Arbitration in America: The Early History

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Background

On June 29, 1789, Zephaniah Turner of Charles County, Maryland, wrote to President George Washington and observed:

> Our Laws are too Numerous. Is it not possible that an alteration might take place for the benefit of the public?. . .Could it not be possible to curtail the Number of Lawyers in the different States? Suppose each State was to have but Two Lawyers to be paid liberally. . .[and] where a real dispute subsisted between Plaintiff and Defendant a reference [to arbitration] should be proposed, and arbitrators [be] indifferently chosen by both parties. . .whose determination shall be final.[1]

Arbitration had been in use in Maryland since at least the early 1600s, as was true in a number of the original colonies. However, centuries later, a notion developed that the courts in the United States had always been jealous of the arbitration process and that they consistently refused to grant enforcement of arbitration agreements. In *Gilmer v. Interstate/Johnson Lane Corp.*,[2] Mr. Justice White wrote that the purpose of the Federal Arbitration Act (FAA), first passed in 1925 and reenacted in 1947, "was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same

1. Record Group 360, National Archives, Washington, D.C. Turner added: "I would not mean to discourage the Study of Law, but I really find that the multiplicity of Students in that branch, in this State, has been an inconvenience to the Sons of reputable Parents and more so to the Parents themselves."

2. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

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Law and History Review February 2013, Vol. 31, No. 1

doi:10.1017/S0738248012000740

footing as other contracts." The point was explained more fully in the 1924 House Report on the bill that became the FAA:

> The need for the law arises from an anachronism of our American law. Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the grounds that the courts were thereby ousted from their jurisdiction. This jealousy survived for so long a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts. The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment.[3]

A good illustration of the attitude of the American courts is the opinion by Justice Story in *Tobey v. Bristol*.[4] The ultimate holding in the case was narrow,[5] but in a rambling opinion issued only months before his death in September 1845, Justice Story assessed whether an agreement to arbitrate could be specifically enforced in court. He said that, "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," adding that, "So far as the authorities go, they are altogether the other way."[6] All of the authorities cited by Justice Story were English cases, including *Wellington v. Mackintosh*[7] and *Kill v. Hollister*.[8] Those two cases came to stand for the principle that private parties could not, by agreeing to arbitrate, oust the courts of jurisdiction. In part because of inaccurate reporting, *Wellington* and *Kill* had been misinterpreted;[9] nonetheless, as stated in the 1924 House Report (quoted above), the "no-ousting" principle became embedded in English law and then traveled to America.[10]

3. H.R. Rep No. 96, 68th Cong., 1st Sess., 1–2 (1924).

4. *Tobey v. County of Bristol*, 23 F.Cas. 1313 (C.C. Mass. 1845).

5. As stated in the West headnote: "Under a statute authorizing county commissioners to refer to arbitrators the claims of a person against the county, the commissioners have no authority to submit a part only of his claim." Ibid. 1317.

6. Ibid., 1320.

7. *Wellington v. Mackintosh*, 2 Atk. 569 (1743).

8. *Kill v. Hollister*, 1 Wils. 129 (1746).

9. For an explanation, relying on manuscript reports of both cases, see James Oldham, "Detecting Non-Fiction: Sleuthing among Manuscript Case Reports for What was Really Said," in *Law Reporting in England*, ed. Chantal Stebbings (London: Hambledon, 1995) 133, 138–40.

10. In *Thomson v. Charnock*, 8 T.R. 139 (1799), the plaintiff sued for breach of covenant, and the defendant's answer (the plea) was that it had been agreed in the contract (the charter-party) to refer any dispute to arbitration. Chief Justice Kenyon of the Court of King's Bench would not allow the plea, declaring that "it is not necessary now to say how this point ought to be determined if it were res integra, it having been decided again and again that an

Justice Story acknowledged the then-modern view favoring arbitration, especially in commercial nations, but he said that whenever arbitration was made compulsive, it was pursuant to legislation that equipped arbitrators with all powers necessary for effective decision making, but with the safeguard that arbitration decisions could be appealed to the courts. He thought that the limited experience in America with compulsive arbitration had been lackluster at best, and, "At all events, 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 the common law."[11]

We will demonstrate that Justice Story's description of the status of arbitration in America in his time was simply wrong. First, however, let us fast-forward to see how arbitration in America fared during the twentieth century, continuing to the present.

In the famous *Lincoln Mills* case,[12] Mr. Justice Douglas spoke for the Court in championing the arbitration process in the context of collective bargaining agreements governed by the National Labor Relations Act, which the Court declared enforceable in federal district court by virtue of §301 of the Taft-Hartley amendments of 1947. Three years later in the *Steelworkers Trilogy*,[13] the Court reaffirmed and reinforced its endorsement of arbitration of labor disputes. These cases afforded protection to unionized employees, which was thought important because of the supposed inapplicability of the Federal Arbitration Act. That Act contains a provision that exempts "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[14] The lower federal courts for some time struggled with the meaning of this exemption, but not until 2001 did the Supreme Court face the question. In *Circuit City Stores, Inc. v. Saint Clair Adams*,[15] the Court concluded that the provision, taken in the context of the circumstances surrounding its enactment, "exempts from the FAA only contracts of employment of transportation workers."[16] The Court divided five to four, and Justice Kennedy, writing for the majority, repeated the

agreement to refer all matters in difference to arbitration is not sufficient to oust the Courts of Law or Equity of their jurisdiction." 140.

11. 23 F.Cas. at 1321.

12. *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957).

13. *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

14. 9 U.S.C. §1.

15. *Circuit City Stores, Inc. v. Adams*, 532 U.S.105 (2001).

16. Ibid., 119.

observation that "the FAA was a response to hostility of American courts to the enforcement of arbitration agreements, a judicial disposition inherited from then-longstanding English practice."[17]

In *Circuit City*, as a condition of getting his job, an employee was required to sign an arbitration provision agreeing to settle by arbitration any dispute whatsoever relating to his employment, including claims that might arise under Title VII of the Civil Rights Act of 1964. Such sweeping "take-it-or-leave-it" arbitration provisions can be attacked as unconscionable as a matter of state contract law,[18] but for present purposes, this background is to illustrate the consistent endorsement of arbitration by the Supreme Court ever since *Lincoln Mills*,[19] in contrast to the supposed jealousy of the arbitration process in early American courts.

Arbitration in the Colonies and Early Republic

A representative case from the late eighteenth century is *Borretts v. Patterson*,[20] a 1799 North Carolina action of debt on an arbitration bond. The defendant was a factor who, for a commission, received and offered for sale the merchant-plaintiffs' goods, and a dispute arose over accounts claimed by plaintiffs to be owing. The parties submitted the dispute to arbitration, and the arbitration bond recited the defendant's agreement to be bound by the decision of named arbitrators, otherwise to forfeit the amount of the bond. The named arbitrators determined that defendant owed plaintiffs more than £400, but amounts owing to Patterson from buyers of the goods were to be deducted, provided Patterson had used due diligence in trying to collect from the buyers. Patterson refused to honor the award, and defended in court by arguing that the award was too indefinite and open-ended to be enforced. The court rejected Patterson's argument, declaring that rigorous application of rules of construction of arbitration awards or the use of "endless subtlety of refinement would be, in truth, to render awards of no use, in the main purpose of their introduction–re-adjusting the controversies of men, before a domestic tribunal, unattended with expense, trouble or delay."[21]

17. Ibid., 111.

18. See, for example, *Circuit City Stores, Inc. v. Mantor*, 335 F.3d 1101 (9th Cir. 2003), cert. denied 540 U.S. 1160 (2004) (arbitration agreement substantively unconscionable under California law).

19. For recent cases in addition to *Circuit City*, see *Eastern Associated Coal Corporation v. United Mine Workers of America*, 531 U.S. 57 (2000); *Green Tree Financial Corp. v. Randolph*, 530 U.S.1296 (2000); *Major League Baseball Players Association v. Garvey*, 532 U.S. 504 (2001); and *14 Penn Plaza v. Pyett*, 566 U.S. 247 (2009).

20. Tay. 37, 1 N.C. 126 (1799).

21. Ibid., 127.

Economy, informality, and speed have always been the chief hallmarks of the arbitration process, and that process was in place long before the North Carolina court's pronouncement in *Borretts*. The most extensive and accurate description of arbitration practices in colonial America is Bruce Mann's study of arbitration and community in pre-revolutionary Connecticut.[22] Mann states that seventeenth century arbitration in Connecticut was informal, neighborly, "a community affair."[23] He correlates changes in the arbitration process with changes in the character of community in the colony. As communities grew and became settled by land speculators, dispute settlement became less informal. This process accelerated in the second half of the eighteenth century, after arbitration was made the subject of legislation.[24]

The use of arbitration in seventeenth-century America was not unique to Connecticut. Other studies have pointed to early experience in other colonies, such as Eben Moglen's examination of practices in New York.[25] Of necessity, studies such as these are shaped by available records, and available arbitration records usually relate, in one way or another, to the courthouse. How extensive the practice of arbitration was among private citizens with no involvement of lawyers or the courts we will probably never know, as the only records of such practices will be happenstance. There are, nevertheless, good reasons to suppose that "private" arbitration had a widespread usage: reasons such as the heritage of the law merchant, familiarity of men of business with the process, and the use of arbitration by the Dutch in New York and by Quakers in Pennsylvania and New Jersey. As early as 1648, English barrister John March claimed that "Compromises or Arbitrements were never more in full use than now," and that "most men either have been or may be Arbitrators; or at least have done, or may submit themselves to the Arbitration of others."[26]

22. The fullest version is Bruce H. Mann, "The Formalization of Informal Law: Arbitration Before the American Revolution," *New York University Law Review* 59 (1984): 443. A somewhat abridged version was later presented as chapter 4 in Bruce H. Mann, *Neighbors and Strangers: Law and Community in Early Connecticut* (Chapel Hill: University of North Carolina Press, 1987).

23. Mann, "The Formalization of Informal Law," 451.

24. Ibid., 456, 468.

25. Eben Moglen, "Commercial Arbitration in the Eighteenth Century: Searching for the Transformation of American Law," *Yale Law Journal* 93 (1983): 135.

26. John March, *Actions for Slander, and Arbitrements* (printed for Elizabeth Walbanck, London, 1674 [first written in 1648]),149. In the 1674 edition, the section devoted to arbitration runs 171 pages. Even so, March was not the first to take up the subject in print. Arbitration is treated, although in much less depth, in the writings of Sir John Doddridge, a seventeenth century judge on the Court of King's Bench. John Doddridge, *The Lawyers Light* (printed for Benjamin Fisher, London, 1629), 17 and following; also,

Whatever its "private" history, arbitration was a regular part of the customs of colonial courts. The seventeenth century custom took the form of what was called a "reference": the consensual removal of pending litigation from the court docket and the referral of the dispute to arbitration. This practice emerged in both England and the American colonies in the mid-1600s. In the discussion to follow, we augment Bruce Mann's exposition of the Connecticut experience with specifics from early legislation and archival records of Pennsylvania and Maryland. In addition, we refer to early American statutes that authorized or endorsed the procedure by which arbitration submissions were made rules of court. The latter requires an understanding of a 1698 English statute drafted by John Locke.

The John Locke Statute: Submissions Imitating References

In England in 1698, Parliament enacted an arbitration statute that had been drafted by John Locke.[27] In drafting the statute, Locke was executing an assignment for the Board of Trade, of which he was a member. He clearly was seeking a formula that would encourage private dispute settlement between merchants without legal entanglement. Locke was not an admirer of the legal profession. In his journal for 1674, he listed among those who hindered trade, "Multitudes of lawyers."[28]

The formula produced by Locke, which became the 1698 statute, was ingenious. The foundation upon which it stood was the well-understood practice of consensual referrals of litigated cases to arbitration. Referrals, or "references," as they were called, had an important advantage that private arbitration lacked. When a reference was agreed to, the agreement was made a rule, that is, an order, of court. This made the arbitration agreement, and often the award as well, enforceable through the contempt power.[29]

John Doddridge, *The English Lawyer* (printed by the assignees of I. More, Esq., London, 1631) 129, 166–190.

27. For the background and development of the statute, see Henry Horwitz and James Oldham, "John Locke, Lord Mansfield, and Arbitration During the Eighteenth Century," *The Historical Journal* 36 (1993) 137.

28. Ibid., 139, citing Locke MS C 30, fol. 18, Bodleian Library, Oxford, and Patrick H. Kelly, ed., *Locke on Money* , 2 vols., (Oxford: Oxford University Press, 1991) II:485–86.

29. William Blackstone claimed that, as a consequence of the 1698 legislation, "it is now become a considerable part of the business of the superior courts, to set aside such awards when partially or illegally made; or to enforce their execution, when legal, by the same process of contempt, as is awarded for disobedience to such rules and orders as are issued by the courts themselves." William Blackstone, *Commentaries on the Laws of England*, (Chicago: University of Chicago reprint, 1979; originally published 1768) III:17.

What John Locke did was to contrive a way for private parties wishing to arbitrate to have the advantage of the contempt power without having to commence active litigation. The trick was to allow the parties to *pretend* to litigate; to "paper" their arbitration as if it were an active lawsuit by going to the clerk's office and paying a fee in order to have the submission agreement entered in the rule book. No pleadings or other litigation records were required. The simple entry in the rule book made the contempt power available, and this is what the 1698 statute explicitly allowed. Over the course of the eighteenth century, submissions to arbitration under this statutory authority became commonplace, increasing in number as the century progressed.[30] By the 1790s, the Locke statute had become so well known that it turned up in satirical verse about lawyers. In the *Pleader's Guide*, the description of a country attorney—a "worthy little friend" named Joe Ferrett—includes the following:

> A friend to all who are oppress'd,
> And seek by Law to be redress'd,
> One that abhors all Compositions,
> All mean *Retraxits*, and *Submissions*,
> Scorns *Arbitrations* as a stain,
> To *ninth* and *tenth* of William's Reign,
> Acts, which he deems mislead his Clients,
> Cramp Genius, and degrade the Science[31]

What was the experience in America with the 1698 statute? No one has systematically examined the extent of American adoptions of the statute or private agreements taking advantage of it. The first of these—legislative adoptions—can be located in printed sources,[32] but most contractual applications can be found only in manuscript sources, if at all. As to the statutes, some understanding is needed of how, or the extent to which, English statutes became law in the colonies and states. In this description, we rely

30. See Horwitz and Oldham, *supra* n.27 above, at 145–147.

31. John Anstey, *The Pleader's Guide, a Didactic Poem, In Two Books, Containing the Conduct of a Suit at Law* (London: T. Cadell, Jr. and W. Davies, 1796), 70–71. The author explained with the following footnote: "*Arbitrations*–By the 9 and 10 W. 3d. c. 15, it is enacted, That Merchants, Traders, and all persons desiring to end their controversies by Arbitration, may agree that their *submission* of their Suit to the Award or Umpirage of any person or persons should be made a rule of any of his Majesty's Courts of Record; and in case of disobedience to such Award or Umpirage, the parties neglecting or refusing to perform the same, shall be subject to all Penalties of contemning a Rule of Court."

32. For example, Bruce Mann notes the adoption in 1753 in Connecticut of a variation of the Locke statute. Mann, "The Formalization of Informal Law," 468–69.

almost entirely on the excellent work by Elizabeth Gaspar Brown, *British Statutes in American Law.*[33]

The extent to which inhabitants of the British colonies in North America carried with them the common and statutory laws of England was hotly debated in the years of American colonization. As British subjects, most American colonists believed they were entitled to invoke all English statutes and common law, and considered this an important right of their citizenship. The English, however, did not agree.

Each American colony was launched with a charter from the "King in Parliament." The charters gave settlers the right to enact laws, as long as they were not contrary to the laws of England. The charters also reserved the right of the King to legislate for the colonies. Typically, they contained a declaration that the colonists were not to be deprived of their "liberties and immunities" as English subjects.[34]

Despite this language, it was not the Crown's intention literally to transplant intact the laws of England to the American colonies. Rather, the English view was that the details of which laws applied in America would be worked out on a case-by-case basis, as different fact patterns arose.[35] This position was based on the theory that whether colonists carried English laws with them depended upon whether the settled lands were inhabited or uninhabited, and whether they were made by English conquest or cession. If the land was uninhabited, the colonists took with them "all laws in force in England." If it was inhabited, the colonists did not directly carry the laws with them, but the King had the power to declare which laws would be in force.[36] England considered that the American colonies were inhabited and were taken by conquest or treaty; therefore, the colonists did not take the laws with them automatically.[37]

The English view was that statutes enacted by Parliament after the date of a colony's settlement by conquest could be considered in force there in two different ways. First, if an act of Parliament was specifically extended to one or more colonies, it was in force there. Second, an act of Parliament could be "received" in the colony by an act of the colonial legislature, or by long-accepted usage or practice of colonial courts.[38] Blackstone in the first volume of his *Commentaries*, published in 1765, explained the English position as follows:

33. Elizabeth Gaspar Brown, *British Statutes in American Law 1776–1836* (Ann Arbor: University of Michigan Law School, 1964).

34. Ibid., 4.

35. Ibid., 7.

36. Ibid., 12.

37. Ibid., 13.

38. Ibid.

> Our American plantations are principally of this latter sort [conquered or ceded countries], being obtained in the last century either by right of conquest and driving out the natives. . .or by treaties. And therefore the common law of England, as such, has no allowance or authority there; they being no part of the mother country, but distinct (though dependent) dominions. They are subject however to the control of the parliament; though (like Ireland, Man, and the rest) not bound by any acts of parliament, unless particularly named.[39]

American colonists disagreed with the notion that the colonists did not automatically carry English statutory and common law with them. Their position was that the American lands were uninhabited when the colonists arrived, as they were really the first settlers after the Indians vacated. The only exceptions were New York and New Jersey, which had been ceded by the Dutch.[40] In Virginia, the sentiment was that the settlers had driven away a savage, lawless people and inhabited unsettled land; therefore, Virginia authorities believed that they brought the common law of England with them when the colony was first settled in 1607. English cases decided after 1607 were considered binding, not persuasive, authority in Virginia's courts.[41]

The colonists employed three major challenges to the English position. First, they argued that language in the colonies' charters about being "agreeable to the laws of England" constituted a grant of the laws of England. Second, they argued that the charters' grants of the "rights and privileges" of Englishmen were grants of the laws. And third, colonial legislatures attempted to incorporate large numbers of British statutes into their own laws by reference, although the Crown often disallowed such measures.[42] It was also accepted that some English statues took root in the colonies through "uninterrupted usage and practice."[43]

England's arbitration statute of 1698 had two main provisions: 1) allowing out-of-court agreements to arbitrate to be made rules of court by a process of submission by the affidavit of either party in "any of his Majesty's Courts of Record"; 2) establishing that a defaulting party to any arbitration agreement entered as a rule of court shall be subject to the penalties of contempt of court.[44] The statute did not include an express provision

39. Blackstone, *Commentaries,* I:105.

40. Brown, *British Statutes*, 16.

41. W. Hamilton Bryson, "English Common Law in Virginia," *Journal of Legal History* 6 (1985) 249, 253

42. Brown, n. 33, 17.

43. Ibid., 19. See the Pennsylvania experience described below (text at notes 47–100) and the Maryland example (notes 101–24).

44. "An Act for Determining Differences by Arbitration," 9 & 10 Will. 3, c. 15, at 697 (1698).

stating that it applied to the colonies. Therefore, its status in each American colony would have depended upon whether it had been "received" by the colony through a declaration of the legislature, or through usage and practice.

We have attempted to identify all of the statutory adoptions. There are at least twenty-two, some from the colonial era, some after statehood, and some from the territories.[45] All of these contain the basic formula

45. The colonies/states/territories in question are: Alabama, Arkansas, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Kentucky, Maine, Massachusetts, Michigan, Mississippi, Missouri, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Vermont, and Virginia. See "An Act providing for the determination of suits and controversies, by arbitration," *1819 Alabama Acts* 58; Ch. IX, "Arbitrators and Awards," William McBall and Sam C. Roane, *Revised Statutes of the State of Arkansas* 103 (1838); "An Act for the more easy and effectually finishing of Controversies by Arbitration," *1753 Connecticut Colony Acts & Laws* 268, microformed on *Colonial Session Laws* (William S. Hein); Ch. V, "An Act about Defalcation" and Ch. VI, "An Act concerning Awards," Willard Hall, *Laws Of The State Of Delaware: To The Year Of Our Lord, One Thousand Eight Hundred And Twenty Nine Inclusive: To Which Are Prefixed The Declaration Of Independence And Constitution Of The United States* (Wilmington: Porter & Son, 1829 rev. ed), 111–12; "An Act, Concerning Awards and Arbitrations," *1823 Acts of the Florida Legislative Council* 28, microformed on *Session Laws of American States and Territories*, Florida Territory, 1822–1845, Fiche 4 (Redgrave Info. Res.); "An act for determining differences by arbitration," William Schley, *Digest of the English Statutes in Force in the State of Georgia* 302 (1826); "An Act authorizing and regulating Arbitrations," *1819 Illinois Laws* 71; "An Act authorising and regulating arbitrations, "*1818 Indiana Acts* 320; "An Act concerning Awards," *1798 Kentucky Acts* 57; "An Act for rendering the decision of Civil Causes as speedy and as little expensive as possible," 1 *Laws of the State of Maine* 361 (1821); "An Act for rendering the Decision of civil Causes, as Speedy, and as little expensive as possible," *1786 Massachusetts Acts* 474; "Of reference to arbitration by agreement before a justice of the peace," *Revised Statutes of the State of Michigan* 531 (1838); "An Act, concerning Arbitrations and Awards," *1822 Mississippi Laws* 99; "An Act regulating Arbitrations and References," 1 *Laws of the State of Missouri* 137 (1825); Ch. 36, "An Act in Addition to an Act Intitled an Act for the More Speedy Recovery of Small Debts and to Save Cost Usually Attending the Recovery thereof in the Present Course of Law" (Dec. 16, 1796) and Ch. 17, "An Act for Rendering the Decision of Civil Causes More Speedy and Less Expensive than heretofore" (June 21, 1797), in *Laws of New Hampshire: Including Public and Private Acts*, *Resolves, Votes, etc., Second Constitutional Period 1792–1801*, vol. 6 (Concord: Evans Printing, Co., 1917), 380, 409; "An Act for regulating References and determining Controversies by Arbitration," *1794 Acts of the Eighteenth General Assembly of the State of New Jersey* 965; "An Act for determining Differences by Arbitration," (enacted 1791), 1 *Laws of the State of New York* 156 (1802); "An Act authorizing and regulating arbitrations," *1799 Acts Published by the Governor and Judges of the Territory of the United States, North-West of the River Ohio* 44, microformed on *Session Laws of American States and Territories, Northwest Territory, 1788–1801*, Fiche 3 (Redgrave Info. Res.) and "An Act, authorising and regulating arbitrations," 1805 Ohio Laws 140; "An Act for Defalcation," (enacted 1705), John W. Purdon, *Digest of the*

that permitted an arbitration agreement to be entered in court rule books as if an actual lawsuit had been filed, and to be given the same effect as any other court order. Some are direct copies of the Locke statute, and in some jurisdictions other than the twenty-two with statutory adoptions, there is evidence that the 1698 statute was tacitly adopted by usage.[46]

Notes from Pennsylvania

The Pennsylvania legislature adopted in 1806, and expanded in 1808 and subsequently, a full-fledged "Lockeian" scheme for submissions to arbitration that could be made rules of court.[47] These statutes were essentially a legislative ratification of eighteenth century practice and usage that had been built upon a narrow 1705 enactment.

Laws of Pennsylvania 44 (M'Carty & Davis 1831) and "An Act to regulate Arbitrations and proceedings in Courts of Justice," 4 Smith 326 (March 1806), as cited by Purdon; "An Act prescribing the Manner of Proceeding in Courts," in *The Public Laws Of The State Of Rhode-Island And Providence Plantations: As Revised By A Committee, And Finally Enacted By The Honourable General Assembly, At Their Session In January, 1798* (Providence: Carter and Wilkinson, 1798), §§ 15–16, pp. 161–76; Ch. VI, "Of the Judiciary" (passed March 2, 1797), § 79, pp. 85–86, Ch. VIII, "Of Probate of Wills, and Settlement of Estates" (passed March 10, 1797), No. 1, § 85, p. 156, Ch. XI, "Of the Jurisdiction of Justices of the Peace" (passed March 4, 1797), No. 1, §§ 31–33, pp. 181–82 in *The Laws Of The State Of Vermont, Digested And Compiled, Including The Declaration Of Independence, The Constitution Of The United States, And Of This State*, 2 vols. (Randolph: Sereno Wright, 1808), I:85, 86, 156, 181–82; and "An Act concerning Awards," *1789 Virginia Acts*, Ch. LII.

46. In the Provincial Court of Maryland records, starting in 1712, arbitration entries begin to employ the phrase, "according to the form of the statute." There was no Maryland statute at the time to which this expression could refer. It is logical and likely that the reference was to the 1698 English statute. (The 1712 case reflecting the earliest use of the expression that we have discovered was *Carey v. Jessup*, Maryland Statutes Annotated (hereafter "MSA")/ Provincial Court Judicial Records (hereafter "PCJR"), Liber TP #2, April Term 1712.) Further, William Kilty in his Report on English Statutes in Maryland (see text following n. 119) states that "[i]t would seem . . . that this statute [the 1698 act] had been considered in force in the province" prior to 1778. William Kilty, *A Report of All Such English Statutes As Existed At the Time Of the First Emigration Of the People Of Maryland, and Which By Experience Have Been Found Applicable To Their Local and Other Circumstances; and Of Such Others As Have Been Made In England Or Great-Britain, and Have Been Introduced, Used and Practised, By the Courts Of Law Or Equity; and Also All Such Parts Of the Same As May Be Proper To Be Introduced and Incorporated Into the Body Of the Statute Law Of the State*. (Annapolis: Jehu Chandler, 1811) 181.

47. "An Act to regulate Arbitrations and proceedings in Courts of Justice," March 1806. Another part was added in 1808 and was reworded in 1810 with much more detail. The statute was supplemented in 1813, 1820, 1821, 1824, and 1825. John W. Purdon, *Digest of the Laws of Pennsylvania* (Philadelphia: M'Carty & Davis, 1831) 45–56.

1705 Defalcation Statute

The pre-1806 experience in Pennsylvania with arbitration was unusual and illuminates how ready the courts were to embrace the arbitration process even without clear statutory authorization. The only pre-nineteenth century statutory treatment of arbitration was a 1705 law entitled, "An Act for defalcation."[48] The third section of this statute provided as follows:

> That in all cases where the plaintiff and defendant having mutual accounts to produce one against another, shall by themselves or attorneys or agents consent to a rule of court for referring the adjustment thereof to certain persons mutually chosen by them in open court, the award or report of such referees being made according to the submission of the parties and approved of by the court, and entered upon the record or roll, shall have the same effect, and shall be deemed and taken to be as available in law as a verdict given by twelve men, and the party to whom any sum or sums of money are thereby awarded to be paid, shall have judgment or a *Scire Facias* for the recovery thereof as the case may require, and as is herein before directed concerning sums found and settled by a jury, any law or usage to the contrary of this act in any wise notwithstanding.

Despite the apparent narrowness of this statute and its requirement of approval by the court, James Dallas reported that in Pennsylvania, as of 1790, referees handled "a very great share of the administration of justice."[49] This happened by the open encouragement of the courts, with virtually no legislative guidance.

Even though the defalcation statute was not a copy of the English statute, the Pennsylvania Assembly in 1705 clearly borrowed and adapted the Lockean formula, but took only a conservative first step applicable to a narrow category of accounts disputes. Logically by negative inference, we can assume that the Assembly did not intend to extend the Lockean formula to other types of disputes. Nevertheless, Chief Justice M'Kean stated in 1789 in the case of *Primer v. Kuhn* that, "although the words [of the Defalcation Act] are confined to the case of accounts, yet the construction of the Act has liberally extended the right and benefit of such a reference, to every other cause of action."[50] A prominent treatise of the day supported this assertion. The editor of the first American edition of Stuart Kyd's *Treatise on the Law of Awards*, published in Philadelphia in 1808, prepared detailed notes on Pennsylvania arbitration practice, and after pointing out the limited scope of the 1705 statute, stated, "But the law has been

48. A. James Dallas, comp., *Laws of the Commonwealth of Pennsylvania* (Philadelphia: Hall and Sellers, 1797) I:65–66.

49. Dallas, *Reports* I:vi.

50. *Primer v. Kuhn*, 1 U.S. 452, 456 (Pa. 1789).

extended by construction not only to every other cause of action, but to cases in which there is no mutuality of demand; so that at this day there is no species of civil controversy known to the law of Pennsylvania for the adjustment of which the parties may not call in aid this act of assembly."[51] Later in the treatise, remarking on the validation of agreements reached during court vacations and entered on the books by the prothonotary, the editor observed that the 1705 statute had been "completely twisted . . . from its spirit as well as its letter with a view to extend its benefits to every case."[52] Further, he noted that "this species of award has entirely silenced one of its competitors at common law; and among all the printed reports in Pennsylvania, there is not to be found a single reference by rule of court, to which the principles which govern awards made under a rule of Nisi Prius in England, have been applied."[53] But the fact that no references are to be found in the printed reports does not mean that they did not happen. As the editor observed elsewhere, "it is a matter of perfect notoriety, and of infinite inconvenience to the bar of Pennsylvania, that they are compelled to grope for the practice of the state courts, among the imperfect and sometimes conflicting recollections of experienced men."[54]

In *Lessee of Dixon v. Morehead,*[55] a dispute over title to real estate had resulted in a jury verdict for plaintiff, despite a prior arbitration award in defendant's favor. In deciding to grant the defendant's motion for a new trial, the president judge of the Westmoreland County Court, Alexander Addison, surveyed the types of arbitration then prevalent in England and compared them to those adopted in Pennsylvania. He identified three types employed in England: two at common law, one by statute. The first common law type was a simple agreement to arbitrate where there was no lawsuit, and in such cases, "the award of the arbitrators binds the parties" and if not obeyed by one party, "the other has his remedy, by an action at law, either on the submission, or on the award."[56] The second common law type was the reference after the commencement of a lawsuit, withdrawing the case from the court or jury and making the reference to arbitration a rule of court. The third type was the John Locke 1698 statutory formula permitting a submission to be made a rule

51. Stuart Kyd, *A Treatise on the Law of Awards*, first American ed. (Philadelphia: William P. Farrand and Co., 1808) 34a. See, for example, *Mays v. Mays*, 33 Watts 561 (Pa. 1838) (recognizing the defalcation act's application to trover actions); and *Massey v. Thomas*, 6 Binn. 333 (Pa. 1814) (stating the court would have extended the defalcation statute to ejectment actions, if necessary).

52. Kyd, *Treatise*, 34d.

53. Ibid., 34b.

54. Ibid., 326a.

55. Addison's Reports 216 (Westmoreland County Court, 1794).

56. Ibid., 225.

of court even though no actual lawsuit existed. Counsel for defendant in *Lessee of Dixon* argued that the Pennsylvania 1705 defalcation statute "is in imitation of the act of parliament 9 and 10 *William* 3, and meant the same thing and no more,"[57] but President Judge Addison disagreed. He said that, "Our act of assembly, in cases of mutual accounts, did not copy this *English* statute, but introduced into *Pennsylvania* a fourth species of awards, which differs . . . in this, that the [referees'] report, when approved by the court, is to be proceeded on, as a verdict, by judgment, and then by execution or *scire facias*, as the case may be, not by attachment."[58] Chief Justice M'Kean of the Pennsylvania Supreme Court had earlier reached the same conclusion and had noted a difference between the 1698 Lockean statute and the 1705 defalcation statute:

> This act differs essentially from the statute of W. 3. in many respects, but particularly, that to render a report, or award, valid and effectual, the former requires, that it be approved by the Court; but no such provision is made by the latter, and, therefore, awards under rules of Court, are conclusive in England, unless some corruption, or other misbehaviour, in the Arbitrators is proved.[59]

In Pennsylvania, a close cousin to the arbitration process was a procedure called an "amicable action." This procedure was also linked to the 1705 defalcation statute, and it was used to collect debts.[60] The action took the form of a judgment of confession, which was a "judgment entered on an acknowledgment of indebtedness without the formality, time or expense, involved in an ordinary adverse proceeding."[61] Judgments in amicable actions had the finality of a jury verdict,[62] the parties agreed to forego the usual steps in instituting formal actions, and courts, in turn, indulged the informal processes that parties used.[63] Because of the laxity with

57. Ibid., 221.

58. Ibid., 225.

59. *Williams v. Craig*, 1 U.S. 313, 314–15 (Pa. 1788).

60. *Herman v. Freeman*, 8 Serg. & Rawle 9 (Pa. 1822). See also our discussion of manuscript sources below, text at nn. 67–85.

61. Richard Henry Klein, *Judgment by Confession in Pennsylvania*. (Philadelphia: George T. Bisel, 1929) 2. Judgments of confession could be entered with or without a warrant of attorney, or by the prothonotary. See, generally, ibid., for a description of amicable action practice under common law and statutory law.

62. Ibid., 2–3.

63. Pittsburgh Term. *Coal Corp. v. Potts*, 92 Pa. Super. Ct. 1 (1927) ("Judgments rendered in amicable actions do not depend for their validity upon conformity with the provisions of any act of assembly; such actions and judgments are not statutory but were well known at common law and sec. 40 of the Act of June 13, 1836, P. L. 572, 579, is merely a recognition of an established common law practice."). Robert Sprenkle further elaborated: "The manner in which the agreement for the confession of judgment in an amicable action was carried into

which amicable actions were used, confusion was inevitable. As stated by Robert Sprenkle:

> [U]nfortunately, in practice, the distinction between the confession of judgment by an attorney and the entry of judgment by the prothonotary and the different procedures has not always been maintained. Much of the confusion of the legal principles in the reported decisions is caused by this failure to maintain the distinction between the various methods for the confession of judgment.[64]

Manuscripts from Pennsylvania State Archives

Our survey of manuscript sources in Pennsylvania reveals that amicable actions and rules of reference were both widely used to settle disputes over debt and other matters. There were at least three amicable action patterns. In some cases the defendant confessed judgment without dispute and without the intervention of a neutral third party. In other cases, amicable actions were set down for trial, with a jury determining whether the defendant owed the plaintiff any money, and if so, how much. In a third variation, amicable actions were referred to arbitrators for resolution.[65] More common than any of these amicable actions, however, was the familiar rule of reference.

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effect was not of great importance and the courts under prior practice never required strict conformity to a standard practice. Therefore, the procedure varied from the filing of a simple declaration by one attorney acting for both parties to the filing of a praecipe for a summons and a self-sustaining complaint with affidavit, followed by a confession with the instrument containing the power of attorney attached; nor was it important . . . that any particular phraseology be used by the attorney in confession of judgment. It was the substance and not the form which was considered important." Robert C. Sprenkle, *Pennsylvania Confession of Judgement* (Philadelphia: Bisel Co., 1982) I, §4.2, pp. 10–11.

64. Sprenkle, *Pennsylvania Confession*, §3.1, 7 (see footnotes on that page for illustrative cases). In *Herman v. Freeman*, 8 Binn. 9 (Pa. 1822), the court characterized the action as a "reference under the Act of 1705" in which "the plaintiff and defendant consent to a rule of Court, for the adjustment of their controversies by persons mutually chosen by themselves." Therefore, it was an "entry of an amicable action, designating the parties as plaintiff and defendant, and a submission of all matters in variance between them under the Act of 1705." Although the text of the defalcation statute did not explicitly refer to amicable actions, they were eligible for the submission process. Such widely disparate practices have made classifying amicable actions difficult.

65. See *Mays v. Mays*, 33 Watts 561 (Pa. 1838) ("Amicable action of trover . . . in which . . . we do nominate and appoint Simon Drum, William M'Kinney and Randal M'Laughlin arbitrators."); *Massey v. Thomas*, 6 Binn. 333 (Pa. 1814) ("Amicable action of ejectment . . . . All matters in variance and controversy between the parties respecting a boundary line between them, referred to [seven persons] who, or any four to decide; and the said parties request the prothonotary to grant an order accordingly.").

As discussed previously, Justice Story in *Tobey v. Bristol* claimed that arbitration in America was neither useful nor convenient.[66] However, contrary to Justice Story's assertion, Pennsylvania courts had long recognized the use and value of arbitration agreements. A sampling of submissions taken from the Eastern District of Pennsylvania from 1785 to 1806 illustrates the extent to which parties used arbitration to settle their claims.[67] A wide cross-section of people used both rules of reference and amicable actions.[68] Of 300 cases that we examined, 229 were rules of reference and 71 were amicable actions.[69] Some of the wealthiest and most prominent Pennsylvanians of the day used arbitration, including Benjamin Franklin, Oliver Pollock,[70] John Nixon,[71] and Stephen Girard,[72] several of whom were repeat players. Judging from the rough hand and tortured spelling and grammar of some of the agreements, a

66. See above, text at nn. 4–11.

67. The State Archives in Harrisburg, Pennsylvania hold over a thousand manuscripts of such actions (dating from 1762 to 1837), 300 of which we compiled as a representative sample.

68. Record Groups 33.9 and 33.99, respectively.

69. The sampled documents were all filed in the Eastern District of Pennsylvania, which included the city of Philadelphia and neighboring counties. Arbitration practice may have differed in less urban parts of the state.

70. Oliver Pollock is often credited with the creation of the United States dollar sign, and he was a major financier of the American Revolution. He later fell on hard times, but Congress discharged his debts in 1791. However, that same year, his financial woes returned, and he fell into debt yet again in 1800. See, generally, James A. James, *Oliver Pollock; the Life and Times of an Unknown Patriot* (New York: D. Appleton-Century Co., 1937). There are several rules of reference and amicable actions pertaining to him for those 2 years. See, for example, *Wright v. Pollock* (Pa. 1791) #102–03; *Thomas v. Pollock* (Pa. 1801) #323–24; *Leiper v. Pollock* (Pa. 1801) #325; and *Smart v. Pollock* (Pa. 1800) #327–29.

71. John Nixon was also a financier of the Revolutionary War. He was involved in politics and fought alongside General Washington in various battles, including Valley Forge. He became the first director of the Bank of Pennsylvania in 1780 and helped organize the Bank of North America (1781–1782), which he served as President from 1792 until his death in 1808. *1 Penn. Mag. of Hist. and Biog.* (Philadelphia: Historical Society of Pennsylvania, 1877) 188–202. For cases involving Nixon as a party, see, for example, *Read v. Nixon* (Pa. 1801) #1015–19 (involving a dispute between partners, in which the parties decided the jury would decide whether the plaintiff was entitled to half of Mr. Nixon's salary as bank president, while referees would handle all other matters); and *Macarty v. Nixon* (Pa. 1785) #860–63. For a case naming Nixon as a referee, see *Sibbald v. Mariner* (Pa. 1795) #1078–80.

72. Girard was a French-born, naturalized American, philanthropist, and banker. He almost single-handedly saved the United States government from financial ruin during the War of 1812 (his bank underwrote up to 95% of the government's war loans), and he became one of the wealthiest men in America. He devoted much of his fortune to philanthropy. See, generally, Cheesman A. Herrick, *Stephen Girard Founder* (Philadelphia: Girard College, 1923).

substantial number of uneducated members of the lower social classes also participated in the arbitration process. Participants in the arbitration process used it for a variety of purposes, including property disputes,[73] determining property boundaries,[74] interpreting wills,[75] ejectments, and maritime law.[76] Parties sometimes gave the referees the power to order interrogatories,[77] depositions,[78] and other evidence.[79] The referees at times had extraordinary powers, and the prothonotaries often served as more than mere clerks. There were times when parties could not agree on referees, in which case the prothonotaries would appoint them.[80] Or, if the case had been set for trial, the jurors could simply become the referees.[81]

One aspect of Justice Story's criticisms of arbitration had at least partial validity. As he said, "we all know, that arbitrators, at the common law, . . . 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*."[82] There were instances in which the referees stated that the issues submitted to them were too complex for them to resolve, so they returned the case to the court.[83] These cases were, however, the exceptions. Certain

73. *Leaming v. Steinmetz* (Pa. 1789) #554–55 (involving the plaintiff's right of dowry and a possible set-off using a licensed right of way).

74. *Wilkoff v. Cresson* (Pa. 1806), #168–69; *Smith v. Saunders* (Pa. 1801), #178–80; and *Peaceable v. Willing* (Pa. 1798) #452–66.

75. *Ware's Lessee v. Fisher* (Pa. 1800) #115–18.

76. *Thurin v. Bell* (Pa. 1794) #409–10 (involving an insurance policy on a ship's lost freight).

77. *Hill v. Hughes* (Pa. 1800) #1171–74.

78. *Wilcox v. Bunell* (Pa. 1806) #811–13; *Mussi v. Rousseau* (Pa. 1800) #619–20; *Neill v. Neill* (Pa. 1800) #896–901; and *Wallis v. Wilson* (Pa. 1797) #145–46.

79. *Lovel v. Gilchrist* (Pa. 1798) #482–86 (empowering the referees "to hear the proofs and allegations of the parties with power to examine them on oath to wit on their own adjournments and to procure such other evidence as shall be competent to satisfy their minds on the Subjects in Controversy."); also *Williams v. Redman* (Pa. 1787) #221–23.

80. See, for example, *McKean v. Leiper* (Pa. 1805) #745–47 (in which the prothonotary had fixed the number of referees at five because the parties could not agree on a number. "The plaintiff then named twelve persons all of whom were objected to by the defendant and the prothonotary thereupon made out a list of twenty-five names and the parties alternately struck out the names each leaving [named people] . . . as the arbitrators.").

81. *Walsh v. Simmons* (Pa. 1802) #108–12 (in which all but three of the original jurors became referees); *McDonald v. Green* (Pa. 1797) #645–46; and *Thurin v. Bell* (Pa. 1794) #409–10 (all twelve jurors were converted to referees).

82. *Tobey*, 23 F. Cas. at 1321.

83. *Walsh v. Simmons* (Pa. 1802) #108–12. The original referees said they were dissatisfied with their report because the issues had been complicated and involved points of law "they [did] not feel themselves competent to decide, and desire[d] for the sake of Justice that a new trial of it may be had." See also *Wilson v. Leiper* (Pa. 1797) #217–18

referees were highly sought after because of mercantile expertise that enabled them to resolve complicated disputes.[84] Often, referees were lawyers or men who had some knowledge of the law.[85] Based on the representative sample of arbitration practice that we examined, it is easy to see that, by the late eighteenth century Pennsylvanians were quite comfortable using arbitration as a means of solving legal disputes.

The 1698 Lockeian Statute, 1705 Defalcation Statute, and the Remedy of Attachment

A question not yet squarely addressed is whether all aspects of the 1698 English statute were operational in Pennsylvania during the eighteenth

("We the Referees having Examined the acct as above menshoned and finding our selves not Capible of Settleing the ____ [*sic*] beg that the Court will Take som other Remedey to settle the ___ [*sic*].").

84. Robert Ralston, a prominent merchant and philanthropist, was a repeat referee. *Peters v. Rodgers* (Pa. 1800) # 976–78; and *Peddreck v. Sommerl* (Pa. 1800) #948–50. See also *Hurst v. Ingram* (Pa. 1797) #1175–78 (merchant referees awarded the plaintiff £876 and ordered that he be exonerated and indemnified for a listed sum of money he had expended on the defendants' behalf while serving as their attorney); and *Marinho v. Giese* (Pa. 1795) #824-26. The agreement to refer in *Marinho* named Richard Rundle and James Yard as referees, among others. Both men were prominent merchants: Rundle was also real estate investor, director of the Bank of North America, and a manager of the Pennsylvania Hospital, whereas Yard owned a brick store and was also a shipping merchant. Kathleen Foster, *Captain Watson's Travels in America* (1997) and Abraham Ritter, *Philadelphia and Her Merchants* (Philadelphia: published by the author, 1860). In this complex case, the referees ordered the defendant (Giese) to give the power to receive goods originally consigned by himself to third parties over to Marinho – "sufficient powers to receive from Parish H Merchants of Hamburgh the dye wool consigned to them by Thomas Giese on the Ship Jane ____[*sic*] or the proceeds thereof if the same should be sold, the condition of which order or power shall be that the said Antonio Joze de Marinho do pay or cause to be paid to the said Parish H the amount of twelve hundred pounds sterling advanced by them to Thomas Giese." The award also ordered Giese to pay to Marinho a little more than £623 in exchange for security from Marinho to Giese to indemnify Giese if the dye wool was insufficient to reimburse Parish. The referees reserved the right to determine the "nature and form of the power" to receive the consigned goods and also the "competency of the security," and Giese would have legal recourse in the event that Giese remained liable to Parish for any sum greater than the security he was to receive from Marinho.

85. See, for example *Frances v. Pearce* (Pa. 1803) #1133–39 (providing that if the referees could not agree, they would appoint a "Gentleman of Eminence in the Law, namely William Tilghman Esquire."); *Ware v. Fisher* (Pa. 1800), #115–18 (interpreting a will in which the referees had to determine whether "children" was synonymous with "heirs of the body."); and *Levy v. Bartram* (Pa. 1790) #468–73, 556–59 (determining whether the plaintiff had any share in her deceased husband's estate as the heir and residuary legatee of a certain James Steele).

century. We earlier noted the remarks of Chief Justice M'Kean and President Judge Addison on the differences between the 1705 Defalcation Act and the 1698 Locke statute.[86] A report of the Pennsylvania Supreme Court judges to the state Senate and House of Representatives in December 1808, however, stated that the Lockeian statute had long been in force and ought to be incorporated in Pennsylvania law, despite the passage of the statutes in 1806 and 1808.[87] After much deliberation,[88] the judges wrote in a prefatory note that all the statutes that followed in the report were then in force in Pennsylvania, of which 9 and 10 Will. 3, ch. 15 was one and ought to be considered to have been incorporated.[89] Subsequently, multiple nineteenth century legal digests confirmed that the 1698 Lockeian statute had been adopted in Pennsylvania.[90]

The genius of the 1698 English statute, of course, was to extend the remedy of attachment for contempt to the enforcement of arbitration agreements or awards even though there was no lawsuit pending. And in view of the language of President Judge Addison in *Lessee of Dixon*,[91] it would not appear that the remedy of attachment had been available in Pennsylvania, at least not before the adoption of the "Lockean" legislation of 1806 and 1808. However, according to the editor of the first American edition of Kyd's *Treatise on the Law of Awards*, the remedy had been allowed, despite "the declaration of a very experienced lawyer, that it had never been known to the Pennsylvania practice."[92]

Here was the problem that prompted the Pennsylvania courts to permit the remedy of attachment in specific cases, even without statutory sanction. Arbitrators would at times issue awards that required one side to pay

86. Text at nn. 58–59, above.

87. "The Report of the Judges of the Supreme Court of the Commonwealth of Pennsylvania" Appendix to 6 Binney's Reports (1808) 593–626. The General Assembly had passed an act in April 1807 commissioning the judges to cull through English statutes to determine which ones ought or ought not to be incorporated in Pennsylvania. Ibid., 594.

88. The judges reported that because they had been so careful in their survey, their report "deserves to be placed by the side of judicial decisions, being the result of very great research and deliberation by the judges, and of their united opinion. It may not perhaps be considered as authoritative as judicial precedent; but it approaches so nearly to it, that a safer guide in practice, or a more respectable, not to say decisive, authority in argument, cannot be wanted by the profession." Ibid., 595, n.

89. Ibid., 625.

90. James Dunlop, ed., *The General Laws of Pennsylvania from the year 1700, to April 22, 1846, chronologically arranged: with notes and references to all the decisions of the Supreme Court of Pennsylvania*, (Philadelphia: Johnson, 1847) 698, n.1; and *Laws of the Commonwealth of Pennsylvania: from the fourteenth day of October, one thousand seven hundred* (Philadelphia: Bioren, 1812) 5:139, n. (c).

91. See above text at nn. 55–58.

92. Kyd, *Treatise,* 326b.

money and the other side to perform an act, such as to return specific property. For example, in *Buckley v. Durant*,[93] a trover action, referees ordered plaintiff to pay the defendant £3 and the defendant to return certain articles for which the action had been brought. The defendant's counsel argued that the order could not be enforced, as the 1705 statute declared that the referees' report was to be the equivalent of a verdict, and a verdict in a trover action could only decide money damages, but could never order the restoration of specific chattels. The court allowed the parties to refer the matter back to arbitration and gave no opinion, but according to Dallas, inclined strongly toward defendant's counsel's opinion.[94]

Some years later, in *Levezey v. Gorgas*,[95] the Pennsylvania Supreme Court confirmed an award in a trespass action that included specific orders about the height of a dam, orders that could never have been issued by a jury. The submission, however, had explicitly given the referees power to fix the height of the dam and to order any alterations to the dam that needed to be made. This prompted the editor of the first American edition of Kyd's *Treatise* to speculate that "the whole question is a question about terms; for if an award, totally unlike a verdict in the same cause, will nevertheless be confirmed by the court where the submission authorizes it, the only question will be, whether the award is within the submission, and if it be, it is of no consequence whether it be or be not like a verdict, or whether a judgment may be entered and execution awarded thereupon."[96]

In *Kunckle v. Kunckle*,[97] a case decided after *Buckley* but before *Levezey*, a report of referees was objected to because it required one party to pay money and the other to convey property, and this would allow justice on one side only, as an execution could only issue for the payment of money. The Court of Common Pleas of Philadelphia County declared that, "The determination of causes by referees under a rule of Court, has been found a practice of such general convenience and utility, for the speedy and equitable decision of controversies depending in the Courts of law, that the Judges have always encouraged and supported it."[98] The court then observed:

93. *Buckley v. Durant*, 1 Dallas 129 (1785).

94. Ibid., 130.

95. *Levezey v. Gorgas*, 4 Dallas 71 (1799). The report in Dallas gives the arguments before and disposition by the High Court of Errors and Appeals, on error from the Supreme Court, which was decided on other grounds.

96. Kyd, *Treatise,* 326f.

97. *Kunckle v. Kunckle*, 1 Dallas 364 (1788).

98. Ibid., 365.

> Where a report of referees awards money to be paid on one side, and certain other things to be done on the other, if the Court cannot inforce both, they will certainly inforce neither. In the present case, the question will be, whether they can oblige the Plaintiff to perform his part of the award? They certainly cannot do it by *execution*; but if they can do it by *attachment*, the remedies are mutual, though not by the same kind of process. That an attachment will lie for a contempt in not performing an award of referees appears clearly to have been agreeable to the common law prior to the statute of 9 *and* 10 *W*.3. which is declared by the Judges, and appears from a perusal of the act itself, to have been made only to put agreements to refer cases never instituted in Court, upon the same footing with causes already in Court, and to be declaratory of what the law was before in the latter cases.[99]

Therefore, the editor of the first American edition of Kyd's *Treatise* concluded that "the weight of the cases may be considered in favour of the attachment, and *that* also may be stated as a means of compelling the performance of an award, where a judgment and execution cannot be granted upon it."[100] He added that the fact that this remedy was not authorized by the 1705 statute should not be much of a worry, "for if by the liberal construction of that act, the remedy it prescribes has become incompetent to the distribution of perfect justice between the parties, the provision of a new remedy follows as a consequence from the extension of the rule to new cases."[101]

The Maryland Experience

Both printed and documentary records from the seventeenth to the nineteenth centuries for the state of Maryland reflect widespread use of arbitration. For the seventeenth century, extensive Maryland records are printed in the Archives of Maryland volumes. These volumes encompass Provincial Court proceedings from 1637 to 1683, where the earliest recorded arbitrations in Maryland can be found. Records of arbitrations appear as well in other documents printed in the Archives, such as the *Proceedings of the Provincial Council*[102]; *Proceedings of the Court of Chancery*[103]; *Proceedings of the County Courts of Kent County 1648–1679, Talbot County 1662–1674, and Sommersett County 1665–1668*[104]; *Proceedings*

99. Ibid.
100. Kyd, *Treatise*, 326h.
101. Ibid.
102. E.g. Archives of Maryland, vol. VIII, p. 351, 1693.
103. E.g. Archives of Maryland, vol. LI, arbitration cases from the years 1669 (p. 20), 1670 (p. 36), 1677 (p. 544).
104. Archives of Maryland, LIV: 10, 154, 234, 316. 382, 637, 646, 712, 727.

of the County Court of Charles County 1666–1674[105]; and *Proceedings and Acts of the Assembly of Maryland June 1771–July 1773*.[106]

There are, moreover, many manuscript records for county courts, mostly from the eighteenth and nineteenth centuries, but there are also a few seventeenth century documents, which are not contained in or are beyond the years covered by the printed Archives. A sampling of these records reveals references to arbitration as well. Two unique early nineteenth century manuscript "booklets" are apparently retrospective compilations made up entirely of arbitrations; one for Montgomery County,[107] the other for Frederick County.[108]

The principal archival source in Annapolis that we have examined is the Judgment Record of the Provincial Court, 1658–1778. These manuscripts contain a valuable record of references to arbitration.[109] The documents are extraordinarily well preserved, and there is an index running approximately 2,000 pages showing the procedural posture of each case (each page indexing approximately thirty cases). Approximately 400 cases are indexed as references.[110] In percentage terms, the number of references to arbitration was not large: perhaps 1 in 100 cases overall. There were very few in the early years, but the number of references steadily increased over time.

Here is a representative early entry of an arbitration award as recorded in the Judgment Record for December 14, 1668 (full text):

> *Edmund Lindsey plaintiff v. Thomas Sprigg* defendant [Morecroft for the plaintiff and Calvert for the defend]
>
> The plt sues the defendant in a plea of trespass upon the Case for keeping and Entertaining the plt's servant by name Rob: Leeds.
> Both parties having put their differences to Arbitration & Elected Mr. Thomas Nottley and Doctor John Pearce for the determining of same, doth into Court bring & present their Arbittmt, which was by the defendants Attorney Ordered that it might be accordingly Entered & Acknowledged, vizt that they the said Arbitrators do Deeme and award that the said Thomas Sprigg shall pay or cause to be paid to the said Edmund Lindsey

105. Ibid., LX: 92.

106. Ibid., LXIII: 297.

107. MSA, C 1139-1, recording 546 cases from 1787 to 1827.

108. MSA C 863-1, recording 603 "actions referred by consent of parties & rule of court. . .see Act of Assembly November 1785, chapter 80, section 11," 1786–1809.

109. Docket and minute books for the Provincial Court also contain arbitration references. See, e.g., MSA 548–5, September Term 1774 (docket book); MSA 553–1, April Term 1765 (minute book).

110. A few of these turned out to be continuances (signified on the index by the word "referred"). Also, examination of the documents themselves revealed a number of references that are not shown in the indexes.

> his Executors or Assigns the Just quantity of Five Thousand pounds of good Arranoca tobacco in Caske at or near Portobacco Creek in Charles County at or before the last day of this instant month of December for which he the said Sprigg shall immediately pass his specialty to the said Lindsey for payment thereof accordingly and then the said Edmund Lindsey to give the said Sprigg a General release, witness their hands and seal,
>
> Thomas Nottley, John Pearce—(seal)[111]

This award exemplifies the references to arbitration at common law that served as the model for the 1698 statute.

References in Maryland from the early days in the 1600s appear to have been almost as legalistic as court proceedings of the time. Occasionally one of the sitting judges would become one of the arbitrators[112]; counsel were always active on both sides (at least in court; probably they continued to act for their clients in the arbitration, but there is rarely evidence to show this one way or the other); disputes customarily concerned business or property matters that were settled in the currency of the day: tobacco.[113] Property disputes included occasional disagreements about slave ownership.[114] On occasion, an arbitrated dispute revealed the hard realities of the lives of the early settlers. For example, in the case of *Alcocks v. Robinson* (August 13, 1767),[115] plaintiff Thomas Alcocks's wife and child were killed by Indians, and some of the property taken by the Indians came into possession of Jonathan Lumbrozo. Thomas Alcocks and Lumbrozo took out an arbitration bond of 10,000 pounds of tobacco. Arbitrators William Calvert, Esq. and Zachery Wade, gentleman, found for Alcocks, awarding him 900 pounds of tobacco. Lumbrozo died before delivering on the award, and Alcocks sued the representatives of Lumbrozo's estate. The arbitration award was confirmed by the Provincial Court.

111. Maryland Archives, vol. LVII, Proceedings of the Provincial Court 1666–1670.

112. Iin one case in 1702, the chief justice of the Provincial Court became one of the arbitrators in a suit in which one of the junior justices, Thomas Greenfield, was the plaintiff! *Greenfield v. Cox*, MSA/PCJR, Liber TG. One of the judges of the Provincial Court in mid-eighteenth century who acted as arbitrator in a number of cases was Bedddingfield Hands, Esq. See, for example, *Harris v. Holt*, MSA/PCJR, Liber BT #3, 325, referred April 11, 1758.

113. See Alan F. Day, "Lawyers in Colonial Maryland, 1660–1715," *The American Journal of Legal History* XVII (1973): 145, 163 "The population which quadrupled between 1660 and 1700 was overwhelmingly engaged in the production and marketing of tobacco. Specie of any kind was scarce and tobacco became the currency and the cash crop of the province." (Footnote omitted.)

114. See, for example, *Hall v. Ridgey*, MSA/PCJR, Liber BT #3, 159, referred September 13, 1757.

115. Maryland Archives vol. LX, Proceedings of the County Court of Charles County 1666–1674, 92.

Despite their legalistic flavor, most references resulted in decision making by laymen, and reflected a popular sentiment that has been constant in England and America for centuries: a desire to control, if not avoid, the perceived avarice of the lawyers. During the early nineteenth century, anti-lawyer sentiment swept through Maryland, and according to Jeffrey Sawyer one manifestation of this sentiment was "an attempt to introduce a radical system of arbitration, to be available at the choice of either party, for the resolution of *any* civil litigation not cognizable by justices of the peace."[116] Sawyer explains that, "Maryland's arbitration proposal would have allowed any civil complaint to be determined altogether outside the courts. A panel of arbitrators evenly selected by the parties would hear the evidence and make a determination. . .. If either party rejected the [arbitration] settlement, he could appeal to the courts, but if he failed to win a judgment more favorable than the arbitration settlement, he paid the legal costs of his opponent as well as the original award and a per diem penalty for the delay."[117] In the end, the campaign for the bill failed.

The Maryland archival records demonstrate an early American endorsement and continuation of English arbitration practices. The records, however, give no means of identifying which cases were submissions that were entered as rules of court, as fictitious lawsuits in order to gain the remedy of attachment for contempt of court.[118] The entries that we examined seemed all to be genuine references. We did not go far beyond 1778, the year in which the General Assembly adopted legislation that included arbitration provisions directed only at references.[119] William Kilty, Chancellor of Maryland, published a report in 1811 on all English statutes that he considered properly part of the statute law of the state.[120] It was an extremely comprehensive work, and although not a formal judicial opinion, it was well-received by the

116. Jeffrey K. Sawyer, "Distrust of the Legal Establishment in Perspective: Maryland during the Early National Years," *Georgia Journal of Southern Legal History*, II (1993): 1, 22.

117. Ibid., 25.

118. However, we do know that these submissions existed. See, for example, *West v. Stigar*, 4 H. & McH. 490 (Md. Prov. Ct. 1765); and *West v. Stigar*, 1 H. & McH. 247 (Md. Prov. Ct. 1767).

119. Acts of Assembly, 1778, ch. 21, §§ 8 and 9. "If any cause instituted in any court of this state shall be referred to the award of any persons, it shall be lawful for such court to give judgment, and award execution, in the same manner as they might do upon verdict; and such judgment shall have the same effect, to every intent and purpose, as any judgment upon verdict; provided such award shall remain seven days in court before judgment be entered. And if it shall appear to the court that the award was obtained by fraud or malpractice in, or by surprize, imposition, or deception of the arbitrators, or without due notice to the party, their attorney or attornies, it shall be lawful for said court to set aside the said award."

120. Kilty, *A Report of All Such English Statutes*. For a description of the magnitude of this work, *see* Bernard Steiner, "The Adoption of English Law in Maryland," *Yale Law Journal* 3 (1899) 353, 358–59.

Maryland courts.[121] He commented as well on English statutes that were *not* proper to be incorporated. As to the 1698 statute, he wrote the following:

> 9 and 10 *William* 3.–A.D. 1698
> CHAP. 15. An act for determining differences by arbitration.
> It would seem . . . that this statute had been considered in force in the province, or that its provisions had been extended to submissions by rule of court of actions depending therein, which was the usual mode of reference. The act of October, 1778, Ch. 21, s.8, does not appear to have provided for submissions under this statute, but to have related to causes in court, empowering the judges to give judgement on the awards; and on considering the provisions in the 9th section of that act, and the practice since, it does not appear proper that this statute should be incorporated.[122]

Therefore, although Kilty acknowledged that the 1698 Lockean statute had been in force in Maryland, he concluded that the 1778 statute superseded it. However, the Court of Appeals (the highest state court in Maryland), in the 1837 case of *Shriver v. State*, held that the British statute remained in force alongside the 1778 state statute.[123] After surveying Kilty's entire body of work, one scholar, Bernard Steiner, concluded that Kilty was mistaken on only two statutes, one of which was 9 & 10 Will. 3.[124] Steiner's appraisal was later endorsed in multiple Court of Appeals cases, establishing that the Maryland courts recognized the 1698 English statute both before and after the 1778 Maryland statute.[125]

121. According to the Maryland Court of Appeals, "The only evidence to be found on that subject [whether a particular statute was incorporated in Maryland] is furnished by Kilty's *Report of the Statutes* . . . . That book was compiled, printed, and distributed, under the Sanction of the State, for the use of its officers, and is a safe guide in exploring an otherwise very dubious path." *Dashiell v. Attorney General*, 5 Har. & J. 392, 403 (Md. Ct. App. 1822).

122. Kilty, *A Report of All Such English Statutes*, 181.

123. *Shriver v. State*, 9 G. & J. 1 (Md. Ct. App. 1837).

124. Bernard Steiner, "The Adoption of English Law in Maryland," 353, 360–61 ("[I]n only two cases, and these occurring in the first thirty years after the publication of the Report, were additional Statutes decided to have been found applicable, and that, in no case, was one found applicable by Kilty taken out of the list by the Court of Appeals.").

125. *Moxley v. Acker*, 447 A.2d 857 (Md. Ct. App. 1982) ("Although no official action was taken on this report, 'in only two cases . . . were additional Statutes decided to have been found applicable, and that, in no case, was one found applicable by Kilty taken out of the list by the Court of Appeals.'"); and *State v. Magliano*, 255 A.2d 470 (Md. Ct. Sp. App. 1969) ("That Kilty did not regard a statute as 'applicable' did not preclude a court from having a different view. Steiner found only two cases, however, in which Kilty's opinion was overruled, *Shriver v. State*, 9 Gill. & J. 1, 11 and *Sibley v. Williams*, 3 Gill. & J. 63."). See also *Gallaudet Univ. v. Nat'l Soc'y of the Daughters of the American Revolution*, 699 A.2d 531, 541 (Md. Ct. Sp. App. 1997); *Dean v. State*, 285 A.2d 295, 298 n.3 (Md. Ct. Sp. App. 1971); and *Silberman v. Jacobs*, 267 A.2d 209, 220 (Md. Ct. App. 1970).

Conclusion

In his comprehensive 1872 treatise, *The Law of Arbitration and Award*, John Morse referred to the 1698 English statute allowing submissions to be made rules of court, but declared that, "in the absence of statutes, the English practice has not obtained in the United States, and no judgment will be entered by the court unless the referees proceeded upon authority vested in them by a rule of court."[126] However, statutes adopting the formula of the 1698 English act were plentiful in the colonies and early republic, as we have shown. In Pennsylvania and Maryland, moreover, the English practice was in place long before legislative affirmation. It is probable that the procedure was followed in practice in other jurisdictions, notwithstanding Morse's later claim to the contrary. Any such practice would be obscure to historians depending upon printed records. Occasional contempt cases might be reported, but it would not be apparent whether the attachment was connected to a reference or a submission.

We hope that the summary given in this article persuasively shows how untrustworthy the notion was that "the longstanding judicial hostility to arbitration agreements that had existed at English common law" also "had been adopted by American courts."[127] Certainly, at the least, there is no evidence of any such hostility in the seventeenth and eighteenth centuries, Justice Story's opinion in *Tobey v. Bristol* notwithstanding. Morse's 1872 treatise on arbitration runs 632 pages, and although he relied entirely on reported cases (more than 1,800 of them), the overwhelmingly positive reception given by American courts to the arbitration process is apparent in his work. That reception is equally evident in manuscript sources, such as those that have been described from Pennsylvania and Maryland, reaching back well into the seventeenth century. Finally, the Pennsylvania courts' willingness to erect upon a narrow defalcation statute an arbitration apparatus that served all types of civil disputes is an unusual example of what can fairly be called constructive judicial activism, designed to enlarge and support the arbitration process.

126. John T. Morse, Jr., *The Law of Arbitration and Award* (Boston: Little Brown, 1872), 80.

127. Justice White, in *Gilmer v. Interstate/Johnson Lane Corp*, text at n. 2, above.