CONTRACTUAL CONTROL OVER ADJECTIVE LAW: RECENT DEVELOPMENTS

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Fifteen years ago it was possible to call attention to the curious but persistent attempt that was manifesting itself in business to substitute "synthetic" arrangements by contract for the traditional machinery for the enforcement of the law.[1] Attempts were being made to substitute contractual arrangements for the laws governing venue, periods of limitations, the conflict of laws, summons, mode of trial, evidence, competency of witnesses, judicial review, self-help, choice of a remedy, and measure of damages. Occasionally the attempts went so far as to specify that no damages could be collected or that no action could be brought, at least not until some condition was fulfilled—and this condition might conceivably have been such as to make a trial highly improbable, if not unnecessary. Such instances are shown by cases where submission to arbitration or reference, or even the "satisfaction" of one party, were made conditions precedent to bringing an action.

Until that time all these or similar attempts were dealt with very casually in the law books, since they were looked upon as agreements the validity of which could be questioned on the ground that they interfered with the administration of justice.[2] The courts were very jealous of their jurisdiction and were still fond of the phrase "ousting the court". In their fear of what might happen if they yielded an inch, they indulged in magnificent *reductiones ad absurdum.*

> "If a rule of evidence can be abrogated like this, how long will it be before the procedure in all the courts of the land will be controlled by contracts regulating the method of procedure and the competency of testimony and of witnesses and the sufficiency of proof? Why, this by-law, if valid, effectively repeals any statute contrary to its provisions. This company has made a little legislature of itself and would now perform the judicial functions of this court in controlling through this by-law how we shall determine the existence of a disputed fact. This course must be stopped at the threshold or courts of justice will become lifeless and inanimate machines, mechanically operated by contracts

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1. *Cf.* Isaacs, *Contractual Control over Adjective Law* (1922) 29 W. VA. L. Q. 1. The forms on the basis of which the observations in this article were made had been collected somewhat earlier.

2. *Cf.* 3 WILLISTON, CONTRACTS (1920) c. XLVI; 13 C. J. 426, § 382. Contrast the very specific treatment of the latest case book on contracts, COSTIGAN, CASES ON CONTRACTS (3d ed. 1934) 1027 *et seq.*, upon material from which I have drawn freely in this paper.

> often unfairly depriving an unsuspecting party of statutory rights which he did not intend to surrender." [3]

The court in that particular case, decided only ten years ago, described such attempts to abrogate rules of evidence by contract as "a very modern innovation". But the idea behind the innovation is very old. Roman legal procedure is based on the theory that the parties have agreed to submit to a particular outcome, even though the gist of the action may be in tort. Hence comes the concept, which we have somewhat mechanically copied in Anglo-American law, that a judgment is a quasi-contract. Under Anglo-American law, it is true, we incline towards a tort theory in procedure, even where the cause of action is the breach of the contract. Nevertheless, "joining in issue", so vital and so troublesome a factor in the history of our pleading, is at bottom a concession that submission to trial, even by the established forms and in the regular tribunals, is essentially a contractual undertaking. Without such an approach, it is difficult to see how trial by jury could have found its way to the courts in place of the older modes of trial even when they were rendered impractical by the refusal of the Church to participate in them. In other words, there was a time when the most firmly established of our traditional modes of trial was in itself a "synthetic" arrangement for contractual control over adjective law.

But we need not go back so far in the history of law to find experiments whereby the parties withdrew from the ordinary modes of trial either all or a part of a pending dispute. In spite of the long discouragement of arbitration by the common law courts, a condition which persisted here longer than in England, arbitration has been continuously used. The hearing of cases upon agreed statements of facts may represent an equally artificial substitute for the determination of questions of fact by trial. Stipulations of counsel with the approval of the court have long been allowed a wide influence on the course of pending litigation. But by no means have all such attempts in the past been limited to pending cases. Insurance companies in the period of their greatest latitude in drawing their own contracts, that is, prior to the standardizing of the twentieth century, have led the way with their own provisions as to how and when they must be notified of claims, how and when they must be sued, how particular facts must be proved, what shall be presumptive and what conclusive and what indispensable evidence, what law or laws shall govern, and so forth. Questions are still arising, as in the case quoted above, when the contractual clause as to what constitutes a proof of death clashes with a common law presumption or a statutory conclusion; but in the main the tempering of the one-sidedness of insurance contracts by

3. Modern Woodmen of America v. Michelin, 101 Okla. 217, 224, 225 Pac. 163, 169 (1924).

adjudication, legislation, and administrative control lies behind the post-war period now under review.

In the last fifteen years a great deal has happened to change the problem and its solution. In the first place, arbitration statutes have been passed very widely, under which acts it is lawful not only to submit future as well as pending disputes to arbitration, but also to make irrevocable submissions and to obtain awards that have the standing of judgments. It is no longer the fashion to talk of the danger of ousting courts from their jurisdiction.[4] In the second place, there has been a good deal of discussion of contracts as to evidence, concerning which there has come forth an increasing realization that rules of evidence are but convenient arrangements related in the main to the history of trial by jury and by no means beyond the possibility of improvement for given sets of conditions.[5] In any event, a distinction has been discovered between those few rules in which the public has an interest for its own protection, notably in the enforcement of criminal law, and the general run of rules which can easily be waived, if the parties are willing, without raising any question of public policy. In the third place, big business and even moderately sized business has of late been following the example of the old insurance companies in preparing forms to be signed on the dotted line. In sales forms, order forms, employment forms, leases, service contracts, or whatever they draft, one encounters a new crop of exculpatory clauses; understandings that an officer or employee of one party shall be judge and jury if any controversy arises; extensive powers reserved, the actual exercise of which would shock the business world; self-help bargained for; deposits demanded; liens created or negatived; and powers to confess judgment extended to new fields. The extent to which this experimentation had gone was realized early in the depression, when men who had signed brokers' cards or bankers' forms were astonished to see how quickly they could be sold out and with how little redress, even where they felt they had been unfairly treated, not only through the absence of warning but in many cases through the presence of reassurance. A fourth consideration, likely to become more important in the years immediately ahead of us, is the rather liberal guiding lines laid down on the subject in the *Restatement of the Law of Contracts*.[6] Finally, we have become acquainted with numerous non-judicial modes of handling disputes of fact, particularly of the nature of

4. How the statutes have removed the curse even from common law arbitration is well illustrated in Ezell v. Rocky Mountain Bean & Elevator Co., 76 Colo. 409, 232 Pac. 680 (1925).

5. See Wigmore, *Contracts to Alter or Waive the Rules of Evidence* (1921) 16 ILL. L. REV. 87; Chafee, *The Progress of the Law, 1919-1921: Evidence* (1922) 35 HARV. L. REV. 302, 306; Note (1932) 46 HARV. L. REV. 138; Note (1933) 82 U. OF PA. L. REV. 561.

6. The subject is covered in RESTATEMENT, CONTRACTS (1932) under the general heading *Bargains Tending to Obstruct the Administration of Justice*, beginning with § 540, entirely in the manner of the early text books above referred to. The changes of tone and content, however, will be noted as we proceed.

hearings before administrative tribunals. Some of our workmen's compensation laws contemplate a contractual substitution of such tribunals for ordinary courts. The result may be expected, on the whole, to show itself in greater liberality on the part of courts in allowing parties to the contract to choose their own mode of settling their disputes, coupled with a keener search for guiding principles to isolate those special cases that are contrary to public policy. And such has, in the main, been the actual development.

Let us consider, first, the substitutes for the whole of legal procedure and then the substitutes for each part of the history of a case taken chronologically. In each situation we must pay particular attention to the principles currently laid down for distinguishing between the permissible and the forbidden deviations from standard practice.

Among the substitutes for court procedure as a whole there are, first, provisions in the nature of substituted modes of proceeding, and secondly, provisions that look to no trial or hearing or similar procedure at all. Arbitration as the term is generally understood may fall within either of these categories.[7] Reference in its strictest sense is a substitute for trial, not a mode of trial, though the sharp distinctions may be toned down by special arrangements permitting the referee to supplement his information by conducting hearings. The legal principle on the basis of which such arrangements are upheld is the fine-spun one of saying that they do not exclude proper court action but merely constitute conditions precedent to the perfection of a right of action. It is interesting to see a half-hearted acceptance of this doctrine in the *Restatement*.[8] It is not illegal (in the absence of legislation) to make arbitration or reference as to one or more facts a condition precedent to bringing an action, but it is illegal to make arbitration of the *whole* question of whether there has been a breach of contract a condition to any right of action. The fear of "ousting" has left its imprint on the common law.

If we view arbitration as a mode of trial we find another type of precaution or prejudice against it that expresses itself in such phrases as "unless the agreed terms of arbitration are unfair," [9] or "unless its terms under the circumstances are unfair".[10] Such a principle of division between legal and illegal agreements to arbitrate, while understandable, is exceedingly difficult to apply. It leaves the question open for a court in every case, whether the terms are fair or not, and affords little guidance to reach either conclusion. Presumably, terms that gave a party in interest the position of an arbitrator,[11] or terms that gave one side an initial advantage, might be so construed. But

7. Isaacs, *Two Views of Commercial Arbitration* (1927) 40 HARV. L. REV. 929.
8. RESTATEMENT, CONTRACTS (1932) § 551.
9. *Id.* § 550.
10. *Id.* § 551.
11. Patton v. Babson's Statistical Organization, Inc., 259 Mass. 424, 156 N. E. 534 (1927).

what about such terms as the following: the exclusion of lawyers; the acceptance or non-acceptance of technical rules of evidence; time limits; secrecy; the rules of a particular trade association, chamber of commerce, or similar association; provision for default award; and authorization of private investigations by arbitrators in the absence of the parties? An argument can be put forward against the fairness—at least under given circumstances—of any one of these or a hundred other terms in arbitration agreements. If the "fairness" test is to stand, many questions must still be answered. Of course, we are not concerned with such unfairness as avoids the whole arbitration clause, such as the duress complained of in one stage of the history of contracts in the moving picture industry.[12] The unfairness there was not in the terms of arbitration but in the making of the contract that provided for arbitration.

Coming to the contractual points with reference to the particular steps in procedure, we are confronted at the threshold with attempts to substitute general consents for the old tradition of a personal summons. The progress made in recent years in this direction is notorious in the case of dealing with violators of automobile laws.[13] There is a tendency to lay down as a condition precedent to the issuance of a license a consent to be summoned either by a notice left with an officer of the state or by some informal mode of communication. In fact, the tendency has gone further and seems to point in the direction of looking upon the tagging of a machine as the equivalent of a personal summons in both civil and criminal proceedings. Curiously enough, these suggestions are put forward under the guise of contract. Thus, the use of the highways of the state is extended on the acceptance of this peculiar condition.[14] The idea is of course not new. For a long time it has been part of the corporation law of many jurisdictions that as a condition precedent either to incorporation or to doing business in particular states, agents for the acceptance of summons within those states had to be named.[15] Under continental law, non-resident stockholders in buying stock submitted to being summoned into court on matters relating to the corporation by notice issued to the office of the corporation.[16] As between individual citizens, such arrangements as waiving summons in cognovit notes and judgment leases for the confession of judgment are of course not new. Nevertheless, the extension of the practice is dangerous, and courts may well be

12. Paramount Famous Lasky Corp. v. United States, 282 U. S. 30 (1930).

13. See Kane v. New Jersey, 242 U. S. 160 (1916); Hess v. Pawloski, 274 U. S. 352 (1927). As to service by "tagging", see People v. Levins, 273 N. Y. Supp. 941 (Ct. Spec. Sess. 1934).

14. In Hess v. Pawloski, 274 U. S. 352, 357 (1927), the court refused to see much difference between the express and the implied contract: "The difference between the formal and implied appointment is not substantial, so far as concerns the application of the due process clause of the Fourteenth Amendment."

15. PARKER, CORPORATION MANUAL (annual) § 52, under each State.

16. *Cf.* Copin v. Adamson, L. R. 9 Ex. 345 (1874).

expected either to set limits to the possibility of doing away entirely with the necessity of summons by contract, or at least to take precautions in individual cases as they arise. Certainly the criticism of the machinery which the common law provides for obtaining jurisdiction over a person has its point in these days of accelerated business life and widespread business operations across state lines. In this problem the dividing legal principle involves a question of constitutional rights and of the power of the citizen to barter or sell or give away such rights. The *Restatement* is exceedingly vague and general on this point. Unreasonable restriction of the liberty or freedom of action of a party is illegal.[17] But whether it is such unreasonable restriction to lay one's self open to court action without anything resembling the traditional summons, we are not told. The automobile cases make light of the matter.

However favorable the courts might be to arrangements extending the jurisdiction of courts by means of contracts among the parties, they have almost uniformly frowned on attempts in the opposite direction.[18] The *Restatement,* however, leaves the matter in the air except as to the concurrent jurisdiction of federal and state courts. Is it "unreasonable", for example, to contract against the option to resort first to a squire's court or administrative board or other limited tribunal whose decisions are to be swept aside if the case is appealed to the ordinary courts and tried *de novo?*

> "A bargain to forego a privilege, that otherwise would exist, to litigate in a Federal Court rather than in a State Court, or in a State Court rather than in a Federal Court, or otherwise to limit unreasonably the tribunal to which resort may be had for the enforcement of a possible future right of action . . . is illegal." [19]

One of the objects sought to be accomplished by such a delimitation of choice among jurisdictions has to do with clarifying the question "What law governs?" Theoretically, it should make no difference in substantive law whether the action is brought in one jurisdiction or another. The adjective law, however, is quite likely to carry with it not only something of substantive right, but under a given set of facts, after a controversy has arisen, it may, by a rule excluding a bit of evidence, or some similar rule, determine the probable outcome of the case. The law has gradually come to permit a deliberate choice of law on the part of parties to a contract, so far as such choice amounts to a clarification of their intention, or of the nature of judicial definition of the words used, provided, first, that the point contracted for is not contrary to the public policy of the jurisdiction whose law would normally

17. RESTATEMENT, CONTRACTS (1932) § 591.

18. Among recent cases involving the point are: General Motors Acc. Corp. of Cal. v. Robinson, 207 Cal. 285, 277 Pac. 1039 (1929); General Motors Acc. Corp. v. Hunsaker, 50 S. W. (2d) 367 (Tex. Civ. App. 1932). See Note (1925) 74 U. OF PA. L. REV. 89.

19. § 558.

govern, or of the forum, and provided, further, that the particular law chosen has some *raison d'être* in the case and is not merely read in by the parties arbitrarily or in bad faith.[20]

When we reach the actual trial of a case, we are more clearly within the province in which the traditions of the court rather than the wishes of the parties must be given consideration. Certainly an attempt to substitute a form of trial for which the court is not equipped or for which it has no traditions must be frowned upon, particularly in view of the opportunity rendered by arbitration statutes to substitute a different kind of tribunal where an entirely different kind of trial is sought. Of course, waiver of a jury is today a matter of a consensual nature, just as authorization of a jury trial was historically. Stipulations between the parties as to modified juries are obviously no more difficult to uphold than the waiver of jury trial altogether. In fact, at this point stipulations of counsel furnish a very large opportunity for contractual control over adjective law. Waivers of formalities, the extension of time for particular steps, the admission of certain types of evidence either absolutely or conditionally—all such matters in so far as they tend to facilitate and expedite the administration of justice are favored, provided they meet with the approval of the court. Such stipulations, however, are to be distinguished sharply from similar ideas introduced into contracts in the absence of pending litigation and without the benefit of a court's scrutiny.[21]

The evidence adduced at a trial and its relation to the contractual control of the parties has in recent years received much more attention at the hands of authors than have any of the other aspects of contractual control or interference with procedure. Dean Wigmore at the opening of the period under consideration advocated a relaxation of the rule against giving effect to such agreements.[22] Courts have been reluctant to do so, largely because of a feeling that the wisdom of the ages was crystallized in the rules of evidence that had developed in court.[23] They fail to see at times the accidental nature

20. The cases are collected in 12 C. J. 451, § 32, where the leading case of Arnold v. Potter, 22 Iowa 194 (1867), is quoted: "In thus holding, we, of course, do not decide that two citizens of Massachusetts could make a contract in that State, payable there or in New York, agree to be governed by the laws of Iowa or California, and thereby avoid the consequences of the usury. Nor do we hold that a citizen of one State could make his note in another to a resident there, payable in a third, with interest as allowed in a fourth."

21. The whole subject of stipulations is exhaustively treated in a new article in 60 C. J. 36. The matters which may be the subject of stipulations, listed there, include most of the topics on which contracts with reference to adjective law touch. By definition, however, these stipulations are distinguished from contracts, even from contracts made in the course of judicial proceedings. If they are contractual at all, it must be remembered that they are not only agreements between parties but between the parties and the court. Unlike contracts, they need no consideration to support them.

22. Wigmore, *supra* note 6.

23. See Fidelity & Deposit Co. of Maryland v. Davis, 129 Kan. 790, 801, 284 Pac. 430, 435 (1930), where the court after reviewing at length Mr. Wigmore's argument says: "This court likes to be considered progressive, but not to the extent that we are going to set aside the established order of things to encourage new experiments. We choose to look before we leap."

of some of these rules, which are manifestly based on convenience under the jury system. They suspect any new suggestion, particularly one that might introduce a type of evidence with which they have not become familiar. Of course this point of view has more justification in some situations than in others. Where the attempt is made to introduce hearsay evidence, for example, or in very general terms to throw down the bars of technical rules of evidence, there is occasion for hesitation about the new and untried course of procedure. On the other hand, where the point has to do with such a specific matter as the use of a particular document which under the ordinary rules of evidence would not be admissible because it is not considered the best evidence, we have an entirely different problem. The situation is met sometimes by indirection, as where it is recited that each of several copies of a contract is an original, or where in the absence of such a provision the law says so. Furthermore, since the law of its own accord can recognize a method of handling records which treats a third or fourth copy as in effect an original entry, it is difficult to see why parties may not by an agreement in advance hasten, for the purposes of a particular case, any recognition of such a system in that way. The real difficulty comes where the parties attempt to open the way for evidence or for witnesses excluded by rule of law. One must consider in such cases whether the sole parties interested in such a rule are the parties to such a contract. It may be that the witness whose testimony is excluded is also one of the parties protected, or it may be that society has an interest in excluding the testimony. Thus, where two parties to litigation are willing to unseal the lips of a clergyman, physician, lawyer, or spouse, in a place where any of these are incompetent witnesses, it may well be contended that there are reasons for refusing to hear such witnesses that transcend the interest of the parties to the case.

A distinction might well be recognized between those types of contracts relating to evidence and those in which the parties agree that only by proving one set of facts shall they be deemed to have satisfied a condition of a contract. Thus, if an insurance agreement speaks of the sickness or disability of the person insured and then stipulates what shall constitute an adequate proof of sickness or disability, it may well be argued that what is insured against is the set of facts crudely described as evidential. Nevertheless, such contracts are also in disfavor.[24]

Where arbitration is substituted for the jury trial, and even where a jury is waived and the trial of facts is before the court, it is possible to go some length in permitting the judge to look into matters that might conceivably be looked upon as dangerous if placed before a jury. It is possible, for example, to permit an arbitrator to make an investigation of his own, outside the ordinary course of the hearing. It is not only possible to stipulate that

24. American Beneficial Life Ass'n v. Hall, 96 Ind. 498, 185 N. E. 344 (1933).

he may take his own expert knowledge into consideration in reaching a conclusion, but, by the very nature of the case, when he is chosen because he is an expert it is difficult to contend that he is bound to disregard his own special information. Dangerous as it may be to tamper with the whole institution of jury trial by attempting to permit similar privileges to a jury, it is at least debatable whether under proper judicial supervision it may not be desirable to relax the rigors of the jury system somewhat similarly.

Attempts have been made to modify procedure after hearing or trial, particularly so as to cut off the right to demand judicial review. On the one side it may be argued that such a stipulation makes of the lower tribunal an arbitrator, and that if arbitration is permissible without review on the merits of the case a stipulation limiting the parties to one day in court is *a fortiori* permissible. On the other hand, it may be contended that our system of judicial review does not exist merely for the benefit of the parties in an individual case but serves a social function without which our whole judicial system would be a different thing than it is. Courts are accordingly still divided upon the permissibility of such agreements.

Of course what one does with a judgment after he gets it is, in a measure, a matter for his own initiative. He may use it as a basis for collection, or for negotiating, or, in the instance of a test case, for future reference. It is quite possible and common to compromise after a judgment has been rendered. May one agree in advance that a judgment if rendered will not be enforced? The difficulty we run into here is again the jealousy of courts, which is awakened at the merest suggestion that they are being asked to decide a moot question. The line of argument which distinguishes such questions from moot questions, however, is familiar in connection with recent discussions of the declaratory judgment. Nevertheless, an agreement not to use a judgment might well be interpreted by a court as the equivalent of a discharge from liability and thus be allowed to operate as a bar to recovery.[25] There is perhaps no great need for this kind of arrangement, especially in view of the growth of the declaratory judgment idea.

On the question whether one may extend the time for a statute of limitations otherwise than by using existing legal distinctions such as adding a seal, there is little or no pressure from business, although the validity of an agreement not to plead the Statute of Limitations is a current subject for dispute, with a tendency in the period under discussion to recognize such agreements.[26] The *Restatement* seems to limit its treatment of time contracts to the opposite endeavor of further restricting the time within which action may be brought. "A bargain to . . . limit unreasonably . . . the time within which a possible future claim may be asserted is illegal."

25. RESTATEMENT, CONTRACTS (1932) § 556.
26. McGee v. Jones, 79 Cal. App. 403, 249 Pac. 544 (1926). Notes (1930) 30 COL. L. REV. 383; (1926) 39 HARV. L. REV. 771; (1925) 74 U. OF PA. L. REV. 193.

This, of course, is a topic more likely to arise in accordance with the accelerated conditions of modern business life.[27]

One other type of clause, established perhaps longer than any of those so far discussed, is a provision for the liquidation of damages. What the courts have done in this field is familiar to every law student. They have made a sharp theoretical distinction between penalties, which are not enforceable, and *bona fide* liquidations of damage, which they respect. The distinction has frequently been criticised, and it has been pointed out that courts first decide whether they will uphold a particular provision, and then call it by one name or the other. Nevertheless, the distinction has held. In fact it has in the course of time justified itself with the aid of a fine series of decisions that have gradually drawn a fairly clear line between liquidated damages and penalties. As laid down in the *Restatement* the theory has two features: first, that the harm must be one either incapable or very difficult of accurate estimation; and second, that the amount fixed must be a reasonable forecast of just compensation. The principle at first seems not very clear—in fact it is frequently obvious that the reasoning of the courts in rejecting or upholding an arrangement for liquidated damages is not clearly articulated. But if we compare the articulated principles already gathered in connection with our discussion of all the lines drawn by courts between permissible and prohibited contractual modifications of adjective law, we may get an understanding of what underlies the practical decisions in the matter of liquidated damages.

To summarize these principles, then, we find, short of the old doctrine that it was no affair of the parties to control procedure, first, the suggestion that everything depends on whether the proposition is in the form of a condition precedent to litigation or not. This distinction has crumbled. Second, that in some particulars it depends on whether it is the whole case or only particular facts that are withdrawn from the ordinary channels of dispute. This is a weak compromise with no principle behind it. Third, whether the provision pertains to present or future litigation. The tendency of arbitration law is to knock down this fence. Its real importance in the matter of stipulations is perhaps that it gives an opportunity for insisting on judicial regulation. Here is at least a suggestion of a principle—let us number it fourth—that contractual control over adjective law should be subjected to

27. See 37 C. J. 728, § 45 n. Considerable light is thrown on what will be held to constitute an unreasonable curtailment of the period. Among the more obvious cases of interfering with the administration of justice not specifically discussed here are: the paying of extra fees to ordinary witnesses; the restricting of bidding at judicial sales; the waiver in advance of an equity of redemption, or of a right to go into bankruptcy or to use particular defenses such as fraud or usury or to sue alone without the joinder of other parties in interest. In many instances the cases turn on questions of statutory interpretation. It is, of course, quite possible for a statute so to lay down a point of public policy as to make contracts that are inconsistent with it unenforceable. The question whether any particular statute was intended as a formulation of such public policy presents, of course, the major difficulty.

judicial review. Fifth, there are suggestions that the line of demarcation is between what is fair and what is unfair—a difficult dichotomy that has the disadvantage of sending us back into the courts, from which we tried to escape, and sending us there to spend our time on a collateral matter instead of the main issue. Sixth, a distinction has been drawn between provisions of adjective law made for the benefit of the public and those made for the parties. The idea is good, but its application is fraught with too many doubts to be feasible, especially when presented in the form of a question as to what dangers frequent indulgence in a particular relaxation of a rule might lead to. Seventh, something has been made of the danger of using the court for what seems to be a moot question. The principle prohibiting such action is clear, but it may be made equally clear, as it has been in the case of declaratory judgments, that the willingness to forego damages or any other remedy does not make a dispute as to legal rights nor the desire to have them adjudicated any the less genuine. Eighth, in some instances, at least, the question has been disposed of as one of statutory interpretation, the question being whether the method laid down by a statute is exclusive or merely presumptive and, further, whether it is intended to embody a principle of public policy or merely a practical choice of the method where it is more important that some method be chosen than that a particular one be given preference over all others. Finally, we have reached an unpromising line of cleavage with which courts have bungled through very well—that between penalties and liquidated damages.

The essential difference between a penalty and an unenforceable agreement to liquidate damages is not simply one of size, though roughly speaking one may say that a sum constitutes a penalty if it is relatively large and disproportionate to the purpose it is calculated to serve. Nor is the difference one of intent, though of course if it becomes obvious that the contracting parties had no thought of reaching a conclusion as to the actual damages likely to result, we are dealing with a penalty. Nor is the difference to be found by distinguishing between those cases in which damages are readily ascertainable by a jury through the ordinary methods and those in which damages are not readily ascertainable, though here, too, we may have a helpful indication. Certainly the distinction is not between those matters which a court considers distinctly within the scope of its prerogative and those as to which public policy is silent; there is no suspicion here of ousting the court of its jurisdiction. The essential distinction is this: that those agreements which tend to forward the purposes of the administration of justice are to be upheld, while those that tend to obstruct it or to substitute some artificial standard for it are condemned.

If we take this principle developed in connection with liquidated damages and apply it to the other doubtful cases of attempts by parties to substitute their own plans for the ordinary procedure of courts, we have, it is submitted,

a valid distinguishing principle. It is not possible, for example, to say that all contracts as to evidence, or all contracts as to jurisdiction, or as to any of the other points discussed, are or are not in furtherance of justice. It is possible, however, in every individual case to raise these questions and reach a conclusion. Some such method has, it is submitted, already been resorted to by courts more or less unconsciously, even when they have hidden their reasoning behind such words as "unfair", "unreasonable", or the question-begging "ousting" phrase. With the real question revealed, whether the contracts in question tend to promote the administration of justice or to block it, we may hope eventually to draw safe and useful guide-lines for the drafting of such contractual clauses and thereby not only avoid a hindrance but create a genuine aid in settling disputes.