such agreement between the parties, as can be carried into execution. The only agreement, into which the Defendant entered, was to purchase at a price, to be ascertained in a specified mode. No price having ever been fixed in that mode, the parties have not agreed upon any price. Where then is the complete and concluded contract, which this Court is called upon to execute? The price is of the essence of a contract of this sale. . . .

> * * *

In this case the Plaintiff seeks to compel the Defendant to take this estate at such price as a Master of this Court shall find it to be worth; admitting, that the Defendant never made that agreement; and my opinion, is that the agreement he has made is not substantially, or in any fair sense, the same with that; and it could only be by an arbitrary discretion that the Court could substitute the one in the place of the other.


Blundell v. Brettargh, *supra*, adopted the same rationale and denied specific performance of the parties’ purchase and sale contract in line with Milnes v. Gery. The same appears from Wilks v. Davis, *supra*. Agar v. Macklew, *supra*, also involved specific enforcement of a purchase and sale contract wherein price-fixers or valuers were to determine the price. *The bill sought to have the court appoint a surveyor as appraiser* (the defendant having refused to make any appointment to meet with plaintiff’s appointee) or to have the court refer the matter to a Master to fix the price. *Demurrer to the bill was sustained*, and the Vice-Chancellor entered his ruling in accord, it seems, with the rationale in Milnes v. Gery, *supra*, as follows:

> I consider it to be quite settled that this Court will not entertain a bill for the specific performance of an agreement to refer to arbitration; nor will, in such case, substitute the Master for the arbitrators, *which would be to bind the parties contrary to their agreement.*


34. 8 Co. Rep. 81b, 77 Eng. Rep. 597 (Q.B. 1609). For a competent and persuasive review of the earlier British cases challenging Coke’s parable as he presented it, see COHEN, *COMMERCIAL ARBITRATION AND THE LAW* 103-69 (1918). It is noticeable that Mr. Justice Story seems to have utilized Coke’s exposition of the rationale for revocability of an arbitration agreement rather than the subsequent dogma as announced in Kill v. Hollister, 1 Wils. 129, 95 Eng. Rep. 532 (K.B. 1746), that unless held revocable such agreements would oust the courts of jurisdiction. He appears to have had *Kill v. Hollister* before him. See note 31 *supra*. 

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the common law. It is certainly the policy of the common law, not to compel men to submit their rights and interests to arbitration, or to enforce agreements for such a purpose. Nay, the common law goes farther, and even if a submission has been made to arbitrators, who are named, by deed or otherwise, with an express stipulation, that the submission shall be irrevocable, it still is revocable and countermandable, by either party, before the award is actually made, although not afterwards. This was decided as long ago as in Vynior's Case, 8 Coke, 81b. The reason there given, is, that a man cannot, by his act, make such authority, power, or warrant not countermandable . . . as if a man should, by express words, declare his testament to be irrevocable, yet he may revoke it, for his acts or words cannot alter the judgment of law, to make that irrevocable, which is of its own nature revocable. . . . When the law has declared, that any agreement for an arbitration is, in its very nature, revocable, and cannot be made irrevocable by any agreement of the parties, courts of equity are bound to respect this interposition, and are not at liberty to decree that to be positive and absolute in its obligation, which the law declares to be conditional and countermandable.35

Mr. Justice Story also found reason to deny specific enforcement—especially insofar as appointment of arbitrators were sought—within the “established principle of courts of equity never to enforce the specific performance of any agreement when it would be a vain and imperfect act, or where a specific performance is from the very nature and character of the agreement, impracticable or inequitable,” if enforced; that in a large variety of cases specific enforcement is denied because of the “utter inadequacy of the means of the court to enforce the due performance of such a contract.” So in this case he asked:

How can a court of equity compel . . . the parties mutually to select arbitrators, since each much, [sic] in such a case, agree to all the arbitrators? If one party refuses to name an arbitrator, how is the court to compel him to name one? [Several similar questions as posed by the Justice are omitted.] If either party should refuse to name any arbitrator, or to agree upon any named by the other side, has the court authority, of itself, to appoint arbitrators, or to substitute a master for them?36


36. Tobey v. County of Bristol, 23 Fed. Cas. 1313, 1321–22 (No. 14065) (C.C. Mass. 1845). (Emphasis added.) The justice answered this question in the negative relying upon the British cases cited note 31 supra.
Having ruled out the competence of equity in all of these cases, the Justice concluded:

So that we abundantly see, that the very impracticability of compeling the parties to name arbitrators, or upon their default, for the court to appoint them, constitutes, and must forever constitute, a complete bar to any attempt on the part of a court of equity to compel the specific performance of any agreement to refer to arbitration. It is essentially, in its very nature and character, an agreement which must rest in the good faith and honor of the parties, and like an agreement to paint a picture, or to carve a statue, or to write a book, or to invent patterns for prints, must be left to the conscience of the parties, or to such remedy in damages for the breach thereof, as the law has provided.37

Mr. Justice Story found other specifications of impracticability and of injustice that might be born of the specific enforcement of arbitration agreements. Thus, it is written in the traditions of equity

that a court of equity ought not to compel a party to submit the decision of his rights to a tribunal, which confessedly, does not possess full, adequate, and complete means, within itself, to investigate the merits of the case, and to administer justice. The common tribunals of the country do possess these means; and although a party may have entered into an agreement to submit his rights to arbitration, this furnishes no reason for a court of equity to deprive him of the right to withdraw from such agreement, and thus to take from him the locus penitentiae; and to declare that the common tribunals of the country shall be closed against him, and he shall be compelled to submit all his rights and interests to the decision of another tribunal, however defective or imperfect it may be, to administer entire justice.38

38. Id. at 1320. Justice Story elaborated upon the want of facilities of common-law arbitrators "to investigate the merits of the case, and to administer justice." Ibid.

Now we all know, that arbitrators at the common law, possess no authority whatsoever, even to administer an oath, or to compel the attendance of witnesses. They cannot compel the production of documents, and papers and books of account, or insist upon a discovery of facts from the parties under oath. They are not ordinarily well enough acquainted with the principles of law or equity, to administer either effectually, in complicated cases; and hence it has often been said that the judgment of arbitrators is but rusticum judicium. Ought then a court of equity to compel a resort to such a tribunal, by which, however honest and intelligent, it can in no case be clear that the real legal or equitable rights of the parties can be fully ascertained or perfectly protected?
Id. at 1321. For critical review of these specifications of frailties of the arbitral process at common law, see Sturges & Sturges, Appraisals of Loss and Damage Under Insurance Policies, 13 U. MIAMI L. REV. 1 (1958). See also the commentaries by Lord Eldon set out in the discussion of Waters v. Taylor, note 33 supra.
Mr. Justice Story went on to avow that courts of equity did not refuse specific enforcement of arbitration agreements because they wish to discourage arbitrations, as against public policy. On the contrary, they have and can have no just objection to these domestic forums, and will enforce, and promptly interfere to enforce their awards when fairly and lawfully made, without hesitation or question. But when they are asked to proceed farther and to compel the parties to appoint arbitrators whose award shall be final, they necessarily pause to consider, whether such tribunals possess adequate means of giving redress, and whether they have a right to compel a reluctant party to submit to such a tribunal, and to close against him the doors of the common courts of justice, provided by the government to protect rights and to redress wrongs.39

This refinement in the paternalism of the courts ("at law" and "in equity") as declared for the recalcitrant party to an arbitration agreement hardly rings true. Nor is it clear why it should end at the point of the making of an award under his agreement, but not at the point of entering into his agreement to arbitrate. The traditional adage that he who makes his bed should lie in it seems just as commanding in its application to the entry upon the agreement as to the award thereunder; the closing of the "doors of the common courts of justice" upon the making of the agreement for arbitration seems no more critical or foreboding than at a later time in the chronology of the arbitral process.

It will be emphasized at this point that court orders of specific performance of arbitration agreements qualifying under arbitration statutes of the 1920 New York pattern, including orders to the parties to appoint arbitrators and court appointments of arbitrators, have not experienced the frustrations, entanglements or impracticabilities which were projected by Mr. Justice Story.40 It also will be emphasized that none of the opinions in the foregoing British cases which he cited appears to have relied upon any of his declared impracticabilities as reason to deny specific enforcement of the agreements involved therein. And, to repeat, he


cited no American cases nor any text writer in support of any of his views as set down in his opinion.\textsuperscript{41}

Mr. Justice Story also took note of certain criticism presented in the course of the argument of the case, to the effect that the “doctrine” of equity which refuses specific enforcement “is not solid or satisfactory.” Story replied with comments upon the nature of the judicial process that today seem to be outmoded. He declared that, even if the criticism were admitted to be true,

I do not know that any judge would now deem it correct or safe to depart from it, \textit{as he must content himself upon this, as many other occasions, to administer the established law, and walk in the footsteps of his predecessors, super antiquas vias}. But, in truth, I do not well see, that the doctrine could have been otherwise settled.\textsuperscript{42}

In a subsequent American case,\textsuperscript{43} decided 12 years after \textit{Tobey v. County of Bristol}, Judge Selden put the New York Court of Appeals on record to the effect that courts of equity should not decree specific performance of arbitration agreements because to do so would conflict with the policy of revocability at law. “It is well settled that courts of equity will never entertain a suit to compel parties specifically to perform an agreement to submit to arbitration. . . . To do so, would bring such courts in conflict with that policy of the common law which permits parties in all cases

\begin{footnotes}
\item[41] American decisions \textit{prior to Tobey} appear to be in accord in declaring on prior authority, if any authority were deemed necessary, agreements to refer to arbitration to be revocable and nonenforceable in equity. In none of these decisions was there any discussion of the reason for the rule; at most one or two English cases were cited. See Tyson \textit{v. Robinson}, 25 N.C. 333 (1843); Norfleet \textit{v. Southall}, 7 N.C. (3 Mur.) 189 (1819); Allen \textit{v. Watson}, 16 Johnson 205 (N.Y. 1819); Aspinwall \textit{v. Tousey}, 2 Tyler 328 (Vt. 1803).

In \textit{Copper v. Wells}, 1 N.J. Eq. 10 (Ch. 1830), the parties’ lease provided for arbitrators to fix the value of improvements made by the lessee on the leasehold and, the lessor was to purchase at that price at the expiration of the term. In a suit by the lessee for specific performance of the arbitration clause, it was declared upon earlier authority that an arbitration agreement was nonenforceable in equity. The court, however, after vouching for the rule, created an “equitable lien” in favor of the plaintiff lessee and appointed a special master to find the value of the improvements. The result, while perhaps not formal specific enforcement of the parties’ arbitration agreement, was close to it in at least considerable part.

\item[42] \textit{Tobey v. County of Bristol}, 23 Fed. Cas. 1313, 1320 (No. 14065) (C.C. Mass. 1845). (Emphasis added.) Had Justice Story confined his declared adherence to “the established law” because of his predicament as the judge of an inferior court of the United States when the United States Supreme Court already has spoken out in adherence to the doctrine, more sympathy might be accorded. Compare United States Asphalt Ref. Co. \textit{v. Trinidad Lake Petroleum Co.}, 222 Fed. 1006 (S.D.N.Y. 1915) (Hough, J.).

\item[43] \textit{Greason v. Keteltas}, 17 N.Y. 491 (1858).
\end{footnotes}
to revoke a submission to arbitration already made." Judge Selden here relied upon two British cases which were included in Mr. Justice Story's citation. He did not mention Tobey nor any American case or text.

It should be noted that after the decision in Tobey, but before the foregoing opinion by Judge Selden, the British House of Lords in 1856 had decided Scott v. Avery, which substantially deflated the British common-law tradition of revocability of arbitration agreements.

Judge Selden also voiced an "additional reason" why courts of equity should not decree specific performance. It was similar to one which had been advanced by Justice Story, namely, "that it is against their policy to make decrees which they cannot enforce. If the arbitrator be named in the decree, this would violate the policy of the law as to the right of revocation; and if not named, the decree could readily be evaded by choosing an arbitrator who would refuse to act."

It remains to note that the United States Supreme Court came out with an opinion in Burchell v. Marsh (decided somewhat after Mr. Justice Story's foregoing commentaries, but before those of Judge Selden), as to what should be the attitude of courts of equity toward arbitration. Although the Court did not mention the views of Tobey v. County of Bristol, it seems to have gone out of its way to admonish the courts as follows:

"Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal. As a mode of settling disputes, it should receive every encouragement from courts of equity. If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact."

44. Id. at 496.
45. These two cases, Gourlay v. Duke of Somerset, 19 Ves. 429, 34 Eng. Rep. 576 (Ch. 1815); Agar v. Macklew, 2 Sim. & S. 418, 57 Eng. Rep. 405 (Ch. 1825), were discussed in note 33 supra.
47. This case is reviewed by Sturges & Sturges, Appraisals of Loss and Damage Under Insurance Policies, 11 Miami L.Q. 1, 9 (1956).
49. 58 U.S. (17 How.) 344 (1854).
50. Id. at 349. (Emphasis added.)
It seems clear that the acceptance by courts of equity of revocability and nonenforceability of arbitration agreements upon which the arbitral process is predicated deserves little credit for being any "encouragement," much less "every encouragement" of arbitration.

In several American cases decided since Tobey there are judicial utterances (mostly by state courts) in some accord with the foregoing views presented in that case to the effect that equity should not decree specific performance of common-law arbitration agreements;\(^5\) in some revocability in equity seems not to have been favored and was denied.\(^2\) There is in truth a medley of views which are in the earlier decisions in American equity courts, not very reliable as a whole, regarding specific enforcement of general arbitration agreements in absence of a pertinent statute.

2. Specific enforcement of common-law agreements—granted

In several recent cases of substantial respectability specific enforcement has been decreed by plenary suits in equity. These decisions by American courts belie the equity "doctrine" sponsored in Tobey v. County of Bristol. Thus in Textile Workers Union v. Lincoln Mills,\(^5\) a majority of the Supreme Court of the United States found—with the aid of "a few shafts of light" from the legislative history of the Labor Management Relations Act, including section 301—a "federal policy that federal courts should enforce" collective bargaining agreements qualifying under the act; that enforcement of executory agreements to arbitrate grievance disputes arising from such collective bargaining agreements is within that "policy"; that, accordingly, such arbitration agreements enjoy congressional "approval" and, by implication, there is to be deduced the rejection of "the common-law rule, discussed in Red Cross Line v. Atlantic Fruit Co., 264 U. S. 109, against enforcement of executory agreements to arbitrate."\(^5\)

In a footnote at this point the opinion of the majority added that: "We do not reach the question, which the Court reserved in Red Cross Line v. Atlantic Fruit Co., supra, p. 125, whether as a


\(^{52}\) See Electrical Research Prods., Inc. v. Vitaphone Corp., 20 Del. Ch. 417, 171 Atl. 738 (1934); Ellington & Guy, Inc. v. Currie, 193 N.C. 610, 137 S.E. 869 (1927).


matter of federal law executory agreements to arbitrate are enforceable, *absent congressional approval.*\(^5\)

The role of this "congressional approval" (whatever its make-up may prove to be) is not very clear; its derivation in *Lincoln Mills* is equally speculative. At most, it seems to be some sort of legislative reform for judicial sin. The need for any such legislative "approval" is not apparent. Revocability of arbitration agreements and refusal of equity specifically to enforce them either by a general order to proceed with arbitration or refusal to order the appointment of arbitrators against a recalcitrant party are points of judge-made law. They have been predicated for the most part upon ancient dicta; the legislature took no part in this law making. As Justice Cardozo pointed out in *Berkovitz v. Arbib & Houlberg,* the common-law tradition attending arbitration agreements "was hesitating and feeble" and the "judges might have changed the rule themselves if they had abandoned some early precedents."\(^6\)

Some common-law judges (British and American) have done as much with respect to the revocability of future disputes provisions; and without legislative aid.\(^5\) It seems clear, moreover, that common-law arbitration agreements and arbitrations thereunder require no legislative legitimation.\(^5\) In short, it seems

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55. Id. at 456 n.7. (Emphasis added.)

On the other hand, in Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109 (1924), Mr. Justice Brandeis, for the Supreme Court, saw fit to present a noncritical summary and report of the doings of the federal courts as having,

both in equity and at law, denied, in large measure, the aid of their processes . . . to enforce executory agreements to arbitrate disputes. They have declined to compel specific performance, *Tobey v. County of Bristol,* 3 Story, 800, 819–826; or to stay proceedings on the original cause of action. *Story, Equity Jurisprudence,* § 670. *Id.* at 120–21.

He obviously chose to accord prestige (at least within the federal system) to the commentators of Story in *Tobey* rather than to further the admonition to courts of equity as voiced by the Supreme Court in *Burchell.* See note 49 *supra* and accompanying text. (His opinion discloses that he had the report in *Burchell* before him—at least the case is cited in his opinion.)

58. Thus, without any arbitration statute, common-law arbitration is
awry to implicate the legislature in the origination or initial sponsorship of the common-law, judge-made rules now under consideration. Certainly no resolution by the Congress has been discovered disapproving of arbitration or agreements therefor and a minimum of ingenuity of the federal judiciary should enable them to derive any necessary "congressional approval" of arbitration in any area from the enactment by the Congress of the United States arbitration statute.59

Certainly the United States Supreme Court does not and will not seriously declare itself in need of any "congressional approval" to enable it to overrule its own commentaries upon the common-law stature in the federal courts of common-law arbitration agreements.

Rationale similar to that used by the Court in Lincoln Mills had been used by the Supreme Court of Alabama in 1934 to rule irrevocable, contrary to common-law tenet, a provision for arbitration of grievance disputes arising out of a collective agreement entered into by and between an employer-carrier and the union of its employees as provided in the Federal Railway Labor Act.60 But, in a later case, Moore v. Illinois Cent. R.R.,41 the United States Supreme Court ruled out such enforcement declaration.

In Mengel Co. v. Nashville Paper Prods. Workers, 221 F.2d 644 (1955), it is broadly declared in the majority opinion that "there is no common law right of arbitration." Id. at 647. To support this statement the court cites Hamilton v. Home Ins. Co., 137 U.S. 370 (1890), and Nutt v. United States, 125 U.S. 650 (1888). Neither the purport of this statement nor the context of the foregoing citations is clear, but the authorities as cited do not seem to support the statement in any sense.


60. Bell v. Western Ry., 228 Ala. 328, 153 So. 434 (1934). The court stated:

The contract of appellant with the appellee, to submit the disputes between the carrier and its employees to arbitration by a board for that purpose, duly constituted by them, is not only not opposed to any public policy of the state, or of the national government, but is in accord with the declared policy of the United States government in the matter of the settlement of such disputes, is sanctioned by, and was executed in obedience to, the positive mandate of the federal act. Id. at 335, 153 So. at 440–41. (Italics in original.) The court did not make clear what was the make-up of the "positive mandate" which it indicated was contained in the federal act. Congressional approval therein was of the voluntary arbitration plan which the parties had undertaken as contemplated in the act.

61. 312 U.S. 630 (1941).
ing that the Act was not to be regarded as based on a "philosophy of legal compulsion." 62

In Reserve Mining Co. v. Mesabi Iron Co., 63 a federal district court ordered the defendant to proceed with arbitration pursuant to an arbitration provision in a lease of mining lands in Minnesota between himself and the plaintiff. Jurisdiction of the court rested on diversity of citizenship. With due allegiance to Erie R.R. v. Tompkins, the court resorted to the law of Minnesota and found that the state supreme court had ruled, contrary to common-law tradition, that an arbitration provision in a construction contract was irrevocable; that "the state policy favoring arbitration was unequivocally and clearly enunciated by the State Supreme Court in a case holding an agreement to arbitrate 'all differences' valid." 64 The federal court also pointed out that in a second decision the Minnesota court again

(although stating the case before it was not an action for specific performance) . . . affirmed a trial court order "declaring the arbitration provisions of the agreement valid and enforceable and further ordering that the parties forthwith proceed to take such action as is required to carry plaintiffs' demand for arbitration through to completion." 65

Hence the order of specific performance in the principal case.

Again, without pretense of legislative approval, the Ohio Supreme Court granted the insured specific performance of an irrevocable standard appraisal provision in a standard fire insurance policy by affirming an order of the court below appointing an appraiser to the appraisal board upon refusal of the insurer to appoint so that appraisal could go forward. 66 The New York Court of Appeals, however, has since denied insured's suit to obtain a general order against insurer to proceed with the appraisal. It expressly declined to follow the Ohio decision because "this court is so far committed on the question that remedial action must come from the Legislature, if at all." 67 The court did not elaborate upon the make-up of its "commitment."

64. Id. at 11.
65. Ibid. The two Minnesota decisions referred to were Park Constr. Co. v. Independent School Dist., 209 Minn. 182, 296 N.W. 475 (1941) and Zelle v. Chicago & N.W. Ry., 242 Minn. 439, 65 N.W.2d 583 (1954).
B. STATUTORY ARBITRATION AGREEMENTS

Assuming that the parties' arbitration agreement qualifies under the arbitration statute so that statutory remedies for enforcement of the agreement are available, is the plenary suit in equity or petition for declaratory judgment equally available? If available, are the non-statutory remedies, or either of them, to be preferred over the statutory remedies by the party seeking enforcement?

It seems clear that the differences between these nonstatutory remedies and those provided in the arbitration statutes are only formal. Clearly, the statutory enforcement proceedings are as much "equitable" as is the plenary suit in equity to enforce the agreement. It also seems clear that provisions in the arbitration statutes fixing venue for such proceedings should likewise apply to the plenary suit or petition for declaratory adjudication. Further, the provisions for trial by jury appearing in the earlier group of statutes following the 1920 New York pattern should apply in those jurisdictions to the nonstatutory remedies as much as to the statutory remedies.

68. Plenary suit is available in lieu of statutory motion. Gaer Bros. v. Mott, 144 Conn. 303, 130 A.2d 804 (1957).
69. Shanferoke Coal & Supply Corp. v. Westchester Serv. Corp., 293 U.S. 449 (1935); Reconstruction Fin. Corp. v. Harrisons & Crosfield, Ltd., 204 F.2d 366 (2d Cir. 1953); Gatlift Coal Co. v. Cox, 142 F.2d 876 (6th Cir. 1944); In the Matter of Lipschtitz, 304 N.Y. 58, 106 N.E.2d 8 (1952); Finsilver, Still & Moss, Inc. v. Goldberg, Maas & Co., 253 N.Y. 382, 171 N.E. 579 (1930); Marchant v. Mead-Morrison Mfg. Co., 252 N.Y. 284, 169 N.E. 386 (1929); Nimphius v. Greyhound Corp., 165 N.Y.S.2d 996 (Sup. Ct. 1957). And when an action is brought in disregard of an arbitration agreement, a bill in equity to stay trial pending arbitration should, it is thought, be brought according to rules governing such suits generally unless the relief may be adequately claimed before the court in which the action is pending by "equitable counterclaim" or similar process. See Demchick v. American Eutectic Welding Alloys Sales Co., 22 Misc. 2d 920, 204 N.Y.S.2d 889 (Sup. Ct. 1960).

Enforcement by petition for declaratory judgment is not readily distinguished from the plenary suit in equity for injunction and "multiple relief"; the differences seem to be formal, not substantial. See Reserve Mining Co. v. Mesabi Iron Co., 172 F. Supp. 1 (D. Minn. 1959).


70. It also seems probable that other provisions of the statutes and various judicial constructions thereof reached in cases wherein the statutory remedies were used would prevail in like cases involving common-law enforcement remedies. See Continental Grain Co. v. Dant & Russell, Inc., 118 F.2d 967 (9th Cir. 1941); The Beechwood, 35 F.2d 41 (S.D.N.Y. 1929);
enforcement seeks aid in addition to and more comprehensive than the adjudication of the validity of his claim to a general order to proceed (or for the appointment of one or more arbitrators), the plenary suit or declaratory petition is likely to yield no more than the statutory process. When claim to the additional aid is properly joined (i.e., consistently with the views of general equity-law) it seems clear that the plenary suit still should follow the course of the statutory remedies as set down in the statute in order that the parties' statutory arbitration agreement shall be adjudged and enforced as such or enforcement denied for cause thereunder. Precedents in one type of proceeding relating to the statutory agreement should, it is thought, serve well in the other type of proceeding.

V. INTERCHANGEABILITY OF COMMON-LAW AND STATUTORY REMEDIES WITH RESPECT TO AWARDS

A. GENERAL

The existence of the dual systems of arbitration (common-law and statutory) obtaining in most jurisdictions presents recurring problems as to the interchangeability of common-law remedies and remedies provided by the arbitration statutes relating to awards. Such problems arise in more jurisdictions than do those relating to arbitration agreements, as reviewed above, because issues as to enforceability of statutory arbitration agreements generally have arisen only in jurisdictions having the 1920 New York type statute. As indicated above, statutory remedies to enforce agreements (even though qualifying under an arbitration statute)


It must be admitted, however, that at least two provisions common to the 1920 New York type statute seem so specially addressed to the making of the motions thereunder that they might well be ruled inapplicable to plenary suit brought for like purpose. These provisions might be identified as "merely directory" and held to apply only in case of the statutory motions. Reference is made to the two provisions whereby (1) a party may, under the statute, petition for a general order to proceed with arbitration upon "Eight days' notice" to the party alleged to be in default and (2) a party desiring trial by jury "may, not later than five days after the service of the order directing a trial of such issue," claim a jury; the court shall refer the issue so claimed "to a jury in the manner provided by law for referring to a jury issues in an equity action." N.Y. CIV. PRAC. ACT § 1450. In short, the eight days notice provision and the five days limitation might best be ruled applicable only to proceedings on the statutory motions.
were not provided in the older statutes. Furthermore, questions regarding interchangeability with respect to awards are more prevalent than those with respect to agreements for not only the interchange of enforcement remedies comes to issue in the former, but also the interchange of common-law and statutory remedies to vacate, modify or correct the respective awards. In other words, most of the older statutes, along with the 1920 New York type, provide for impeachment and correction of statutory awards as well as for their enforcement. 71 The statutory remedies relating to awards, like those relating to agreements, are born of the arbitration statutes, while the common-law remedies (plenary actions “at law,” plenary suits “in equity”) are derived from the general jurisprudence, and declaratory judgment petitions from their respective statutes. 72

The statutory modes of enforcement of awards are likely to be somewhat more summary and expeditious than the corresponding plenary action or suit. Indeed, it is common for judicial opinions to cite these aspects of the statutory remedies relating to statutory awards as the good reason for enactment of the arbitration statutes. This citation generally has covered the statutory enforcement remedies relating to statutory awards under the older statutes and has involved comparisons with common-law enforcement remedies relating to common-law awards. 73 When the common-law enforcement of the common-law award permits matters of fact attending the arbitration agreement, the arbitration or the award to be tried by a jury, congested court dockets are likely to impose substantial delays. On the other hand where summary judgment practice is available much of such delay may be bypassed. 74 If the award is of a kind which will be specifically enforced “in equity,” the delays that the plaintiff might incur “at law” in his enforcement action are not likely to be so substantial.

Vacation and correction of common-law awards traditionally have been accomplished “in equity,” except as a few jurisdictions have been disposed to deny the affirmative remedy of impeach-

71. This also is true of the statutes enacted after 1920 in Nevada, North Carolina, Utah and Wyoming.
72. It may be said again that the declaratory judgment derived from the declaratory judgment petition provided by the statute is not likely to be substantially different from that derived in the plenary action or suit. See also Declaratory Judgment Act, 28 U.S.C. § 2202 (1958).
73. See, e.g., Rhodes v. Folmar, 208 Ala. 595, 94 So. 745 (1922); McClelland v. Hammond, 12 Colo. App. 82, 54 Pac. 538 (1898).
ment if the alleged cause against the award is one that can be asserted in defense of an action "at law" to enforce the award.\textsuperscript{75}

Motions under the arbitration statutes to confirm the statutory award and enter judgment thereon and common-law remedies ("at law" or "in equity" and including declaratory judgment petitions) to enforce an award are predicated alike upon the parties' arbitration agreement and the arbitral proceedings and award thereunder. The same is true of statutory motions and the common-law processes in equity to vacate, modify or correct awards.

The \textit{enforcement motions} under the arbitration statutes are evaluated and identified in pertinent judicial opinions as being, by reason of their functions, the general equivalent of suits for specific performance of the parties' arbitration agreement and the award thereunder. Justice Cardozo so put the matter in the leading case of \textit{Finsilver, Still & Moss, Inc. v. Goldberg, Maas & Co.} when he stated: "The motion to confirm is equivalent to a suit in equity to carry into effect the terms of the agreement and the arbitration had thereunder."\textsuperscript{76} Similarly, the statutory motion to vacate has been aptly characterized as a "quick bill in equity."\textsuperscript{77}

\section*{B. ENFORCEMENT OF AWARDS}

Viewed either as a matter of construction of the arbitration statutes, or as some inherent limitation upon the powers of the courts, the decisions are in general accord that common-law awards cannot be enforced by the procedure provided by the arbitration statutes.\textsuperscript{78} In other words, enforcement of an award by returning

\textsuperscript{75} See, \textit{e.g.}, Gardner v. Masters, 56 N.C. 462 (1857). See also \textit{Sturges, Commercial Arbitrations and Awards} § 361 (1930). It is to be doubted, of course, that declaratory petitions predicated upon the declaratory judgment statute will become involved in considerations as to what belongs to "equity" and what belongs to "law."

\textsuperscript{76} 253 N.Y. 382, 392, 171 N.E. 579, 582 (1930).

\textsuperscript{77} Koerner v. Leathe, 149 Mo. 361, 368, 51 S.W. 96, 97 (1899). See also Pratt, Read & Co. v. United Furniture Workers, 136 Conn. 205, 70 A.2d 120 (1949), concerning the statutory motion to modify or correct an award.

\textsuperscript{78} Kreiss v. Hotaling, 96 Cal. 617, 31 Pac. 740 (1892); Ready v. Tampa Elec. Co., 51 Fla. 289, 41 So. 535 (1906); Crane v. Barry, 47 Ga. 476 (1873); Halloran v. Bray, 29 Ga. 422 (1859); Moody v. Nelson, 60 Ill. 229 (1871); Low v. Nolte, 15 Ill. 368 (1854); Duffy v. Odell, 117 Ill. App. 336 (1904); Coffin v. Woody, 5 Blackf. 423 (Ind. 1840); Ft. Dodge Lumber Co. v. Rogosch, 175 Iowa 475, 157 N.W. 189 (1916); Love v. Burns, 35 Iowa 150 (1872); Carson v. Carson, 58 Ky. (1 Met.) 434 (1858); Gibson v. Burrows, 41 Mich. 713, 3 N.W. 200 (1879); Gessner v. Minneapolis, St. P. & S.S.M. Ry., 15 N.D. 560, 108 N.W. 786 (1906); Climenson v. Climenson, 163 Pa. 451, 30 Atl. 148 (1894); Richardson v. Cassidy, 3 Watts 320 (Pa. 1834); Owens v. Withee, 3 Tex. 161 (1848). See also Lehigh Structural Steel Co. v. Rust Eng'r Co., 59 F.2d 1038 (D.C.
it to a court with a motion to confirm and enter judgment thereon
and the entry of judgment conforming to the award, unless the
award is impeached for cause, is exclusively by force of the arbi-
tration statute. Unless the arbitration agreement, the arbitration
and the award sufficiently comply with the arbitration statute, the
award generally can be enforced only as a common-law award
by common-law processes. There is an exception to this rule in
most jurisdictions when the matter in dispute in a pending civil lit-
gation is submitted to arbitration by adequate agreement of the
parties. By this exception the award, though not complying with
any arbitration statute, can be returned to the court for entry of
judgment thereon unless the award is set aside for cause.79

The Alabama Supreme Court once covered these matters by
stating:80

There are two kinds of arbitrations and awards recognized as of
force in this State—the one authorized and regulated by statute, and
the other governed by the rules of the common law. In many respects,
they are essentially different; in others, closely analogous. These points
we will not stop to discuss, except in one particular. It is only an
award which is made in substantial compliance with the provisions of
the statute, or a statutory award, which the law makes it compulsory
on a judge or chancellor to enter up as the judgment of the proper
court, if the award is not performed within a specified time.—Code
§ 3537. A court has no authority to enter up as its judgment a com-
mon-law award, unless by the consent of the parties litigant solemnly
given in judicio.81

In considering the use of common-law processes to enforce stat-
Cir. 1932); Fortune v. Killebrew, 86 Tex. 172, 23 S.W. 976 (1893). But
Supp. 87 (Sup. Ct. 1936).
80. Dudley v. Farris & McCundy, 79 Ala. 187, 189 (1885). (Emphasis
added.)
81. Entry of judgment upon the award on a cause in pending litigation
generally is sustained when the agreement of submission to arbitration
rests upon an order of reference of the court in which the litigation was
pending or when it stipulates for entry of judgment by the court upon the
S.C. Ry., 159 N.C. 60, 62, 74 S.E. 592, 593 (1912) the North Carolina Su-
preme Court covered the matter as follows:
Where suit is pending between the parties, and more especially after
issue joined, and there is an agreement to arbitrate, the award to be
made a rule of court, in such case the award may be enforced by
judgment entered in the cause. There is also ample authority for the
position that, on action pending and issue joined, though the agree-
ment to arbitrate be made out of court, if the agreement contains the
stipulation, as in this case, "that the award shall be entered as judg-
ment in the cause," the award, if otherwise valid, may be so entered
and enforced by final process.
utory awards, it should be recalled, as noted above, that statutory procedure to enforce the statutory award is to be identified as the general equivalent of a suit for specific performance of the parties' arbitration agreement and award. Accordingly, when the successful party sues "in equity" to enforce his award, the similarity of function and use of the two procedures (statutory motion and common-law equity suit) is apparent. The differences lie in the procedural matters involved in the make-up of the respective pleadings and the civil practice rules governing the hearing and decision. In the case of the common-law action "at law" (whether assumpsit, trover, replevin, trespass, ejectment, the one civil action, or the like) the procedural incidents of processing the pleadings and of bringing the cause on for hearing and decision may be more numerous and variable than in case of either the equity suit or statutory motion. Even so, these common-law actions, like the equity suit and statutory motion, generally are of limited scope and purpose, namely, to gain a declaratory validation of the award as a step toward execution. The award should be validated unless adequate cause for its impeachment is sufficiently pleaded and proved. Causes which are adequate to impeach statutory awards generally are set out in the different statutes and in a majority of jurisdictions they are the same as apply against common-law awards. If enforcement by common-law action "at law" is sought and cause sufficient to impeach the award is adequately pleaded, trial by jury may be in order to find for or against the matters of fact so pleaded. Summary judgment practice may, of course, cut short this process and obviate the trial by jury.

82. Under earlier statutes following the New York 1920 legislation (including the New York statute) it should be noted that statutory award enforcement is opened up to trial by jury on "the making" of the arbitration agreement and a few allied questions. It seems that an equity suit to enforce the same award would likewise be open to such jury trial.

83. Of course, the declaratory validation may, in some cases, be an end in itself; formal execution may not be intended or useful. Thus, if the award is "no debt owed," or that the discharge of an employee was, or was not, for "just cause," or the like, it is not likely that execution is to be sought. Such awards are to be honored alike in common-law actions and statutory procedures. See Pratt, Read & Co. v. United Furniture Workers, 136 Conn. 205, 70 A.2d 120 (1949); Canuso v. City of Philadelphia, 326 Pa. 302, 192 Atl. 133 (1937).

84. See N.Y. Civ. Prac. Act §§ 1462, 1462a. Some of the older statutes, for example, Illinois, Iowa, Nebraska (and see also the Pennsylvania statute of the 1920 New York type) provide that "legal errors" or the "legal" defects shall be cause to vacate contrary to their respective common-law rules for common-law awards.

In short, the processing of the award in both common-law and statutory proceedings generally seeks the award's confirmation (i.e., judicial declaration of validity) by judgment or decree so that execution may issue thereon.

These considerations upon the similarities of service of common-law processes and statutory procedures for enforcement of statutory awards prompt the inquiry: Why should an arbitration statute expressly or impliedly reserve and permit the use of the common-law procedures to enforce statutory awards?

It seems that the common-law enforcement remedies are best honored only when further and additional relief (beyond the declaratory validation of the award) is duly sought—such as provisional remedies and supplementary processes in aid of execution. In various instances it is unknown for want of decisions, and frequently otherwise doubtful, whether or not such further relief is within the scope of the issues contemplated by the statutory motions. Various situations recur raising realities of the need (or at least usefulness) of the additional aids to execution and the proper service of the common-law remedy to provide them.

Thus, when collectibility of the award is threatened by a conveyance of assets by the losing party which may have been fraudulent and thus avoidable, a bill in equity, not unlike one in aid of a judgment creditor, may well be necessary and proper. The same may be said when attachment is sought in aid of collection. Similarly, a writ of mandamus to compel a public agency to certify an award against such agency to a higher public authority for payment may be necessary and proper.

In short, common-law remedies "at law" or "in equity" have substantial claims to usefulness when auxiliary aids to execution involving issues outside of those involved in adjudging the award are sought along with the declaratory validation of the award. In

86. The Alabama Supreme Court sustained such a bill in Fuerst v. Eichberger, 224 Ala. 31, 138 So. 409 (1931). Awards calling for specific performance and determinations of priorities of liens on certain property in connection therewith (and their foreclosure) also might well be recognized as belonging under "general equity jurisdiction," beyond statutory motion to confirm (or to vacate) the awards. The same, it seems, would be true for pursuit of some receiverships. No precise decision so ruling has been discovered, but see the relief sought and granted in Columbian Fuel Corp. v. Warfield Natural Gas Co., 72 F. Supp. 839 (D.W. Va. 1947; Memphis & C.R.R. v. Scruggs, 50 Miss. 284 (1874), and the occasion for general equity jurisdiction to function.


so far as they are used only to gain the declaratory adjudication upon the statutory award, such common-law remedies might well be denied.

It remains to note, however, that the provisions in the arbitration statutes expressly reserving common-law remedies to enforce statutory awards have received no judicial constructions indicating whether or not the foregoing considerations might be deemed a fit basis for decision to allow or disallow their use as indicated.

The New York arbitration act expressly provides that the statute "does not affect any right of action" to enforce "an award made or purporting to be made in pursuance thereof." Some arbitration statutes contain a similar reservation of common-law enforcement remedies while others have no such express reservation.

Relying upon the predecessor of section 1469, the New York Court of Appeals ruled as early as 1860 in *Burnside v. Whitney* that the party winning a money award could maintain a plenary action to collect the award. There was no indication in the case that the plaintiff sought anything more than adjudication of the validity of the award as a step toward execution. Defendant urged that since the parties had entered upon a submission under the statute, "no other mode of enforcing the award can be resorted to." The court ruled to the contrary. In evaluating the provision of the arbitration statute corresponding to the present section 1469, the court said:

The intention of these provisions seems to me very plain. Either of the parties may, if they see fit, resort to the court named in the submission in a summary way, to set it aside on the one hand, or to confirm and give judgment upon it on the other. But the party complaining is not to be precluded from availing himself of the more ample powers of the Court of Chancery, if he considers it for his interest to resort to them; nor is the party in whose favor the award is made to be barred of his common law action on the award, or on the submission. . . . It follows that the plaintiff in this case was not precluded

90. 21 N.Y. 148 (1860). *Accord*, Beall v. Board of Trade, 164 Mo. App. 186, 148 S.W. 386 (1912); Hackney v. Adam, 20 N.D. 130, 127 N.W. 519 (1910); Caldwell v. Brooks Elevator Co., 10 N.D. 575, 88 N.W. 700 (1901). See also Kentucky River Mills v. Jackson, 206 F.2d 111 (6th Cir. 1953). In Sandford Laundry, Inc. v. Simon, 285 N.Y. 488, 493, 35 N.E.2d 182, 185 (1941), the court of appeals saw fit to emphasize that, in view of § 1469 if not otherwise, "a right of action upon an arbitration award made pursuant to a submission or contract made as prescribed in the statute 'or otherwise' continues to exist though a new statutory method of enforcement of such an award has been created."
from maintaining the action, nor limited to an application to enforce the award by judgment in the court designated in the submission.\footnote{92}

A federal district court came to the same conclusion upon the New York statute after finding that the parties had not agreed that the statutory motion should be "the sole recourse of the parties."\footnote{93}

Several years after Burnside, the Iowa Supreme Court apparently reached a contrary result under the Iowa arbitration statute in Older v. Quinn.\footnote{94} Although the court did not mention the Burnside decision, it appears that the plaintiff sought no more by plenary action than did the plaintiff in Burnside, \textit{i.e.}, a declaratory validation of the award. Said the Iowa court:

Having availed himself of the provisions of the statute, and conformed thereto, he must be held to his election, and be content with the further statutory remedies. . . .

It is contended that, under our statute, though parties have pursued its provisions in reference to arbitration proceedings, still they may, at their election, and after an award is made, seek judgment on it as provided by statute, or they may treat it as a common-law award, and sue directly thereon. The statute reads: "Nothing herein contained shall be construed to affect in any manner the control of the court over the parties, the arbitrators, or their award; nor to impair or affect any action upon an award, or upon any bond or other engagement to abide an award". . . . This section has never been construed by the court. \textit{We think it clearly relates to the jurisdiction of the court over common-law awards. Were it not for this section, it might be contended that the statutory means of arbitration were exclusive, and took away the common-law right. To prevent any such claim this statute was enacted. It certainly was not intended that parties should have the right, after entering upon a statutory arbitration, and securing an award thereunder, to then abandon it, and sue upon it as a common-law award.}\footnote{95}

\footnote{92} Id. at 150.


\footnote{94} 89 Iowa 445, 56 N.W. 660 (1893).

\footnote{95} Id. at 448–49, 56 N.W. at 661. (Emphasis added.) The court seems to have overemphasized the plaintiff's election and abandonment. It also seems to have passed by the rather clear intent of the statutory provision, namely, permitting the enforcement of a \textit{statutory award} (rather than a common-law award). Had the court dwelt upon the scope of relief sought—judicial validation of the award—the ruling might be readily accepted. However, if other and further relief were sought, the views of the court would seem difficult to sustain.

It seems clear that the result reached in the Quinn case should attend the case wherein the common-law enforcement process is initiated only after the award has been confirmed by statutory process; and that this result should stand whether or not relief in addition to declaratory relief is
In jurisdictions which do not have the foregoing express reservation there has been no extensive testing of the issue now under consideration, nor, it would seem, has a prevailing view been established. 96

The present inquiry also invites notice of the question of enforceability of the collateral bond or other undertaking to abide an award. When the bond relates to an award rendered under the statute are there any special considerations upon the interchangeability of statutory and common-law enforcement remedies? Some arbitration statutes, including the New York statute, 97 expressly reserve the enforceability of such bonds or other undertakings. Regardless of whether there is such a reservation in the statute, it seems clearly competent for parties to enter upon such undertakings and have them cover a statutory award. Although no decision on this point has been observed, it seems that the plaintiff's case in seeking to enforce such an undertaking would necessarily embrace a quest for a declaratory validation of the award as a statutory award. If no other relief were sought it seems clear that the statutory motion process to confirm the award and enter judgment should suffice. If, on the other hand, the bond provides for payment of money for nonperformance of the award or if the award embraces one or more requirements in addition to the payment of a designated sum of money, it seems probable that these and other collateral issues arising in connection with such bonds might well make necessary and proper the plenary action to enforce the obligation. Of course, it would be unnecessarily extravagant to require that the award be confirmed by statutory motion (or in plenary action) before making collection on the bond.

It should be noted that several of the arbitration statutes, like the New York and United States statutes, require that statutory motions to confirm statutory awards and enter judgment be instituted in a shorter period of limitation than that applicable to plenary actions or suits brought for the same relief. Under these statutes the successful party "may" move the court for an order confirming

sought. If such relief is sought in such situation the action or suit should stand on its own merits. See the citation of the Quinn case by the Iowa Supreme Court in the subsequent case of In re Powers' Estate, 205 Iowa 956, 961, 218 N.W. 941, 943 (1928). But see Acme Cut Stone Co. v. New Center Dev. Corp., 281 Mich. 32, 274 N.W. 700 (1937).


the award within one year after the award is made. The New York statute also provides, as observed above, that the statute "does not affect any right of action" to enforce "an award made or purporting to be made in pursuance thereof.

No valid reason has been discovered for the one-year limitation for bringing the motion to confirm the award. The plenary action to enforce the award is not expressly included under this limitation and it is readily inferred that the action is free of the limitation not only in cases wherein declaratory validation is sought but also in those involving additional relief. Acceptance of this view, however, means that, as a practical matter, the one-year limitation is circumvented in most cases. On the other hand, extension of the one-year limitation, for the sake of complete equity, to cases wherein additional relief is sought would amount to a special disservice to the successful party. As of now, these considerations have received little attention in the cases.

In Kentucky River Mills v. Jackson, an action at law to collect a money award rendered under the United States arbitration statute was defended on the ground that the suit had not been instituted until after the expiration of the one-year limitation of section 9. The United States Court of Appeals for the Sixth Circuit held to the contrary and pointed out that a party may apply to the court for an order confirming the award, but is not limited to such remedy. The court also noted that the language of section 9 "is not mandatory, but permissive." Otherwise stated, the statutory motion under section 9 is not exclusive of the common-law modes of enforcement, and the one-year limitation, whatever its merits, applies only to the statutory application. It does not appear from the case whether the plaintiff sought in the plenary action anything other than validation of the award as a step toward execution.

C. Vacation, Modification and Correction of Awards

No judicial decisions have been discovered as to whether the statutory motions are available to vacate or correct common-law awards. However, in light of the prevailing view, reviewed above,

100. The new California statute, CAL. CIV. PROC. CODE § 1288, fixes a four-year limitation upon enforcement by petition to confirm and a limitation upon petition to vacate or correct of 100 days after return of the award.
101. 206 F.2d 111 (6th Cir. 1953).
102. Id. at 120.
denying enforcement of common-law awards by the statutory pro-
cess, it is doubtful that the latter may be used to impeach or cor-
correct common-law awards.103

With respect to the impeachment of statutory awards, the com-
mon function of statutory modes and the traditional bill in equity
(including declaratory judgment proceedings) have been discussed
earlier. Indeed, it should be noted that both processes have the
same intent and objective—obtaining specific enforcement of the
statutory causes to impeach, modify or correct statutory awards.
Generally only a declaratory invalidation is sought in toto or in
part as modified or corrected. Both processes are "equitable."
Their differences lie chiefly in sundry procedural matters involved
in processing the respective pleadings and in bringing the cause
on for hearing and decision rather than in substantive right.104

Notwithstanding this common intent and use of the respective
remedies with respect to statutory awards, their interchangeabil-
ity is considerably uncertain. This is true even with respect to arbi-
tration statutes like the New York statute which expressly reserve
not only common-law processes to enforce statutory awards but
also common-law suits ("in equity") to vacate, modify or correct
those awards.

Most of the decisions under such statutory provisions rule that
a party who would impeach a statutory award may choose the
statutory or common-law process of equity suit.105 None of these
authorities seems to have considered whether the plenary suit
should be restricted to situations where relief is sought beyond and
in addition to declaratory invalidation of the award.

The Michigan Supreme Court has taken the extreme view of the
effect of the reservation in its arbitration statute of common-law
remedies with respect to awards. It ruled that although a party had
lost his attack upon the award in the statutory enforcement pro-
cceedings, he might further pursue his attack upon the award by a

103. Compare, however, what actually happened in Holdridge v. Stowell,
39 Minn. 360 (1888).
104. Consult Jones' thoughtful article, The Nature of the Court's
"Jurisdiction" in Statutory Arbitration Post-Award Motions, 46 CALI\F. L.
105. Hensley v. Wasiota & B.M.R.R., 153 Ky. 17, 154 S.W. 385 (1913);
700 (1937); Pacific Lime & Gypsum Co. v. Missouri Bridge & Iron Co.,
App. 25, 150 S.W. 1096 (1912); Bissell v. Morgan, 56 Barb. 369 (N.Y.
1865) (correction of mistake of description in award by bill in equity);
Bumside v. Whitney, 21 N.Y. 148 (1860); Mathews v. Miller & Quarryier,
25 W. Va. 817 (1885). Compare the views of the Iowa Supreme Court in
Older v. Quinn, 89 Iowa 445, 56 N.W. 660 (1893); Mengel Co. v. Nashville
bill in equity. In other words, both proceedings (at least when the chronological sequence was as indicated in that case) were necessary to bring the award to final validation.\(^{106}\)

106. Acme Cut Stone Co. v. New Center Dev. Corp., 281 Mich. 32, 274 N.W. 700 (1937). The defendant had moved under the statute to confirm the award while the plaintiff had moved to vacate the award. Thereafter the parties stipulated for confirmation of the award and court order followed under the statute denying the motion to vacate and confirming the award. Then followed the plenary suit in equity to vacate. The court suggested that the bill of complaint was not based upon any cause to vacate which was listed in the statute and that the decision of the case depended, to quote the court, upon "the inherent jurisdiction of a court of chancery over the awards of arbitrators." \textit{Id.} at 704. The report of the case, however, seems to belie this. It indicates that the bill was based upon a statutory cause to vacate. \textit{Mich. Comp. Laws} § 15402.4 (1929) (cited by the court 281 Mich. at 42, 274 N.W. at 703). Moreover, in support of defendant's motion to dismiss the bill of complaint it was urged that the matter should be set at rest by force of res judicata; that the award having been confirmed pursuant to statutory motion to confirm in which plaintiff had full opportunity for hearing, the award was no longer subject to impeachment. It is also clear that the plaintiff had full knowledge of the matters of fact about which he complained in his bill throughout the prior statutory proceedings for confirmation. In other words, the bill was not based upon newly discovered evidence or matters in anyway fraudulently or otherwise withheld from plaintiff. Finally, the supreme court ruled that "the order confirming the award will stand ..." \textit{Id.} at 706. It seems clear that appeal from the order of confirmation or from the judgment entered thereon in the first proceeding should have been deemed an adequate remedy for the plaintiff without indulging him in a second run of duplicatory litigation as allowed in the Michigan case.

The New York Court of Appeals forestalled such cumulative litigation against a statutory award that had been confirmed by the statutory process. It did so, however, without any declared purpose to foreclose such repetitive litigation against a statutory award. Raven Elec. Co. v. Linzer, 302 N.Y. 188, 97 N.E.2d 746 (1951). See also Apex Binding Corp. v. Relkin, 198 Misc. 381, 97 N.Y.S.2d 85 (Sup. Ct. 1950). Furthermore, when the statutory proceedings end in confirmation of the award and judgment is entered, clearly the judgment should be as impervious to "collateral attack" (whether by plenary suit, counterclaim in plenary action or suit to enforce, or otherwise) as other judgments. "We see no reason," the New York Court of Appeals has said, "for treating judgments entered upon an award of arbitration differently from those entered after trial in an action." Jacobowitz v. Metselaar, 268 N.Y. 130, 135, 197 N.E. 169, 171 (1935). See also Elliott v. Adams, 8 Blacksf. 103 (Ind. 1846); Johnston v. Paul, 23 Minn. 46 (1876); Madawick Contracting Co. v. Travelers Ins. Co., 307 N.Y. 111, 120 N.E. 2d 520 (1954); Springs Cotton Mills v. Buster Boy Suit Co., 275 App. Div. 196, 88 N.Y.S.2d 295 (1949); Suksdorf v. Suksdorf, 93 Wash. 667, 161 Pac. 465 (1916); Dickie Mfg. Co. v. Sound Constr. & Eng'r Co., 92 Wash. 316, 159 Pac. 129 (1916); Clark v. Thurmond, 46 Ga. 97 (1872). Compare the views of the Texas Supreme Court in Fortune v. Killebrew, 86 Tex. 172, 23 S.W. 976 (1893).

It remains to note that since the order confirming an award under the statute ends the functions of the judicial process in validating or invalidating the award and entry of judgment follows as a matter of course, it seems that after the expiration of any pertinent appeal time the views accorded the judgment by the New York Court of Appeals in Jacobowitz v. Met-
The opportunity to engage in duplicate litigation to impeach statutory awards as accorded in the foregoing Michigan case appears in somewhat comparable fashion in a Missouri ruling. An equity petition based upon a statutory cause to vacate a statutory award was sustained in the face of defendant's statutory motion to confirm the award, notwithstanding plaintiff's cross motion to vacate for the statutory cause. Since the substance of the cross motion to vacate and the plenary suit in equity to vacate, modify or correct for such cause are both "equitable" and involve specific enforcement of the causes set down in the statute to vacate, it is not apparent why variations in the respective pleadings should be any basis to honor the duplicatory remedy. Only if further and more complete relief beyond the judicial invalidation were sought might the allowance of the plenary suit be justified.

The pertinent decisions relating to the New York statute and arbitrations and awards thereunder remain to be considered. As heretofore observed, applications under the New York statute and some of the statutes of other jurisdictions to enforce the statutory award may be made "within one year after the . . . award [is] made." By another section of the statute motions to vacate, modify or correct "must" be initiated "within three months after the award is filed or delivered," except that (as expressly provided in the New York statute only) "in opposition to a motion to confirm an award, any of the grounds specified" in the statute as cause to vacate, modify or correct, "may be set up." How do plenary suits in equity and declaratory judgment petitions to impeach statutory awards stand under these provisions?

The reason for this three-month limitation upon motions to vacate, modify and correct statutory awards is no more apparent than the corresponding one-year limitation, observed above, upon motions to confirm and enter judgment to enforce statutory awards. Quite clearly this time limitation ordinarily would not rule the plenary suit to vacate, modify or correct the award. However, if only a declaratory invalidation is sought against a statutory award in a plenary suit it seems that the three-month limita-

selaar, supra, generally should apply to the confirmed award as much as to the judgment to be entered thereon.


108. There may well be good cause for such further and more complete relief in a given case. See LeBlanc v. Beard Paper Corp., 320 Mich. 632, 32 N.W.2d 73 (1948); Shawhan v. Baker, 167 Mo. App. 25, 150 S.W. 1096 (1912).


tion should apply to cut short the suit to vacate, unless the three-
month limitation on the motion is to be written off as useless. In
other words, there can be no substantial use for the three-month
limitation on the motions to vacate, modify or correct if it may be
bypassed as a matter of course by a plenary suit seeking the same
end.

The New York decisions come to this: Plenary action will
not lie.\textsuperscript{112} Statutory motion to vacate a statutory award is the
exclusive remedy to impeach such award. Further, the motion
must be timely, \textit{i.e.}, it must be initiated within three months after
the award is filed or delivered as prescribed in section 1463.\textsuperscript{113}

These rulings upon the exclusiveness of the statutory motion to
impeach statutory awards rest upon the decision of the New York
Court of Appeals in \textit{Raven Electric Co. v. Linzer}.\textsuperscript{114} In that
case a petition for declaratory judgment was sought to impeach a
statutory award for good cause as named in the statute. Plaintiff
charged that the arbitration and award were shams and void.\textsuperscript{115}
The suit, however, was not instituted within three months after the
award and the petition was denied.

The petition was not brought until after the award had been con-
firmed on statutory motion. Accordingly, the court might well
have sanctioned the view that the one litigation sustaining the
validity of the award was enough. But the court saw fit to indulge
in other considerations which led to its ruling that the motion to
vacate is exclusive and that it must be timely to challenge a statu-
tory award. It is readily inferred from the tenor of the court’s opin-
ion that it would deny a plenary suit (as well as a petition for
declaratory judgment) to impeach the award for statutory cause,
and that it would do so even though the award had not been con-
firmed upon motion under the statute.

From all indications, the plaintiff sought no more by its petition
than a declaratory adjudication of the award’s invalidity. The rul-
\begin{itemize}
  \item \textsuperscript{112} Estro Chem. Co. v. Falk, 303 N.Y. 83, 100 N.E.2d 146 (1951);
  Feinberg v. Barry Equity Corp., 302 N.Y. 676, 98 N.E.2d 480 (1951);
  Raven Elec. Co. v. Linzer, 302 N.Y. 188, 97 N.E.2d 746 (1951); Donato
  27, 125 N.Y.S.2d 375 (1953).
  \item \textsuperscript{113} See cases cited note 112 \textit{supra}. See also Heidelberger v. Cooper,
  300 N.Y. 502, 89 N.E.2d 21 (1949); Chandler v. Kopf, 279 App. Div. 636,
  \item \textsuperscript{114} 302 N.Y. 188, 97 N.E.2d 746 (1951).
  \item \textsuperscript{115} The arbitration was initiated under the arbitration statute and the
  award rendered was in excess of the ceiling imposed by the Emergency
  Rent Control Law.
\end{itemize}
ing therefore may be supported on that basis even though the issue might well have been resolved on the ground suggested above. As indicated earlier, this exclusiveness of the motion remedy should not displace the plenary suit to vacate, modify or correct when an additional and more complete remedy, beyond the declaratory invalidation of the award, is sought.

Perhaps it should be emphasized that the court did not indicate any such limitation upon its ruling, nor has it been indicated in any subsequent New York cases. Their record is silent on this possibility.

The opinion in the Raven case, however, is not very persuasive. In the first place, the court gave no consideration to section 1469 of the arbitration statute declaring, as heretofore observed, that the statute "does not affect any right of action in affirmance, disaffirmance, or for the modification . . . [of] an award made or purporting to be made" under a submission whether under the statute or at common law.116 Since the court had previously emphasized that section 1469 is part of the arbitration statute,117 it ought not to have been disregarded in the Raven case.

While the court purported to rely upon the views expressed in Wilkins v. Allen,118 it disregarded that court's earlier opinion in Burnside v. Whitney.119 As pointed out above, Burnside held that the party winning a statutory money award could choose a plenary action to put the award to judgment and execution rather than use the motion to confirm.

Furthermore, the reliance of the court in Raven upon the opinion in the Wilkins case as validating the exclusiveness of statutory motions to impeach statutory awards was not very well taken. The issues in Wilkins were unlike those in Burnside or Raven. In Wilkins the court was called upon to decide whether statutory awards generally are subject to vacation only for cause set down in the statute; also that there is no process under the statute nor at common law to gain judicial review of the merits of the decision made by the arbitrator. The court stated:

The first and only question this court is called upon to determine is whether the decision of the Appellate Division can be sustained, which was to the effect that the appeal to that court did not bring up for review the question of the correctness of the award upon the merits, either as to the law or facts, but presented only such questions as would

117. Ibid.
118. 169 N.Y. 494, 62 N.E. 575 (1902).
119. See note 90 supra and accompanying text.
be involved in an application to vacate, modify or correct it as pro-
vided by the Code.\textsuperscript{120}

This decision of the Appellate Division was sustained. Emphasizing
that statutory awards may be vacated, modified or corrected \textit{only
for causes designated therefor in the statute}, the court in \textit{Wilkins}
expressed the opinion that

this examination of the various provisions of the statute relating to
this subject, and the decisions of the courts of this state as to the con-
clusiveness of an award upon the merits, discloses that the only method
of attacking or reviewing an award is by motion to vacate, modify,
or correct it for \textit{the reasons mentioned in the statute}.\textsuperscript{121}

In short, the court in \textit{Wilkins} seems clearly to have intended to
affirm the ruling of the Appellate Division that there is no process
to gain judicial review of the merits of the arbitrator's statutory
award. Only the causes set forth in the statute may be made the
basis for challenge of the award and the merits of the decision
are not one of those causes.

\textbf{VI. PARTIES INVOKE AN ARBITRATION STATUTE
BUT COMPLIANCE WITH THE STATUTE IS
INADEQUATE: VALIDITY OF THE AWARD
AS A COMMON-LAW AWARD}

If parties choose to arbitrate under an arbitration statute but
fail to comply fully with the statute, may an arbitration and award
be sustained as a common-law arbitration and award? Most of
the litigation involving this question has centered upon the pre-
cise issue of whether the award rendered may be enforced as a
\textit{common-law award} when the default in compliance with the stat-
ute renders it unenforceable as a \textit{statutory award}.\textsuperscript{122}

It should be noted that some prescriptions of an arbitration
statute may be ruled as being "merely directory" and not "manda-
tory" or "jurisdictional" and noncompliance with the statute in
such a particular is not significant to the question at hand.\textsuperscript{123} In

\textsuperscript{120} 169 N.Y. at 496, 62 N.E. at 576.
\textsuperscript{121} 169 N.Y. at 498, 62 N.E. at 576. (Emphasis added.)
\textsuperscript{122} It may be noted that the instances of noncompliance with the stat-
ute would not preclude the parties' arbitration and award from qual-
ifying at common law had they not originally planned to proceed under the
arbitration statute.
\textsuperscript{123} See, \textit{e.g.}, Tuskaloosa Bridge Co. v. Jemison, 33 Ala. 476 (1859);
Compare Priore v. Schermerhorn, 237 N.Y. 16, 142 N.E. 337 (1923);
Conway v. Roth, 179 App. Div. 108, 166 N.Y. Supp. 182 (1917); Con-
(1909).
addition, parties may waive by agreement various prescriptions of
the statute without taking an arbitration and award out of the
statute. Further, the parties may, by their course of conduct,
pass up their original agreement or stipulation for a statutory ar-
bitration and come out with a common-law submission and
award.

The foregoing question also implies that the parties’ arbitration
agreement, arbitration and award, as actually accomplished, qual-
ify under common-law rules.

The question whether an arbitration which has failed under the
statute may be sustained as a common-law award may arise in
litigation in the following ways: (1) The successful party may pur-
sue a statutory motion, or plenary action or declaratory judgment
petition to have the award confirmed and judgment entered and
the losing party raises the issue of noncompliance with the statute
in opposition. Unless the noncompliance is too obvious, ordinarily
the moving party will gain a declaratory validation or be
confronted with a declaratory invalidation of the award as a statu-
tory award. (2) The unsuccessful party may pursue statutory mo-
tion, plenary suit or declaratory judgment petition to have the
award vacated or modified or corrected as a statutory award and
the successful party resists. (3) Either party may pursue a com-
mon-law plenary action or declaratory judgment petition to have
the award judicially validated or invalidated as a common-law
award.

If in any of the foregoing proceedings, an award is adjudged
invalid as a statutory award, it seems that the orderly and economic
dispatch of judicial business would require further judicial deter-
nation, in the same proceeding, of the stature of the award as a com-

It seems impossible to gain any rationale or common touch from the
decisions upon which to base an estimate whether a given provision is
“merely directory” or “mandatory” or “jurisdictional.”

124. See, e.g., Cochran v. Bartle, 91 Mo. 636, 3 S.W. 854 (1887);
Tucker v. Allen, 47 Mo. 488 (1871); Pennsylvania Iron Works Co. v. East
St. Louis Ice & Cold Storage Co., 96 Mo. App. 563, 70 S.W. 903 (1902);
Rice v. Hassenpflug, 45 Ohio St. 377, 13 N.E. 655 (1887). Compare
Hinkle v. Zimmerman, 184 N.Y. 114, 76 N.E. 1080 (1906); Flannery v.
Sahagian, 134 N.Y. 85, 31 N.E. 319 (1892).

125. See Park Constr. Co. v. Independent School Dist., 209 Minn. 182,
296 N.W. 475 (1941).

126. If the parties’ pleadings disclose such noncompliance as, for ex-
ample, an oral submission agreement when the statute requires more, it
seems probable that a proceeding to enforce or to vacate the award as a
statutory award would be subject to dismissal before any adjudication upon
the award.

127. See Holdridge v. Stowell, 39 Minn. 360, 40 N.W. 259 (1888). See
mon-law award, it seems that fit judgment or decree should be entered competent to support execution as in other cases.

A majority of the American cases passing upon the question have refused to honor the award as a common-law award. Apparently the courts feel that to sustain the award as a common-law award would offend the "intention of the parties" (meaning, it seems, the intention of the party who opposes the validation of the award at common law). Instead, the party opposing common-law validation is to be discharged entirely from the adjudication by arbitrators. To hold him, it is said, would be making a new and different contract for "the parties."

The Supreme Courts of Michigan and Texas were the first to deviate from the majority view. Galloway v. Gibson, decided by the Michigan Supreme Court in 1883, is frequently cited in this also Kreiss v. Hotaling, 96 Cal. 617, 31 Pac. 740 (1892); Fink v. Fink, 8 Iowa 312 (1859). But cf. Bureker v. Jefferson County, 201 Iowa 251, 207 N.W. 115 (1926). Although the majority of courts hold that the statutory motions may not be utilized to enforce common-law awards, once the court has taken jurisdiction in the statutory proceeding, general equity principles should allow the court to retain jurisdiction to render complete relief in one proceeding.

It also has been held in like cases that when the arbitral proceedings or the award, or both, fall short of statutory requirements, the award is not conclusive as a common-law award so as to bar an action on the original cause. Tennessee Coal, Iron & Ry. v. Roussell, 155 Ala. 435, 46 So. 866 (1908); Franks v. Battles, 147 Ark. 169, 227 S.W. 32 (1921); Williams v. Walton, 9 Cal. 142 (1858); Hepburn v. Jones, 4 Colo. 98 (1878); Train v. Emerson, supra.

129. 51 Mich. 135 (1883). Accord, Myers v. Easterwood, 60 Tex. 107 (1883). In the Texas case the opinion reports that there were "some things in the agreement of the parties... which indicate that it was their intention to arbitrate under the statute." Id. at 109. The parties failed to comply with the statute because they used only one arbitrator while the statute prescribed more than one.

See also Ames Canning Co. v. Dexter Seed Co., 195 Iowa 1285, 190 N.W. 167 (1922); In re Ames-Farmer Canning Co., 190 Iowa 1259, 179 N.W. 105 (1920); Darling v. Darling, 16 Wis. 675 (1863). Compare Allen v. Chase, 3 Wis. 225 (1854).

In Holdridge v. Stowell, 39 Minn. 360, 362 (1888), the Minnesota Supreme Court put aside the ruling in Galloway v. Gibson as follows:

The cases which follow the rule adopted in 51 Mich. 135... can be sustained only on the theory that, upon a submission to arbitration, the intention and agreement to submit are alone material, and that the mode selected by the parties is not material. Common-law arbitrations not being abolished by the statute, of course the parties may agree on
connection. How the parties had indicated their purpose to arbitrate under the statute does not appear. They had stipulated that the arbitrators should hear no testimony but should decide of their own judgment after an inspection. The parties appear to have joined in choosing their respective arbitrators and the two chosen by them selected the third as provided in the parties' arbitration agreement. An award was returned, but it was not in accord with the statute because it was not acknowledged. The court, allowing enforcement of the award as a common-law award, stated: "It is now claimed that it cannot be treated as a common law arbitration because the parties intended to make it statutory."

(The court rejected this claim, but its basis for so doing is not clear.) The pertinent part of the opinion reads as follows:

This is not a very manifest deduction. It might be a sufficient answer to it to say that in law parties may fairly be supposed to intend to do the very thing which they execute; and if they mistake the law, and are disappointed under that mistake, they should not be prevented from carrying out their agreement, if lawful and practicable, in some other way.

We cannot see that after this settlement, which left nothing whatever open to controversy, the mere question whether judgment should be entered by one process or by another process should interfere to hinder the completion of this settlement. All that the parties desired on the merits has been accomplished.

It should be noted that the arbitrators, not the parties, were to acknowledge the award.

This minority view is hardly more persuasive than the majority position. None of the cases in either group considers the parties' course of conduct which might well disclose their having given a practical construction to their arbitration agreement leading to a valid common-law arbitration and award. Moreover, in most of the foregoing reported cases it is readily inferred that in addition to their formal arbitration agreement, the parties participated in the selection of the arbitral board and in the arbitral proceedings. The nature or extent of the parties' participation (or more particularly that of the defendant who defends against enforcement of the award) is not fully reported nor considered in these early cases. Apparently, according to the majority view, the par-

either mode. The difference between the two modes, and the incidents attending them, are so great that, when they have agreed on one, it can hardly be said that, provided the arbitrator makes an award, it is indifferent to the parties whether one or the other has been followed.


131. Ibid.
ties' "original intention," as revealed by their agreement, seems to be the master of all that comes afterward. The parties' subsequent course of conduct in furthering the arbitration under their agreement might well belie the "original intention" of their formal agreement.

Absent the parties' waiver by agreement and absent a practical construction of the parties' participation in the course of the arbitration and absent any other consensus of both parties to depart from the statute to common law, as, for example, in case of an ex parte arbitration carried on to an ex parte award without participation by the defendant at any point, the mastery of the parties' formal agreement probably should prevail.

The Minnesota Supreme Court took up these considerations and, relying upon the course of conduct of the parties, sustained the noncomplying statutory award as a valid common-law award. In the action to enforce a money award when the arbitral hearing and award had not complied with the arbitration statute, the majority of the court summarized its view of the case as follows:

There was an actual submission, full hearing and award. All was the action of competent parties. They got the result intended and for which they had the right to contract.

* * *

So, even though first intention was to stick to the statute, if later they have set up a common-law arbitration, the parties themselves have annulled their first agreement for a statutory proceeding. Their own effective action has substituted one at common-law.133

132. Park Constr. Co. v. Independent School Dist., 209 Minn. 182, 296 N.W. 475 (1941). The majority of the court overruled Holdridge v. Stowell, 39 Minn. 360 (1854), insofar as it "runs counter to the foregoing."

It remains to note that in Holdridge v. Stowell, the court found that the parties' arbitration agreement left no question but that the parties intended a statutory arbitration. In Park, on the other hand, the majority opinion declared that there was doubt as to what was the intention of the parties. "From the complaint," said the court, "we have difficulty in saying what was the original intention. On that point the contract is not clear. There is material for argument either way." 209 Minn. at 183, 296 N.W. at 476. (Emphasis added.)

133. Id. at 184–85, 296 N.W. at 476–77. While the majority opinion relied upon the parties' practical construction of their arbitration agreement to establish it as one for common-law arbitration, the dissenting opinion indicates that the defendant participated not only in appointing the arbitral board but also in the arbitral proceedings under a reservation of a claim of right to have a statutory arbitration rather than one at common law. The opinion of the majority of the court appears to have disregarded this reservation. It is difficult to justify such disregard. By the same token it is difficult to accept the majority's foreclosure of the defendant's objection to enforcement of the award as validly rendered in a common-law arbitration. See Finsilver, Still & Moss, Inc. v. Goldberg, Maas & Co., 253 N.Y. 382, 171 N.E. 579 (1930).
While the parties' course of conduct in giving practical construction to their arbitration agreement seems likely to be the most reliable factor for resolving the general question now under consideration where the parties have not been explicit, it should be observed that cases will arise wherein this factor will not avail. The New York Court of Appeals had such a case in *Sandford Laundry, Inc. v. Simon*. In that case it appears that only the arbitrator failed to comply with the arbitration statute—he refused to acknowledge his award as required to make it enforceable by the statutory motion. The case was as follows: Arbitration between union and employer was had under the provision for arbitration in their collective bargaining agreement. The arbitrator ruled in favor of the union and ordered reinstatement of all employees who had gone on strike. A further ruling, in favor of the employer, ordered the union to pay $2,400 for breach of the "no strike" provision in the agreement. Although the arbitrator had signed and published his award, he refused to acknowledge it as prescribed in the arbitration statute. He refused because, after the close of the hearings, the employer gave notice of termination of the collective agreement. Such notice of termination was authorized by the terms of the agreement. The agreement was thereby ended shortly after the arbitrator had signed and published his award. The arbitrator was not informed of the employer's action when he reported out his award. By reason of the employer's action the award would be wholly frustrated as to the order for reinstatement, although it might stand for the damages accorded to the employer. The award was not enforceable by motion under the arbitration statute for want of the arbitrator's acknowledgement. Might it, notwithstanding, be enforced by plenary action as a common-law award? Plaintiff employer sought summary judgment and prevailed in the courts below. The New York Court of Appeals held error; judgment reversed and complaint to be dismissed. Upon review of the parties' provision for arbitration the court concluded that the parties had intended and agreed that awards to be rendered thereunder were to be such as would be enforceable by statutory motion; that the parties had accorded no authority directly to the arbitrator to enter any award not so enforceable and therefore the award in this case, lacking acknowledgement, could not be enforceable by action.

The court relied upon the language in the parties' arbitration provision whereby any party in whose favor an award was rendered may thereupon apply to the Supreme Court of the State of New York for the confirmation of such award . . . and for the enforcement thereof with the same force and effect and in the same manner and pursuant to the same proceedings and construction thereof as if such award . . . were made in an arbitration proceeding pursuant to the Arbitration Laws of the State of New York.\footnote{137}

“In unambiguous language,” said the court, “the parties have there indicated that the arbitration must be so conducted that they may obtain the benefit of the statute which they have invoked.”\footnote{138}

It is difficult indeed to find the indubitable “must” which the court seems to have derived from the parties' “may.” And since, as indicated above, the course of the arbitration leading to the award was in compliance with the arbitration statute up to the incident of acknowledgement of the award, which the arbitrator refused, it is not clear how the statutory motion would assure “the parties,” any more than a plenary action, “the benefit of the statute which they have invoked” as mentioned by the court. To find that benefit in the statutory motion seems very dubious. And keeping in mind the want of substantial difference between the statutory and common-law enforcement remedies seeking declaratory validation of the award, it seems that generally it may be doubted that parties would put themselves out to stipulate the one method to the exclusion of the other.

It is conjectured that the court of appeals may have thought it well, without saying so, to let this award die on the vine because of the frustration of the arbitrator's award by the unilateral action of the plaintiff employer.

\footnote{138. Ibid.}