

## THE HISTORICAL BACKGROUND OF COMMERCIAL ARBITRATION

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The origin of arbitration is lost in obscurity. At what time or place man first decided to submit to his chief or to his friends for a decision and a settlement with his adversary, instead of resorting to violence and self-help, or to the public legal machinery available, is not known; and any inquiry of this sort would belong more properly in the history of social growth and ethics than in either law or economics.

In all religions there are many injunctions to be at peace with one's neighbors and to be reconciled speedily with an adversary. Aristotle urged the benefits of conciliation.<sup>1</sup> In Heraldus' *Animadversiones*<sup>2</sup> there is described a court of reconciliation that existed among the Greeks. It was common among the Romans "to put an end to litigation" by means of arbitration.<sup>3</sup> Bell says "this amicable private tribunal is of an earlier date than the public courts."<sup>4</sup> The introduction of arbitration seems to be coeval with the foundation of our law.<sup>5</sup> In the earliest forms of society disputes were tried by the heads of families, whence is derived the patriarchal tribunal now given to the office of arbitrator.<sup>6</sup>

From the charters that were issued to the English guilds, it is clear that these traders recognized the value of some extrajudicial method and, in some of the earlier books on the law merchant, it is certain the merchant preferred justice "according to the Law of Merchants" to that of the common law.

The history of arbitration, unlike the history of law, is not an account of the growth and development of principles and doctrines that have come, through a long use, to have a general validity and force. While arbitration probably antedates all the former legal systems, it has not developed any code of substantive principles, but is, with very few exceptions, a matter of free decision, each case being viewed in the light of practical expediency and decided in accord with the ethical or economic norms of some particular group. One case is not authority for another since the decisions are in terms of persons and practices and not in accord with prescribed rules and doctrines.

If we assume that arbitration is a substitute for a proceeding at law and that it is governed only by the sense and conscience of the arbitrators, it

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1. RHETORIC (*circa* 320 B. C.) bk. III, c. 11.

2. I, 372.

3. PANDEX bk. 4, t. 8.

4. LAW OF ARBITRATION, p. 1.

5. COHEN, COMMERCIAL ARBITRATION AND THE LAW (1918) 25.

6. CONSOLATO DEL MARE BANCHUS (trans. *circa* 1300) 3.

becomes, in substance, a species of moral and economic justice, or justice according to the natural or universal law, the law which Ulpian says "Nature teaches to all men and animals." It is a law imposed by lay arbitrators upon contending parties because of an authority delegated by these parties to arbitrators either by a contract or because of some moral duty to submit disputes to arbitration, as in the trade guilds where the gildsman took an oath of fealty to the wardens to submit all disputes to them.

In considering arbitration history, it is essential to note and classify the situations wherein arbitration has been satisfactory and to note the situations wherein it has failed. Also, in examining the thousands of occasions and instances in which arbitration has been used—situations involving not only every conceivable human relation, but the affairs of states and of nations, as well—it is necessary at the outset to select the situations and practices that form the background of our present commercial arbitration, and exclude the rest.

To account for the origins of commercial arbitration the subject can be conveniently discussed under two heads:

- (1) The methods used by the guilds and the merchants in the dispatch of their affairs.
- (2) The examination of the cases in the law of contracts that contained arbitration agreements and the reaction of courts to them.

It is very common to say that commercial arbitration had its beginning with the practices of the market and fair courts and in the merchant guilds. It is true the gild merchant had wide grants of power as to trade. Mercantile charters were granted to "the men of Ipswich"<sup>7</sup> and to the "men of Gloucester",<sup>8</sup> and to most of the trade towns, entitling those so chartered to extensive privileges and rights. They were monopolistic in character and, in many cases, the right to trade in a borough depended upon membership in a chartered gild. They took active part in the government of the town, though their chief function was the protection of merchant privileges, guarding not only the local gildsman's interest but also that of town traders who had sought the markets of other towns. Pollock and Maitland describe a case where the gildsmen of Gloucester made reprisals on gildsmen of another town for harm done Gloucester traders in a foreign fair.<sup>9</sup> There is good evidence that they took a considerable part in inter-city trade warfare, for frequently complaints were filed against the practice of certain of these guilds.

The gild was a part of the borough government "whose duty was to maintain and regulate the trade monopoly. This was the *raison d'être* of

7. I GROSS, *THE GILD MERCHANT* (1890) 115.

8. *ROT. CARTA* 56.

9. I POLLOCK & MAITLAND, *HISTORY OF ENGLISH LAW* (2d ed. 1911) 666.

the gild merchant of the twelfth and thirteenth centuries.”<sup>10</sup> To become a member a man was required to pay an initiation fee, furnish sureties who would be responsible for the carrying out of his obligations, and take an oath of fealty to the gild to maintain its laws and obey the wardens.<sup>11</sup>

In addition to maintaining trade privileges, the guilds took a part in regulating and settling difficulties that occurred among its members. Carter regards this as arbitration. He says, “We may notice the institution known as the Gild Merchant which seemingly was an association for the purpose amongst others of mutual arbitration. Members of the same gild were bound to bring their disputes before the guilds before litigating the matter elsewhere.”<sup>12</sup>

In the charter of the Company of Clothworkers there is an elaborate ordinance concerning the settlement of controversy.

“If any discord, strife or debate shall fortune to happen between one householder and another of the said company—or between them or any of their journeymen or apprentices or between any of the aforesaid persons of the art or mystery of clothworkers which, without prejudice of the laws of the realms, may be appeased by good and wise men; that the said parties, before they move or attempt by course of law any suit between them or against the other in that behalf, shall first show their grief with the circumstance of the same to the wardens of said mystery . . . And if it shall seem to the masters and wardens that the matter is difficult and beyond their reach to end and determine the same for lack of better understanding of the laws of the realm or the custom of clothiers, that then any of the said parties may take their remedy one against the other without any further licence to be obtained at the hands of the said warden.”<sup>13</sup>

The charter of the Gild of Yarmouth has this expression, “At which feast (Trinity) all private quarrels and emulations were heard and ended. . . .”<sup>14</sup>

In the charter of Bridgewater “. . . for the promotion of love and peace, have ordained that they will choose yearly two Seneschals of their Gild and one bailiff to attend on them; such Seneschals to have power to punish those offending against these ordinances. Any one convicted before the Seneschals for maliciously imputing certain crimes to another shall be amerced, etc. No one shall implead another without the burgh . . . to be amerced; also any one opposing execution or distress made by order of the Seneschals.”<sup>15</sup>

The gild was not a voluntary organization but drew its right to exist from royal charter and exercised well-defined powers. It was a definite

10. I GROSS, *THE GILD MERCHANT* (1890) 43.

11. *Id.* at 29.

12. *ENGLISH LEGAL INSTITUTIONS* (1899) 268.

13. *ORD. CLOTHWORKERS, LONDON, 29 ELIZ.* (1587).

14. 2 GROSS, *op. cit. supra* note 7, at 278.

15. *Id.* at 23.

borough organization whose object was the maintenance and regulation of merchants and their practices. Neither was it a religious or fraternal organization, as is frequently suggested. Gross says "the medieval guildsmen were not always animated by lofty motives of brotherly love or self-abnegation."<sup>16</sup> It was a corporation with wide powers over men and goods.

The suggestion that the guilds maintained boards of arbitration for the benefit of members is not borne out by the facts. Although the evidence is very meagre it is reasonably certain that the guild developed its own court to which members came not voluntarily but by order and summons. In cases involving debt and covenant they were, in many cases, courts of original jurisdiction.

The opinion of Carter that the "morning speeches" of the Gild Brethren were only a "taking of council" and arbitration and settlement of disputes among the members does not appear sound. That they were actual courts which heard and tried cases in accord with well-established rules of law and in accord with a fixed procedure seems more in accord with the facts. In their history of the English law, Pollock and Maitland say:

"Further, at least in some cases, the gild merchant evolves out of itself a court of justice which exists beside the law court of the borough. This can hardly be prevented; the craft guilds of London evolve courts of justice; the French and German merchants in London evolve courts of justice; the learned universities evolve courts of justice; there can hardly exist a body of men permanently united by any common interest that will not make for itself a court of justice if it be left for a few years to its own devices. The gild bretheren, at their 'morning-speeches', do not merely take council for the maintenance of their privileges and the regulation of their trade, but they assume to do justice. In the first place, they decide questions of inheritance and succession. A person's *gilda*, that is his right as a member of the gild, is treated as an object of ownership. With the consent of the court, a man may give or sell it. If he dies possessed of it, it will descend to his heir. And so at the morning-speeches one person will come and demand against another the 'gild' of a dead ancestor 'as his right and inheritance', using the very form of words by which he would have demanded ancestral lands. Such disputes, such actions we must call them, the guildsmen hear and determine at their morning-speeches. But besides this, they entertain actions of debt and covenant and trespass, and hardly dare we call such assemblies mere courts of arbitration, for they can enforce their own decrees; . . ." <sup>17</sup>

### (I) *Courts of the Fair*

Another method of informal decision of disputes that enjoyed a wide prevalence was that of the medieval Courts Merchant. The ancient mer-

16. *Id.* at 36.

17. I POLLOCK & MAITLAND, *op. cit.* *supra* note 9, at 667.

chants were itinerants who peddled their goods in all the continental markets and fairs. Traveling together for protection, they carried their wares from one fair to another, bartering and selling.<sup>18</sup>

The disputes of these traders were settled by "fair law" which was in accord with the universal customs of merchants, and had no reference to the courts of the realm. These were instituted much as our present-day consular courts. There were consuls and prudhommes—some who traveled with the merchant and whose advice was sought in matters of controversy, and some who were permanently established in the staple towns. In addition to the consuls, in the larger fairs constables, market masters, and mayors presided. Carter remarks, "The foreign merchant was a person to be treated tenderly for with him the King could deal directly,"<sup>19</sup> and in the ordinance of Edward I it was ordained, "And whereas the King doth will that no foreign merchant shall be delayed by a long series of pleadings, the King doth command that the Wardens and Sheriffs shall hear daily the pleas of such foreigners as shall wish to make plaint against foreigners; and then speedy redress be given unto them."<sup>20</sup>

"When the King grants a fair or market the grantee shall have without any words to that purpose, a court of record, called the Court of Piepowder."<sup>21</sup>

They are called piepowder "because that for contracts and injuries done concerning the fair or market, there shall be a speedy justice done for advancement of trade. . . . This is a court of record . . . and the jurisdiction thereof consisteth in four conclusions."<sup>22</sup>

"The reason of their original institution seems to have been, to do justice expeditiously among the variety of persons that resort from distant places to a fair or market; since it is probable that no inferior court might be able to serve its process, or execute its judgments, on both or either of the parties; and therefore, unless this court had been erected the complain(an)t must necessarily have resorted . . . to some superior judicature."<sup>23</sup>

"We ordain and establish that some certain loyal and discreet man living in London shall be appointed a judge from among the merchants to recover their debts . . . and give them a quick measure of justice from day to day . . . under a charter granted to merchants to decide questions which arise among merchants and in accord with the law merchant."<sup>24</sup>

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18. See various accounts of fairs in BEN JONSON, *BARTHOLEMW'S FAIR*; JOHN BUNYAN, *PILGRIM'S PROGRESS*; BEWES, *ROMANCE LAW MERCHANT* (1923) 93 *et seq.*

19. *Op. cit. supra* note 12, at 269.

20. *LIBER ALBUS* (1419) 257.

21. 3 *CRUISE, DIGEST* (2d Amer. ed. 1823) 180, § 77.

22. 4 *CO. INST.* 271.

23. 3 *BL. COMM.* \*33.

24. *PRYNNE'S, ANIMADVERSIONS* (1669) 23.

Mr. Cohen, in his book on commercial arbitration,<sup>25</sup> is inclined to view these courts as business men's tribunals, and Mr. Birdseye regards the merchant courts as boards of arbitrators.<sup>26</sup>

It would seem, if the term "arbitration" is used merely as descriptive of a simple and speedy determination of a cause, without reference to a formal procedure but in accord with the customs of a trade, the designation arbitration is proper. If, however, arbitration is taken to mean the voluntary submission of disputed matter to one or more arbitrators who will make an award, and by consent substitute this board for the tribunals provided by the state, then these proceedings in the Merchant Courts and the guilds were not arbitrations, for both the guilds and fair courts had a fixed jurisdiction, "the pleas betwixt strang folk, called pypondrous,"<sup>27</sup> and in accord with merchants "customary law approved by the authority of all kingdoms and not a law established by the authority of any prince."<sup>28</sup>

In addition, the Statute of the Staple<sup>29</sup> provided additional courts merchant "that speedy and ready process shall be against him from day to day and from hour to hour according to the law of the Staple."<sup>30</sup> It gave to mayors and sheriffs complete jurisdiction over merchant causes.<sup>31</sup> Justices in eyre or assize were precluded from hearing cases properly within the cognizance of the mayor or constable.<sup>32</sup> It also provided "that all staple merchants should be ruled by the law merchant and not by the common law,"<sup>33</sup> and speedy justice shall be done to them ". . . without sparing any man or to drive them to sue at the common law."<sup>34</sup>

Both the Carta Mercatoria and the Statute of the Staple provided how merchant juries should be drawn and how constituted, and fixed the duty of the mayor as justice, and the method of serving process and compelling attendance.<sup>35</sup> In the *Black Book of Admiralty*<sup>36</sup> the prudhommes "are of coordinate authority with the king." One of the records of the courts of Bristol says, "The Tolzey Court is an old court of Record by prescription" from Saxon times. In this court was the process of foreign attachment of immemorial usage to recover debts from foreigners, through attachment, seizing of cargoes and goods, and enforced payment.<sup>37</sup>

It appears, therefore, that the gild and fair courts were part of the English judicial system that heard cases which were not justiciable at com-

25. I COHEN, *op. cit. supra* note 5, at 1, 9.

26. I BIRDSEYE, *ARBITRATION AND BUSINESS ETHICS* (1926) 23.

27. *BLACK BOOK OF ADMIRALTY*.

28. MALYNES, *LEX MERCATORIA* (1622) *Preface*.

29. 27 EDW. III (1353).

30. *Id.* c. 2.

31. *Id.* c. 21.

32. *Id.* c. 5.

33. *Id.* c. 8.

34. *Id.* c. 20.

35. See 27 EDW. III, and *SELECT PLEAS IN MANORIAL COURTS* (Seld. Soc. 1888) 153.

36. 2 *BLACK BOOK OF ADMIRALTY* (1871) *Introduction*, lxvii.

37. CARTER, *op. cit. supra* note 12, at 267n.

mon law because of procedural difficulties and because the merchant was regarded as subject to foreign law, rather than tribunals that merely served as arbitrators of disputes. It may safely be concluded that arbitration, as it is understood today, was unknown as a policy or a practice of the fair courts or guilds.

(II) *Common Law—Doctrine of Revocability*

At the common law it has been very generally held that the arbitration clause in a contract can be revoked. It is well settled that the clause cannot be pleaded either in bar or abatement to any action or suit, either at law or in equity. By giving notice of revocation either of the parties can be put to an end to the authority and power of the other to name arbitrators.<sup>38</sup>

The question of revocability goes back to a *dictum* in *Vynior's Case*.<sup>39</sup> This was an action of debt upon a bond brought by Vynior against Wilde for failure to submit disputes to arbitrators. Defendant Wilde set up that no award had been made to which plaintiff rejoined that the defendant had revoked his authority "to submit to stand to and abide an award. Defendant demurred and judgment went to the plaintiff to recover the full penalty."<sup>40</sup>

The case is sound, and representative of the law of the times. It was a bond under seal and enforceable by the obligee when any of the conditions endorsed in it were revoked. The practice of giving penal bonds to enforce engagements was very common. It was usually the practice to put the bond at a high figure as a means of insurance of performance. Writing of these instruments, Professor Barbour says: "It seems to have been not uncommon that a debtor . . . should bind himself in double the amount of the actual debt . . . he could collect the full sum named in the deed; for the common law received such evidence as conclusive."<sup>41</sup> It is doubtful whether, in Coke's time, there could have been a recovery on the promises, so the parties insured themselves of performance with sealed deeds.

The case would long ago have been forgotten but for the *dictum*—"if I submit myself to an arbitrimint . . . yet I may revoke it for my act, or my words cannot alter the judgment of the law to make that irrevocable which is of its own nature revocable."<sup>42</sup>

This argument is unnecessary to anything decided in the case. The validity of the bond depended on its seal and when the obligor revoked the arbitration authority, the bond became enforceable. The proposition as to

38. *Boston & Lowell R. R. v. Nashua & L. R. R.*, 139 Mass. 463, 31 N. E. 751 (1885); *Meachem v. Jamestown R. R.*, 211 N. Y. 346, 105 N. E. 653 (1914); *Henry v. Lehigh Valley Coal Co.*, 215 Pa. 448, 64 Atl. 635 (1906); *Gray v. Wilson*, 4 Watts 39 (Pa. 1835); *Corbin v. Adams*, 76 Va. 58 (1881); *Mead v. Owen*, 83 Vt. 132, 74 Atl. 1058 (1910).

39. 8 Co. 80a, 81b (1609), decided by Lord Coke.

40. This is not the first case that supports a revocation. It is upheld in *Y. B. Pas.* 28 Hen. VI, f. 6, pl. 4 (1449); *Y. B. Hil.* 21 Hen. VI, f. 30a, pl. 14 (1442); *Y. B. Trin.* 5 Ed. IV, f. 3b, pl. 2 (1465); *Y. B. Mich.* 8 Ed. IV, f. 9b, 10a, pl. 9 (1468).

41. 5 HOLDSWORTH, *HISTORY OF ENG. LAW* (1924) 293.

42. 8 Co. 80a, 81b (1609).

the right to revoke powers or authorities is not in question, but the case is continually referred to as the basic authority for revocation of submissions. It is suggested that Coke held the arbitration authority revocable because of the general hostility of the common law judges to arbitration. This argument is hardly tenable, for in this case he enforced a bond for failure to arbitrate and had there been any hostility the whole covenant could have been held void under the convenient doctrine of public policy.

There is no suggestion in *Vynior's Case* that these agreements are revocable because they oust the courts of jurisdiction. This reason was not definitely assigned until the case of *Kill v. Hollister*.<sup>43</sup> The case is very short and no authority is cited, or any reason given for the doctrine. The explanation for this perhaps may be found in the changes in the law that had occurred since *Vynior's Case*. Shortly after the latter, Equity refused to enforce obligations in bonds for any more than damage proved.<sup>44</sup> The Statute against Fines<sup>45</sup> prevented the recovery of penalties, hence it seems clear that obligations could no longer be forced by penal bonds. The reason for the decision in *Kill v. Hollister* may have been the jealousy of the court of its right, or, perhaps, the desire to discourage persons from seeking any but the authorized tribunals to determine rights and duties, or for reasons of public policy—to deny support to any agreement by which the individual contracted away his legal rights. Whatever may have been the reason, the case stands as authority.

In 1743 Lord Hardwicke had said in the case of *Wellington v. Macintosh*<sup>46</sup> that it was not suitable to the dignity of the court to give a discovery for the purpose of an arbitration. In this case a plea that there had been no submission was overruled, but in overruling it he said, "I would not have it understood that such an agreement might not be made in such kind of articles and pleaded; but such a clause should have in it a power given to the arbitrators to examine the parties as well as witnesses upon oath."<sup>47</sup>

There is no suggestion here of ouster of the court, but it is quite generally cited as authority for overruling a plea that there had been no reference, the fact that the court offered no reason notwithstanding. *Kill v. Hollister* and *Wellington v. Macintosh* were considered in the case of *Mitchell v. Harris*,<sup>48</sup> where it was argued: "There is no sense in what is said in *Kill v. Hollister* that such covenants cannot be permitted as the agreement of the parties cannot oust the jurisdiction of the Court. It is not ousted more than by a release of all right of action."<sup>49</sup> In this same case the Chancellor

43. 1 Wilson 129 (K. B. 1746).

44. See 5 HOLDSWORTH, *op. cit. supra* note 41 at 293.

45. 8 & 9 WM. III, c. 11 (1697).

46. 2 Atk. 569 (Ch. 1743).

47. *Id.* at 570.

48. 2 Ves. 129 (Ch. 1793).

49. *Id.* at 131.

in referring to *Wellington v. Macintosh* says, "There is no doubt that the reporter has mistaken Lord Hardwicke's reasons in the case. He has only taken down part of what was said and has misapplied that—but still the case stands as a clear authority that the plea was overruled." <sup>50</sup>

*Kill v. Hollister* and *Wellington v. Macintosh* were accepted as the undisputed authority for supporting revocations, without any regard whatsoever to the fact that one case offered no reason at all, and the other a doubtful and fragmentary reason at best. Still these cases persist and as late as 1856 were seriously discussed as authorities.

In 1788 Lord Kenyon had occasion to examine the question of arbitration in the case of *Halfhide v. Fenning*.<sup>51</sup> In this case a plea that there had been no reference was allowed to be good, the court saying, "Such references are very advantageous to the parties; as arbitrators are more competent to the settling of complicated accounts."<sup>52</sup> In commenting on *Wellington v. Macintosh*, Lord Kenyon says, "Lord Hardwicke's opinion must be misreported."<sup>53</sup> The *Halfhide* case in point of time clearly overrules *Wellington v. Macintosh* and *Kill v. Hollister*, but, curiously, the reporter adds, "This [the *Halfhide*] is a singular case and in direct opposition to Lord Hardwicke's opinion in *Wellington v. Macintosh* . . . ; it has since been repeatedly overruled"<sup>54</sup>—but this last is doubtful. In the case of *Mitchell v. Harris*<sup>55</sup> Lord Loughborough says that *Halfhide v. Fenning* is a singular case and in opposition to *Wellington v. Macintosh* in which, whatever reasons are assigned for Lord Hardwicke's determination, the plea was manifestly overruled; and that it is quite inconsistent with the resolution of King's Bench in *Kill v. Hollister*.

The authority of *Halfhide v. Fenning* is again doubted in *Street v. Rigby*,<sup>56</sup> the Chancellor (Eldon) saying, "I doubt whether it is a very wise exercise of the jurisdiction of this court recollecting that it is to give relief beyond the law, not to order the parties to go to Law to take the effect of the stipulated remedy, but under a positive covenant . . . that they will not sue . . . and send them to that jurisdiction (arbitrators) so likely to miscarry."<sup>57</sup> The opinion is very poorly reasoned. It is rested more on an unfortunate experience of one of Lord Eldon's clients in the matter of *Price v. Williams*<sup>58</sup> than on a careful analysis of Kenyon's decision in *Halfhide v. Fenning*.

Again in *Waters v. Taylor*,<sup>59</sup> Eldon says, "Taking the general doctrine now to be according to Lord Hardwicke's opinion which goes upon the prin-

50. *Id.* at 135.

51. 2 Bro. C. C. 336 (Ch. 1788).

52. *Id.* at 337.

53. *Ibid.*

54. *Ibid.*

55. 2 Ves. 129 (Ch. 1793).

56. 6 Ves. 815 (Ch. 1802).

57. *Id.* at 821.

58. 3 Bro. Cas. 163 (Ch. 1790).

59. 15 Ves. 10 (Ch. 1807).

principle that this court has powers of inquiry beyond those of an arbitrator . . . with reference to the case of *Halfhide v. Fenning* I admit that upon the best authority the opinion expressed by Lord Kenyon in that case is wrong . . . and as a general proposition therefore . . . an agreement to refer disputes to arbitration will not bind the parties even to submit to arbitration . . . before they come into court.”<sup>60</sup> In this deed the party had expressed “great anxiety to keep out of court” and of this Lord Eldon said, “Accordingly I thought it within the scope of my discretion to give the recommendation . . . of giving the parties an opportunity of preserving themselves from the ruin that must be the necessary consequence of an active interference of this Court.”<sup>61</sup> At another place he says the deed “shews their intention against the interference of any other jurisdiction, until they have tried the effect of the special means, provided by themselves; . . .”<sup>62</sup> In this case it is impossible to tell whether it is the anxious desire of the parties or the value of arbitration in this partnership dispute that leads the court to the reference. He nowhere says the court can be ousted but is in accord with the idea of holding it in abeyance until self-help has been tried. Analytically the case adds little to what was concluded in *Wellington v. Macintosh*.

In 1844, in the case of *Dimsdale v. Robertson*<sup>63</sup> after a careful examination of all the authorities the court comes to the conclusion that Lord Kenyon’s position in *Halfhide v. Fenning* is sound, and says, “I think *Halfhide v. Fenning* is still law.”

The case of paramount authority is that of *Scott v. Avery*.<sup>64</sup> In this case it was held that parties by contract may not oust courts but that they may agree by a contract that no cause of action shall arise until a reference is made and a decision had. In his decision Lord Campbell said, “Is there anything contrary to public policy in saying that the company shall not be harassed by actions, the costs of which might be ruinous, but that any dispute that rises shall be referred to a domestic tribunal? . . . I cannot see the slightest ill consequence can flow from it. . . . Public policy therefore seems to me to require that effect should be given to the contract.”<sup>65</sup> As to ousting the court he says, “It probably originated in the contests of the different courts in ancient times for extent of jurisdiction, all of them being opposed to anything that would deprive every one of them of jurisdiction.”<sup>66</sup>

In the report of this case in the *LAW JOURNAL*<sup>67</sup> it is stated that Lord Campbell said, “There was no disguising the fact that as formerly, the emoluments of the judges depended mainly or almost entirely on fees, and

60. *Id.* at 14, 18.

61. *Id.* at 23.

62. *Id.* at 18.

63. 2 Jo. & Lat. 58 (Ir. Eq. 1844).

64. 5 H. L. Cas. 811 (1856).

65. *Id.* at 853.

66. *Ibid.*

67. 25 L. J. (N. S.) 313 (Ex. 1856).

as they had no fixed salary there was great competition to get as much as possible of litigation into Westminster Hall and there was a great scramble in Westminster Hall for the division of the spoil. . . . And they had great jealousy of arbitration whereby Westminster Hall was robbed of those cases."

The same year, in the case of *Russell v. Pellegrini*<sup>68</sup> Lord Campbell said again, "Somehow the courts of law had, in former times, acquired a horror of arbitration; and it was even doubted if a clause for a general reference of prospective disputes was legal. I never could imagine for what reason parties should not be permitted to bind themselves to settle their disputes in any manner on which they agreed."<sup>69</sup>

*Scott v. Avery* may be said to be the last great case on revocability. Before it, *Kill v. Hollister* had been considered the authority and the only one resting on the doctrine of ousting the courts. The case of *Kill v. Hollister* can hardly be said to be reversed, but from 1856 to the present the decisions deal with interpretation and modification of the principles of *Scott v. Avery*.

Some doubt seemed to exist as to the authority of *Scott v. Avery*, for in the case of *Horton v. Sayer*,<sup>70</sup> decided in 1859, the court rejected a plea for reference, the court saying (Pollock, C. B.), "It appears to me this case is distinguishable from *Scott v. Avery*; . . . it falls within the rule which has been acted on for above a century, according to which the superior Courts of law cannot be ousted of their jurisdiction by the mere agreement of the parties; . . ." <sup>71</sup> This case of *Horton v. Sayer* was not followed in 1862, however, but in *Tredwen v. Holman*<sup>72</sup> the court said, "We are of opinion that this case is governed by *Scott v. Avery* and not by that of *Horton v. Sayer*."<sup>73</sup>

In 1875, in the case of *Ripley v. Great Northern Ry.*,<sup>74</sup> Jessel, M. R., said, "Certainly these arbitrations have not been looked upon very favorably by courts of law. Many strict and some absurd rules were laid down at a period when courts of law seemed to consider a reference to arbitration to be something wrong, or as an attempt to oust the ordinary jurisdiction of the court. That period has passed away."<sup>75</sup>

So in 1879, in *Collins v. Locke*,<sup>76</sup> it was said, "Since the case of *Scott v. Avery* . . . the contention that such a clause is bad as an attempt to oust

68. 6 E. & B. 1020 (K. B. 1856).

69. *Id.* at 1025.

70. 4 H. & N. 643 (Ex. 1859).

71. *Id.* at 649.

72. 1 H. & C. 72, 81 (Ex. 1862).

73. But see *Mills v. Bayley*, 2 H. & C. 36 (Ex. 1863), where the same judge follows *Milne v. Gratex*, which depends upon *Vynior's Case*. See also *Elliott v. Royal Exchange Assurance Co.*, L. R. 2 Ex. 237 (1867); *Thompson v. Anderson*, L. R. 9 Eq. 522 (1854); *Edwards v. Aberayon Ins. Society*, 1 Q. B. D. 563 (1875).

74. 31 L. T. R. (N. S.) 869 (Ch. 1875).

75. *Id.* at 870.

76. 4 App. Cas. 674 (1879).

the Court of jurisdiction may be passed by. The questions to be considered in the case of such clauses are, whether an arbitration or award is necessary before a complete cause of action arises. . . ." 77

In this case the court quotes favorably from *Edwards v. Aberayon Insurance Society*,<sup>78</sup> where Brett, J., said: "The true limitation of *Scott v. Avery* seems to me to be . . . that if parties to a contract agree to a stipulation in it, which imposes, as a condition precedent to the maintenance of a suit or action for the breach of it, the settling by arbitration the amount of damage, or the time of paying it, or any matters of that kind which do not go to the root of the action . . . such stipulation prevents any action being maintained until the particular facts have been settled by arbitration." 79

In the examination of the cases from *Vymior's Case* to the present, it is possible to conclude: The doctrine of *Vymior's Case* is now repudiated since the doctrine of penalties and fines has been abolished, and any effect penal bonds may have had in forcing arbitrations is now impossible. The doctrine of *Kill v. Hollister*, which is the authority that courts may not be ousted, is still the law, as it is generally conceded at the common law that the agreement of the parties cannot oust the court. This proposition is not denied even in *Scott v. Avery* which is rather erroneously presumed to have changed the law and to have repudiated *Kill v. Hollister*. What was decided in *Scott v. Avery* is that, parties cannot oust the courts of their jurisdiction, but they may contract that no cause of action shall arise until differences that may arise have been referred to arbitrators. That this case should have been regarded as the leading one upon the subject and the final authority may be due to the dramatic utterances of Lord Campbell about judges' fees, or to the fact that it overhauled and restated all the earlier learning on the subject, and because a good many of the cases subsequent to it treat it with undue respect and authority. It is interesting to note that most writers urging the virtues of arbitration never fail to cite fully the doctrines of *Scott v. Avery* and *Russell v. Pellegrini*. The doctrine of condition precedent is earlier than *Scott v. Avery* and the case is only a reaffirmance of what was already the law. At best *Scott v. Avery* represents one of the various views of the English law of arbitration and is scarcely entitled to the exalted place it holds.

From as early as 1698, various statutory regulations upon arbitration have been passed;<sup>80</sup> their existence demonstrates an interest in the subject, but their content is not greatly helpful in filling in the picture of the attitude

77. *Id.* at 689. To the same effect see a well-reasoned opinion of Coleridge in *Trainor v. Phoenix Fire Assurance Co.*, 65 L. T. R. 825 (Ch. 1892). See also *Jackson v. Barry Ry.*, 68 L. T. R. 472 (1893); *Spurrier v. LaCloche*, 71 L. J. 101 (K. B. 1902); *Gaw v. British Law Fire Ins. Co.*, [1908] 1 Ir. R. 245.

78. 1 Q. B. D. 563 (1875).

79. *Id.* at 596. For a complete list of the later cases see 1 MEWS DIGEST, Tit. Reference Condition Precedent.

80. The first statute was that of 8 & 9 WM. III, c. 15 (1698). Later regulations may be found in 3 & 4 WM. IV, c. 42 (1833); 17 & 18 VICT., c. 125 (1854); 52 & 53 VICT., c. 49 (1889).

taken by the business man of olden time toward arbitration. A résumé of their contents sufficient for further discussion in this issue may be found in Professor Simpson's discussion of equitable enforcement of agreements to arbitrate.<sup>81</sup> It remains now to sum up the attitude of the medieval merchant toward the arbitration process.

### *Conclusion*

Geraud Malynes, a mercantilist of the 17th century, said the trader preferred the law of merchants as a "law not too cruell in her frowns, nor too partiall in her favors."<sup>82</sup> Why the merchant chose this loose and informal method of decision to the deliberative and well-ordered common law, has always been a matter of interesting speculation.

There is one case that suggests a "gentleman" and a "trader" might be judged by different laws.<sup>83</sup> Malynes indicates that merchant controversy might be decided in chancery, at common law, or by the merchants,<sup>84</sup> but the preference of the trader was for the courts merchant. It is also common knowledge that until the time of Lord Mansfield, the English Court was poorly equipped to cope with merchant causes. The common law judge, unlike the Roman prætor who supplemented the *jus civile* with the more liberal *jus gentium*, had not expanded the narrow insular law of the English to meet the needs of a general commerce. Says Lord Campbell, "Mercantile questions were so ignorantly treated when they came to Westminster Hall that they were usually settled by private arbitration among the merchants themselves."<sup>85</sup>

A typical expression from the early books is the following from Malynes: "Merchant affairs in controversy ought with all brevity to be decided to avoid interruption of the traffick."<sup>86</sup> Traders always thought of the common law as something beyond their experience. It was local, not general, custom, and its processes were slow and formal. It is perfectly certain the merchant had a great need of rule and law, but it was rule and law in the market and as he and his kind knew and practiced it. It was not deduction from cases; it was self-generative from transactions themselves. He ordinarily found it possible to operate his affairs without controversy or aid of lawyers or courts, but should he find himself at odds with someone in the course of trade, he had an all-complete system of law to direct the settlement.

Ancient and modern traders have always felt a great reluctance about becoming involved in litigation. Expense and delay are the usual reasons offered, but a stronger reason is that suits at law are contentious and seriously

81. *Infra*, p. 160, at 164 *et seq.*

82. MALYNES, *loc. cit. supra* note 28.

83. *Witherley v. Sarsfeild*, 1 Shower 125 (K. B. 1678).

84. MALYNES, *op. cit. supra* note 28, c. XIV.

85. 3 LIVES OF THE CHIEF JUSTICES (1873) 274.

86. MALYNES, *op. cit. supra* note 28, at 303.

affect business good will, and the trader was, and still is, far more interested in continuing business relations than in preserving his legal rights. The ancient trader found in the piepowder court a broad and understandable justice and also in the market judge a shrewd and practical trader who knew that bargains had to be honest lest the fair of which he was head should come to grief. The only records of these proceedings are to be found in the Roll of St. Ives Fair.<sup>87</sup> They bind their bargains with drinks and God's pennies, and recitation of signs. The market master appeared as an understanding and capable individual, well versed in this laymen's lore and ordered that amends be made or bargains cancelled or gone through with in accord with the universal custom of merchants.

To attempt to say whether these market practices were arbitration or adjudication is not an easy thing.<sup>88</sup> The ancient books speak of merchant law, and merchant courts. They say nothing of arbitration or arbitration tribunals or submissions or references. Such terminology is the property of the common law tribunal. Pollock thinks they were law courts. Carter thinks the procedure was arbitration, and Lord Campbell is inclined to that view.

Not to trifle over terms—"The law of a community consists of the general rules which are followed by its judicial department in establishing legal rights and duties."<sup>89</sup> Says Salmond, "The law may be defined as the body of principles recognized and applied by the State in the administration of justice."<sup>90</sup> It is quite clear that until the days of Mansfield, merchant rules were considered as special customs, sometimes as foreign law, and merely submitted to the jury. These rules were frequently referred to as private international law, and if Austin is to be regarded as sound, "improperly so called", as they are only law by way of analogy. The merchant in many instances was, in insisting upon his own law, relying on his own special practice and customs which were no part of the law of the realm. The principles upon which decision is had, are extrajudicial. If this is true, the argument that piepowder court proceedings were arbitration is strengthened. On the other hand, it may be argued that pure arbitration is free decision, compromise or adjustment in terms of moral right and justice and unrelated to any fixed scheme, and that merchant rules were well settled and established, though not recognized by the Royal Court, and therefore, the proceedings amounted to adjudication, but in terms of a foreign law. But if arbitration is decision by any means other than by a state court, then these practices were arbitrations.

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87. I SELECT PLEAS IN MANORIAL COURTS (Seld. Soc. 1888) 130-160. The fullest and most complete account of the merchant and his law is one by Nathan Isaacs, *The Merchant and His Law* (1915) 23 J. POL. ECON. 529.

88. See pp. 135-138 *supra*.

89. GRAY, NATURE AND SOURCES OF THE LAW (1916) I.

90. JURISPRUDENCE (1902) II.

Additional strength is given to the arbitration argument by the fact that the law merchant, being regarded as a system of natural justice, expanded immensely the possibilities of the market master. The limit of natural justice is human experience, while the civil law is only that quantum of natural justice that is recognized and enforced by a particular state. The market master was interested in fair dealing as a means of preserving the good name of the Fair. He would order traders to "make amends". The swindler was put out. Merchants palming off brass for gold or measuring goods with false measures were summarily punished. His justice was as one human being with another, and his aim was the well-being of his business and his kind.

The question narrows itself down to the proposition—how shall we regard proceedings that are not conducted in accord with the practices of established state courts? Coke with no imagination merely described them. Holt belligerently announced the merchants could tell him nothing. Mansfield, more broadly trained in continental practices and legal systems, felt these practices of merchants should be made part of the law of England, and as Austin would say, he translated customs into law. In its legal development, arbitration has very generally been associated with contracts. It is usually discussed in terms of delegated powers or promises, while merchant practices have generally been regarded as a special proceeding under foreign law.