Date of Meeting: December 18,19, 1959

Date of Memo: December 9, 1959

Memorandum No. 9

Subject: Arbitration

Attached are two additional studies concerning arbitration. Upon the studies so far distributed, the following policy decisions may be made:

1. Should agreements to arbitrate non-justiciable questions be enforceable under the arbitration statute?

Comment:

California now enforces agreements to arbitrate non-justiciable questions. All states limiting statutory arbitration to justiciable questions recognize common law arbitration. California does not recognize common law arbitration, except pursuant to oral agreement, at the present time. The Uniform Act embraces non-justiciable disputes. (Section 12 (a).) yes

2. Should agreements to submit valuation questions to third parties for appraisal and determination in accordance with the independent judgment of such third parties held be specifically enforceable?

Comment:

Under present law, such agreements are not specifically enforceable. A party may, under proper circumstances, enforce the basic contract by disregarding the appraisal provision and proving the value in court. In a sale of goods at a valuation, if the valuation fails without fault of either party, the contract is avoided. Under insurance contracts,

the insured must submit to appraisal or lose his right to recover on the policy; but the insurer may disregard an appraisal provision with impunity and thus force the insured to establish the value of the loss by litigation.

The Uniform Act applies to "controversies" which, under prevailing judicial opinions, do not include appraisal agreements. New York, upon Law Revision Commission recommendation, adopted legislation providing for enforcement of such agreements in 1959.

3. If appraisal agreements are to be enforced, should they be treated in the same manner as arbitration agreements?

Comment:

This would require appraisers to give notice and receive evidence unless waived by the parties. Appraisal awards could be made by majority decision and would be subject to confirmation and correction in the same manner as arbitration awards. Appraisers would have the power of subpena and to receive sworn testimony.

An alternative suggestion is that adopted in New York: To provide for enforcement of such agreements as arbitrations only if one party refuses to comply with the agreement. Another alternative (suggested by the New Lork Law Revision Commission in regard to insurance appraisals, but not adopted by the Legislature) is to provide only for judicial appointment of an appraiser if a party refuses to appoint an appraiser or the appraisers cannot agree on a third. Under both of these proposals, appraisal proceedingswould be governed by common law except as provided.

4. Should the arbitration statute specifically include or exclude questions:

(a) Of title to real property

(b) Arising out of illegal contracts

(c) Concerning the validity of wills or the distribution of estates

(d) Involving domestic relations

(e) Involving child custody

(f) Concerning alimony and property settlement agreements

(g) Which are subject to any other overriding public policy

As an alternative, should the statute provide for the enforcement of agreements to arbitrate any question which could be made the subject of a binding contract between the parties.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

#32 December 5, 1959

ARBITRATION: VALUATIONS, APPRAISALS, AND NON-JUSTICIABLE DISPUTES

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ARBITRATION: VALUATIONS, APPRAISALS, AND NON-JUSTICIABLE DISPUTES

I. COMMON LAW

A. Questions Subject to Arbitration

At common law, the cases did not restrict arbitration to questions which might be made the subject of litigation.[1] Thus, it was held that questions concerning the value of an insured loss,[2] the location of a boundary,[3] the price to be paid for the sale of land,[4] or for a tenant's improvements,[5] the amount to be paid to a tenant for the surrender of the leasehold,[6] or the terms of a labor contract[7] could be the subject of arbitration even though no action could be maintained to determine such questions. Obviously, some of these questions, such as the value of property could be decided by a court as an incidental part of an action, but no court could determine a question such as the terms of a labor contract.[8]

B. Distinction between Appraisal and Arbitration

1. Basis of the distinction

Although the early cases held that any question could be arbitrated, during the 19th Century the doctrine arose that contracts which provide for a third party determination of some of these questions do not call for a true arbitration. It was said, rather, that the parties intended a "valuation" or an "appraisal." To ascertain the nature of the distinction which developed, it will be necessary to review the authorities which established the doctrine.

Some cases and writers have stated that whether a valuation or arbitration is involved depends upon the question submitted to the third party for decision. If the question is incidental to ultimate liability, valuation

is involved; if the question is one of ultimate liability, arbitration.[9] However, the distinction is not helpful; for it has been held repeatedly that questions short of ultimate liability may be submitted to arbitration.[10]

Yet the distinction does have some validity. It is observed to the extent that it will be held that an appraisal is intended if the question is merely one of the value of something instead of ultimate liability unless the parties specifically provide otherwise.[11]

Other authorities attempt to distinguish these proceedings on the basis of whether there is a "dispute" or "controversy."[12] It has been said that arbitration is to settle disputes, but appraisal is to prevent disputes from arising.[13] Although many cases cling to this ground for distinguishing arbitration and appraisal, this distinction, too, is not helpful.[14] Many cases have involved appraisals where the contract clearly provided that there would be an appraisal only when the parties did not agree.[15] On the other hand, it has been stated that arbitration may be involved even though there is no disagreement -- only uncertainty.[16] As the Connecticut Supreme Court pointed out:[17]

> A submission to arbitration is for the purpose of an amicable and easy settlement of a doubtful concern; and it is wholly immaterial whether there be any actual controversy or not.

The distinction followed in California[18] is that indicated by the California Supreme Court in Dore v. Southern Pacific Company:[19]

> Submissions to determine values are of two kinds -- first, where the valuers are to examine the property and fix the value in accordance with their own opinion or judgment; second, where they are to afford the parties a hearing, and an opportunity to offer evidence, and are to adjudge the value upon a consideration of the evidence, as well as their own opinion. In cases of the first class, it is usually held that the agreement is not properly a submission to arbitration and is not subject to the rules which govern arbitrators, and that notice of the meetings of the valuers is not required.

The rule enunciated by the California court has been followed both in England[20] and the United States.[21] It appears to be the soundest basis for

the distinction that appears in the cases, for the rule is free from the qualifications and exceptions that must be made when attempts are made to distinguish these proceedings on other bases.

2. Reasons for the distinction

There has been some misunderstanding of the reason the distinction between arbitrations and appraisals developed. Some writers have suggested that the distinction developed because the courts wished to save appraisals from the rules which prevented enforcement of arbitration agreements.[22] However, this reason is clearly erroneous for the courts would enforce neither arbitration nor appraisal agreements.[23]

In Milnes v. Gery,[24] there was an agreement for the sale of certain property at a value to be determined by two persons appointed by the parties and a third person appointed by the appraisers if they could not agree. The appraisers could not agree either upon the value or upon a third person to resolve the disagreement. The plaintiff thereupon asked the equity court to enforce the agreement either by appointing an appraiser or by otherwise determining the value of the property. The court refused to enforce the contract. It said that as the price had not been ascertained, there was no contract to enforce as an essential provision was missing. Nor would the court appoint an appraiser for to do so would be to enforce an agreement not made by the parties -- the agreement being to sell only at a price determined by persons selected by the parties themselves. The court would not force a party to rely upon the judgment of a stranger when he had not agreed to do so.

In Wilks v. Davis,[25] and in Vickers v. Vickers,[26] the court refused to enforce similar agreements even though the appraisal failed because one party refused to appoint an appraiser or refused to permit his appraiser to perform.

It is true that a sort of negative type of enforcement has been provided by construing certain appraisal agreements as conditions precedent to suit;[27] but it is settled that arbitration, too, can be a condition precedent to suit[28] even though, in the United States, it is usually held that the question involved may not include ultimate liability.[29] In England, when arbitration is given this negative type of enforcement, the question may even involve ultimate liability,[30] yet the distinction between the proceedings persists in the English cases.[31] Clearly, then, the distinction was not for the purpose of enforcing appraisals as opposed to arbitrations, for neither is specifically enforceable and both may be enforced as conditions precedent to suit in properly drawn agreements.

Another writer[32] has suggested that the distinction grew out of the United States courts' application of Scott v. Avery.[33] It is stated that, in this country, the courts have limited the doctrine of enforcing arbitration as a condition precedent to suit to determinations of certain facts (valuations) and have refused to apply the doctrine to agreements calling for the determination of liability (arbitrations). "Thus arose the distinction . . . ." However, this explanation, too, is demonstrably erroneous, for the distinction developed long before the decision in Scott v. Avery.[34] Moreover, the distinction is well developed in the English cases where application of Scott v. Avery has not been limited to valuations.[35] Even in this country, a properly drawn agreement can require arbitration (as distinguished from valuation) as a condition precedent to suit in

jurisdictions which recognize that questions short of ultimate liability can be submitted to arbitration.[36] Thus, it is reasonably clear that the distinction has not grown out of any American application of the Scott v. Avery doctrine.

a. Common law development: England

In England, the distinction was initially created to avoid striking down an appraisal for a technical deficiency. In Leeds v. Burrows,[37] decided in 1810, a vacating tenant left some hay and a spike-roll on the premises for the incoming tenant upon the latter's promise to pay the amount set by certain valuers. The apprisal was given in a written instrument which had a tax stamp upon it for an appraisal and not for an award. The defendant refused to pay the amount and objected to the introduction of the award because it lacked the proper stamp. Judgment was given for the plaintiff. Lord Ellenborough said the agreement was "only appointing persons to settle an account of what was due between the parties for the value of the different articles. The parties had no contemplation of submitting any differences to the award of arbitrators . . . ."[38]

The distinction became more firmly embedded in English law with Lee v. Hemingway.[39] That case, too, involved a sale at a valuation. The valuation was made, but the vendee refused to perform. The vendor sought an attachment as the agreement had been made a rule of court and attachment was available to enforce arbitration awards. The attachment was denied as

the vendor's action was properly for breach of contract and not upon the award. The court pointed out that it had no power to compel the vendee to purchase, and one judge stated that it was not a reference to arbitration in the usual acceptation of the term.

In Collins v. Collins,[40] a brewery was to be sold at an appraised price. Each party was to appoint an appraiser, and the two appointed would appoint a third, or umpire, to settle disagreements between the first two. The appraisers could not agree on anything -- either the price or an umpire. Application was made for the appointment of an umpire under the terms of the Common Law Procedure Act[41] (17 and 18 Vict. c. 125 sec. 12) which provided:

> If in any case of arbitration the documents authorizing the reference provide that the reference shall be to a single arbitrator . . . or if . . . such parties or arbitrators do not appoint an umpire or third arbitrator . . . then . . . it shall be lawful for any Judge . . . to appoint an arbitrator, umpire or third arbitrator . . .

This Act had been adopted since the Leeds v. Burrows[42] and Lee v. Hemingway[43] decisions. Yet the court felt bound by the distinction suggested in those cases. The court stated that the distinction lay in the fact that arbitration resolves differences while appraisal or valuation precludes differences. The court did not believe that the statute was intended to overrule Milnes v. Gery[44] and expressed the view that more precise language would be required to accomplish this result. Thus, a distinction originally

suggested to overcome a technical objection to an award was used to prevent enforcement of an agreement in the face of a statute which would have permitted enforcement.

It is difficult to see why the court chose to insist upon this distinction when the statute was available. The prior cases could have been distinguished fairly easily -- the Leeds case really involved the interpretation and application of a stamp tax statute; the Hemingway case did not involve the enforcement of the award itself but the underlying contract, and as attachment was unavailable to enforce a sales contract when the terms were stated in the contract, logically it should also be unavailable when the price is to be determined by third parties. It is nowhere pointed out why a court should be able to appoint a third party to resolve the differences between the parties when the issue is liability under a contract and should not be able to do so when the issue involves only a term of the contract.

It is not helpful to say (as was said in the Collins[45] case) that the agreement for a valuation was to preclude differences from arising. The only reason the parties were in court was because of a difference. Besides, no logical reason has been offered for court appointment of persons to decide "controversies" and refusal to permit court appointment of persons to resolve questions which will prevent controversies from arising. Neither is it of any value to say that the price was the essence of the contract. Decisions involving ultimate liability would seem to involve the

essence of the contract also, yet the court would have appointed an arbiter in that situation.

Although the English cases thus far discussed indicated a "difference" was essential to arbitration and "valuation" agreements were not "arbitrations" because they precluded differences from arising, Re Hopper[46] (L.R. 2QB 367 (1867)) settled the proposition that the distinction does not depend upon the nature of the issue to be decided. That case involved a lease with a provision permitting the lessor to require the lessee to surrender the premises on 6 months notice. In such event, the lessor agreed to compensate the lessor for the loss of the remainder of the term. Appraisers were to be appointed to determine the value of the surrendered term. Notice to the lessee was given, appraisers appointed and an award made. An attack was made on the jurisdiction of the court on the ground that the award was an appraisal and not an arbitration award. In rejecting this contention, the court rejected the notion that the earlier cases precluded the application of the arbitration law to an award upon the question of value.[47] Cockburn, C. J. stated:

> If it be the intention of the parties that their respective cases shall be heard, and a decision arrived at upon the evidence which they have adduced before the arbitrator, it would be taking too narrow a view of the subject to say that, because the object to be arrived at was the ascertaining of the value of the property or the amount of compensation to be paid, the matter was not properly to be considered as one of arbitration.

Thus, the English cases settled the doctrine that whether arbitration or appraisal is involved depends upon the method to be used in deciding the issue involved and not upon the issue submitted.

b. Common law development: United States

The growth of the distinction in the American cases parallels its growth in the English. As early as 1817, in Underhill v. Van Cortlandt,[48] Chancellor Kent apparently recognized no distinction and treated an appraisal agreement as arbitration, indicating that the appraisers were required to give notice to the parties and receive relevant evidence if offered.[49] The case was reversed, the higher court agreeing with the Chancellor's view of the law but disagreeing with its application.

Apparently the earliest case recognizing a distinction between appraisal and arbitration was Elmendorf v. Harris.[50] There, an action was brought upon an arbitration bond because of the refusal of one party to perform the award. The defendant objected to the award on the ground that the arbitrators had proceeded without notice to the parties. The court held that such an attack could not be made on the award in a law court, but could be made only in equity. To reach this result, the court distinguished Peters v. Newkirk.[51] That was an action for illegally distraining the plaintiff's goods when no rent was due. The plaintiff had given a machine in payment of the rent at an appraised value. The court held the appraisal void for want of notice to the lessor and permitted the value to be established by evidence in the action. In the Elmendorf case, Peters v. Newkirk was distinguished upon the basis that it involved appraisal, not arbitration.

This holding was reversed by the Court of Errors of New York[52] with an opinion by Chancellor Walworth relying on Peters v. Newkirk.

Yet the lower court decision was cited as authority for the distinction in Garred v. Macey,[53] along with Leeds v. Burrows.[54] Garred v. Macey, in turn, was the authority cited in Curry v. Lackey.[55]

Garred v. Macey[56] held that an action could not be brought on the award, but action must be brought on the underlying contract. The court stated that a "controversy" was necessary to have an arbitration. A contract to sell at an appraised price precludes a controversy from arising and cannot, therefore, involve arbitration.

Curry v. Lackey[57] involved an exchange of slaves with an agreement to pay the difference in their appraised values. An action was brought to recover this difference. Objection to the appraisal was made on the ground the arbitrator was not sworn. The objection was overruled because appraisal, not arbitration, was involved.

Norton v. Gale,[58] relied upon the lower court decision in Elmendorf v. Harris,[59] Garred v. Macey,[60] Carry v. Lackey[61] and the English cases[62] in order to uphold an award upon the ground that notice to the parties was not required as appraisal was involved, not arbitration.

Pintard v. Irwin,[63] utilized the distinction to uphold an award when the valuers had not been sworn as would have been required if the valuers had been considered arbitrators.

Thus, in the United States, as in England, the distinction was originally created to uphold awards against objections that technical arbitration requirements were not observed when such objections did not go to the merits of the controversy.

c. Common Law development: California

In California a similar histroy has taken place. Methodist Church v. Seitz[64] established the distinction. There the court considered an agreement to sell at a valuation in the event the parties could not agree on a price. The valuation was made, but the vendor refused to sell. The plaintiff sued to compel compliance with the agreement. The defendant objected that the arbitrators had not been sworn, the parties had been given no notice, the submission was not in writing, and therefore the arbitration award was void. The Supreme Court held that an appraisal was involved, not arbitration, and therefore failure to comply with these technicalities did not impair the validity of the award. The authorities relied upon included Norton v. Gale,[65] Curry v. Lackey,[66] and Collins v. Collins.[67]

Dore v. Southern Pacific Co.[68] 163 C. 182 (1912), made it clear, though, that the nature of the issue involved does not determine whether the proceeding was an arbitration or an appraisal. If the parties intend that evidence is to be presented, it is an arbitration proceeding even if the only question is the value of property to be sold.

II. NON-JUSTICIABLE DISPUTES UNDER STATUTES

A. United States

Despite the enactment of arbitration statutes in most jurisdictions which would permit the enforcement of agreements providing for third party determination of some of their terms, the courts have maintained the distinction

between "appraisal" and "arbitration" as a means of preventing the specific enforcement of "appraisal" contracts.

Of course, some statutes preclude enforcement of such agreements on their face. Thus, the Massachusetts arbitration law[69] is applicable only to "controversies which might be the subject of a personal action at law or of a suit in equity." As an action cannot be brought to determine the value of a piece of property, an agreement to submit the determination of such a question to the decision of arbitrators is not enforceable under the arbitration statue.[70] Similar statutes exist in several other states.[71] California's arbitration statute was similarly worded prior to the enactment of the present arbitration statute in 1927.[72] These statutes may be a reflection of the opinion held by many that "true arbitration" must involve ultimate liability, and therefore, must involve issues cognizable by the courts. In most of the states where the arbitration statute is specifically made inapplicable to non-justiciable disputes, the rule has been followed that such questions are subject to common law arbitration.[73]

A large number of arbitration statutes are in terms applicable to "all controversies" either in existence or "thereafter arising" out of the contract.[74] California's present statute is of this sort.[75] The proposed Uniform Act is similarly worded.[76]

Despite statutes applicable to "any controversy" the courts have repeatedly held that a "valuation" is not a "controversy" within the meaning of these statutes. Poland Coal Co. v. Hillman Coal & Coke Co.,[77] is typical. The plaintiff leased a coal mine to the defendant with an option to purchase the remaining tonnage of recoverable coal. The remaining amount of coal was to be determined jointly by lessor and lessee. If they could not agree,

the question was to be decided by a person named in the agreement as "arbitrator." The option was exercised; the arbitrator notified the parties that he would proceed with the determination and requested that they submit their computations to him. The plaintiff refused to participate in any way. When the award was made, he sought to attack it on the grounds that the arbitrator did not comply with the Arbitration Act by holding a hearing, giving notice thereof and receiving evidence from both parties. The court never reached the defendant's contention that the Arbitration Act was observed, holding/ that the Act was inapplicable. The court said, "The only undetermined element in the transaction was the quantity of coal and there was no dispute about that quantity because the parties had long before provided that the quantity of coal to be paid for was to be determined by the [Arbitrator]. There was no controversy within the meaning of the word as used in the Arbitration Act." Thus, the court held "there was no dispute" and "no controversy" even though, under the contract, the Arbitrator was not to function unless the parties could not agree.

The history of the New York Arbitration Law[78] probably gives the best picture of the reasons for the persistence of the distinction.

New York's modern Arbitration Law was adopted in 1920.[79] It applied to agreements to arbitrate "any controversy" existing at the time of the agreement and agreements to settle "a controversy thereafter arising between the parties to the contract." The Act had many procedural requirements: the arbitrators were required to be sworn, they could act only upon evidence produced at the hearing, they could not conduct ex parte investigations.

In Matter of Fletcher,[80] a contract to sell stock at a valuation came before the court. The parties had appointed two persons as "arbiters" but

the arbiters had been unable to agree on a third as specified in the contract. A motion was made for court appointment under the newly enacted Arbitration Law. The Court of Appeals held the law inapplicable because the contract contemplated valuation, not arbitration. The court cited the procedural requirements and stated that these provisions were appropriate for a proceeding in which the parties wished to have a judicial determination by judges of their own choice. Such provisions "can have no application to proceedings through which disinterested third persons are authorized to settle questions which would otherwise be left to the determination of the parties to the contract." The court reasoned that any other holding would tend to upset many informal appraisals because of the failure of the appraisers to observe the procedural requirements of the law.

Following this decision, the Court later held that non-justiciable labor disputes were not arbitrable under the Law.[81] (Matter of Buffalo & Erie Ry. Co., 250 N. Y. 275, 165 N.E. 291 (1929).)

In 1940, the New York Legislature added specific language bringing non-justiciable labor disputes within the Act.[82] (N.Y. Laws 1940 ch. 851). The following year, the following language was added to the basic section defining enforceable arbitration agreements:[83]

> Such submission or contract may include questions arising out of valuations, appraisals or other controversies which may be collateral, incidental, precedent or subsequent to any issue between the parties.

This amendment was drafted to overcome the ruling in Matter of Fletcher.[84] However, in Syracuse Savings Bank v. Yorkshire Insurance Co.,[85] the Court of Appeals stated that it was unable to see anything in this legislation requiring

appraisals to be enforced like arbitration agreements. A lower court then held that the 1941 amendment was intended to permit arbitrators to decide valuation questions when authorized by the parties.[86] (Matter of Sigelman, 279 App. Div. 771, 109 N.Y. S.2d 115 (1951).)

In 1952, the words "or independent of" were inserted in the statute[87] to make the section read:

> Such submission or contract may include questions arising out of valuations, appraisals or other controversies which may be collateral, incidental, precedent, subsequent to or independent of any issue between the parties.

The sponsor of the amendment stated in a memo to the Governor that the amendment was offered "so as to clarify that valuations or appraisals come within the scope of the arbitration statute even though they are independent of any other controversy."[88]

The Court of Appeals rejected the contention that the new language was intended to make valuation agreements enforceable in Matter of Delmar Box Co.,[89] 309 N.Y. 60, 127 N.E.2d 808 (1955). The opinion is notable in that it collects virtually all of the reasons for continued judicial resistance to the abolition of the distinction between arbitration and appraisal. The opinion states, in part:

> A number of basic distinctions have long prevailed between an appraisement under the standard fire policy and a statutory arbitration. An agreement for arbitration ordinarily encompasses the disposition of the entire controversy between the parties, upon which judgment may be entered after judicial confirmation of the arbitration award, . . . while the agreement for appraisal extends merely to the resolution of the specific issues of actual cash value and the amount of loss, all other issues being reserved for determination in a plenary action. . . . Appraisal proceedings are, moreover, attended by a larger measure of informaility, . . . and appraisers are ' "not bound to the strict judicial investigation of an arbitration." ' . . . . Arbitrators are required to take a formal oath, . . . and may act only upon proof adduced at a hearing

> of which due notice has been given to each of the parties, . . . They may not predicate their award upon evidence garnered through an ex parte investigation of their own, at least unless so authorized by the parties. . . . Appraisers, on the other hand, are not required to take an oath. . . . They are likewise "not obliged to give the claimant any formal notice or to hear evidence'; and they may apparently proceed by ex parte investigation, so long as the parties are given an opportunity to make statements and explanations to the appraisers with regard to the matters in issue . . . .
>
> Furthermore, in an arbitration, all the arbitrators, if there be more than one, 'must meet together and hear all the allegations and proofs of the parties'. . . . The standard appraisal clause, in contrast, specifically recites that the umpire is not to participate in the appraisal in all cases, but is only to pass on such differences as there may be between the appraisers designated by the respective parties. In addition, the vacatur of an arbitration award invariably results in a new arbitration . . . whereas after an appraisal award has been set aside without any fault on the part of the insured, he is not required to submit to any further appraisement but is free to litigate the issues in an action at law on the policy. . . .

Finally, in 1958 the New York Legislature adopted a statute[90] recommended by the New York Law Revision Commission which should have the effect of making valuation agreements specifically enforceable. The New York Law Revision Commission stated that it believed the result of the Delmar Box Co. case was sound insofar as it preserved the simplicity of the common law valuation procedure. The statute recommended and adopted provides that if a party to a valuation refuses to perform, the other party may apply for enforcement in the manner specified in the Arbitration Law. The judge then must enforce the contract as if it arose under the Arbitration Law, except that if the parties have specified a different procedure for making the determination, the terms of the agreement control. The judge may, in his discretion, defer the enforcement of the appraisal until other issues in the case have been decided.

B. California

California has not followed those jurisdictions which have said that "true arbitration" must involve a dispute which can be judicially determined. Dore v. Southern Pacific Co.,[91] established that valuation questions may be settled by arbitration. Nonjusticiable questions involving the terms of labor contracts are frequently arbitrated.[92]

However, the distinction between valuation and arbitration persists. In Bewick v. Mecham,[93] a lease gave the lessee an option to purchase the premises at a price to be agreed upon. In the absence of agreement, the contract stated that the price and terms were to be fixed by "arbitration." The lessee constructed substantial improvements on the property in reliance on the option. The lessee exercised the option. The lessor refused to sell. The lessee appointed an arbitrator as called for by the agreement; the lessor refused to appoint one. The lessee brought action for specific performance. The court fixed the price and ordered performance. The lessor appealed, arguing that the lessee should have tried to enforce the arbitration provision. Ignoring C.C.P. Section 1284 which provides that a person in default in proceeding with arbitration cannot obtain a stay of an action for the purpose of arbitrating a controversy, and ignoring the cases which hold that a refusal to arbitrate constitutes a waiver of the right to rely on an arbitration provision,[94] the court held that the lessor's argument was without merit because the contract called for a valuation only and was not within the arbitration statute -- in spite of the fact that the contract called for "arbitration."

The lessor then argued that the contract was unenforceable because the price was not agreed upon. The court held that the price could be determined

by the court and that the doctrine of Milnes v. Gery[95] is no longer applicable here.

In Solari v. Oneto,[96] 166 Cal. App.2d 145 (1958), it was pointed out that Bewick v. Mecham[97] recognizes that valuation questions can be arbitrated if the agreement clearly so indicates. In the Solari case the agreement not only mentioned "arbitration" but also named the appropriate sections of the Code of Civil Procedure. Therefore, a question of value was held arbitrable under the agreement.

The doctrine of Milnes v. Gery may not be as dead as the Supreme Court indicated. Its rule is codified as a part of the Sales Act in Civil Code Section 1730 when the valuation fails without fault of either party. Moreover, the fact situation presented in Bewick v. Mecham was one where the courts have traditionally refused to apply Milnes v. Gery as the parties could not be returned to status quo.[98] It remains to be seen what the court will do in the classic Milnes v. Gery situation -- where nothing has changed hands, the valuation fails without fault of either party and the only result of applying the doctrine is that the contract fails. Under the Sales Act, it is clear that the contract or sale is avoided under such circumstances.

The distinction, then, is established that if a term of the contract is left to the future decision of third parties, the right to a third party decision in accordance with the contract can be specifically enforced if the third parties are to receive evidence and proceed in a judicial manner. The agreement is not specifically enforceable if the third parties are to rely on their own judgment. It is settled that the enforceability of this provision does not depend upon the nature of the issue submitted. In the light of the Bewick and Solari cases, whether the agreement will be enforceable

will also depend upon the parties' foresight in citing C.C.P. 1280 in the agreement as well as using the term "arbitration."

III. EFFECTS OF INCLUDING NON-JUSTICIABLE DISPUTES WITHIN OR EXCLUDING SUCH DISPUTES FROM AN ARBITRATION STATUTE

A. Appraisals

In view of the fact that appraisals have been excluded from the operation of arbitration statutes because of the fear that appraisal awards would be held invalid because of a failure to observe the technical requirements of a formal arbitration, it will be helpful to determine whether the objections that have been made are still applicable.

The major differences listed by the New York Court of Appeals as reasons for maintaining the distinction between arbitration and appraisal proceedings and for refusing to enforce appraisal agreements under the arbitration statute are these:[99]

Appraisers are not required to be sworn; arbitrators are.

Appraisers are not required to give formal notice of hearing; arbitrators are.

Appraisers may proceed to a certain extent by ex parte investigation; arbitrators are required to hear evidence.

Bewick v. Mecham[100] mentions oaths, witnesses and notices of trials.

Under present California law, it is not necessary that arbitrators be sworn.[101] Neither is the swearing of the arbitrators required under the Uniform Act.[102]

Under the existing California law, there is no specific requirement that arbitrators give notice of hearing,[103] but the courts have nonetheless imposed

this requirerequirement.[104] It has been said that it is not contemplated that there will be a hearing and notice for appraisal proceedings. However, it has also been held that when the property to be appraised has been substantially destroyed, appraisers must give notice and an opportunity to present evidence.[105] The New York Court of Appeals has held that it is legal misconduct for appraisers to refuse to receive evidence relevant to the value of property which has been partially destroyed.[106]

So far as the swearing of witnesses is concerned, although arbitrators have the power to swear witnesses, they are not required to.[107] "The hearing may be in the nature of an informal conference rather than a judicial trial."[108]

In California, the Supreme Court has held that as long as the arbitrators afford a hearing on disputed questions of fact, they may further inform themselves by consulting price lists, examining materials, receiving cost estimates, and consulting disinterested experts without notice or hearing to the parties.[109]

There is nothing in the Uniform Act which would alter the above principles.

Thus, under California's present law and under the Uniform Act, the objections that have been expressed to specifically enforcing appraisal agreements are, in large part, no longer applicable.

The principal remaining objection to the inclusion of appraisals is that appraisal awards may be held invalid because of failure to hold a hearing or give proper notice. The notice requirement can be waived by the interested parties in the contract.[110] As indicated above, some appraisal awards have been upset because of failure to give notice and receive evidence offered by a party. Some might argue that a party <u>ought</u> to have a right to know

when an appraisal is to take place and to call the appraisers' attention to relevant matters even if a formal arbitration is not contemplated.

Apparently to meet the objections of the Court of Appeals, the New York statute[111] brings appraisals within its provisions only upon refusal of one party to proceed. Thus, if both parties proceed with the appraisal, the common law rules remain applicable and the resultant award cannot be attacked for failure to comply with a procedural requirement of the arbitration act. This approach, though, also has drawbacks. The statutory provisions for confirmation, modification or correction of the award are inapplicable. The award is subject to attack for failure of the appraisers to act unanimously -- unless the parties waived that requirement by agreement. The appraisers do not have the power of subpoena and may not require the production of evidence essential to the determination of the question submitted.

To meet all of these objections, the arbitration statute might provide that a hearing is not required upon a question of valuation unless the parties specifically so require in their contract.

Of course, even if no legislation is enacted in regard to appraisals, some enforcement machinery will still exist for some such agreements. Some courts refuse to let a party revoke his agreement to permit appraisal after the appraiser has been appointed;[112] but California has not gone so far. Many appraisal agreements are construed as conditions precedent to suit, and a party may not bring an action to enforce the agreement if he is unwilling to submit to an appraisal. But this enforcement machinery is totally one-sided. Only a plaintiff can be forced to live up to his agreement.

The typical situation involves insurance. The standard fire insurance contract[113] provides that if a dispute arises as to the value of the loss,

"then, on the written demand of either, each shall select a competent and disinterested appraiser . . . . The appraisers shall first select a competent and disinterested umpire; and failing . . . to agree upon such umpire, then, on request of the insured or [the insurer], such umpire shall be selected by a judge of a court of record . . . ." This provision provides for a judge's appointment when the appraisers do not agree on an umpire. Nothing is provided to meet the problems created when the insurer refuses to appoint an appraiser.

As the policy makes compliance with the appraisal requirements a condition precedent to suit, it is apparent that the insured cannot enforce the policy unless he submits to appraisal to determine the amount of loss. As the policy calls for appraisal -- not arbitration -- under the traditional rules set forth in Bewick v. Mecham,[114] if the insurer refuses to appoint an appraiser, the insured's only recourse is to sue on the policy and prove the amount of loss in court.

The traditional rule is set forth in Happy Hank Auction Co. v. American Eagle Fire Ins. Co.[115] (1 N.Y.2d 534, 136 N.E.2d 842 (1956)). That case involved a policy provision identical with the California standard policy provision quoted above. The court said:

> Despite the mandatory language of the standard policy, the New York courts have no power to require an insurer to take part in an appraisal demanded by an insured but refused by his insurer. On the other hand, if the insurer demands appraisal and the insured fails or refuses to comply, the insured forfeits his right of action on the policy . . . . Such is the settled New York law.

It appears from the opinion in Bewick v. Mecham[116] that this is the California law as well.

The New York Law Revision Commission recommended that the insurance law of that state be amended to provide for judicial appointment of an

appraiser if either party refuses to comply with the appraisal provision.[117] However, the recommendation was not adopted. Without the benefit of such specific legislation, the Ohio Supreme Court, in Saba v. Homeland Insurance Co.,[118] held that the court could appoint an appraiser for the insurer under the Ohio arbitration statute. Minnesota, with a somewhat different standard policy, has also held that the insurer's promise to join in an appraisal is enforceable.[119]

The Ohio case may signal the end of the distinction between arbitration and appraisal in that state. A later decision of an intermediate appellate court there has said that the Saba case did not intend to bring appraisals within the scope of the statute.[120] The court held that an appraisal award was not subject to a motion for confirmation under the arbitration law. The authority of this case is somewhat dubious, though, for the principal authority relied upon was the dissenting opinion in the Saba case.

The only arguments for preserving the distinction between arbitration and appraisal are found in opinions like those of the New York Court of Appeals which point out the problems which will be created if technical arbitration procedures are made applicable to appraisal agreements.

As indicated, many of these technical requirements are not present in either the existing California law or the Uniform Act. In any event, the procedural requirements that exist are subject to the contract of the parties, so that by agreement the parties may authorize the arbitrators to proceed in whatever manner they see fit.

Williston[121] believes the distinction has outlived its usefulness and should be abolished. Our consultant also so recommends.[122]

B. Other Non-Justiciable Questions

If non-justiciable questions are not included in the statute, the present law will be changed in part. Valuation questions can be arbitrated if the agreement is properly worded.[123] Other non-justiciable disputes which are arbitrable at present will no longer be arbitrable. For instance, persons would no longer be able to arbitrate wages and hours provisions of labor contracts, and would not be able to arbitrate management differences in business enterprises.

In valuation situations, the courts can disregard the valuation provision and enforce the remainder of the contract by making the valuation itself.[124] However, if the difference involves a management decision in a closely held corporation, or partnership which has reached an impasse, the only solution the law holds out is dissolution.[125] This seems a highly unsatisfactory solution to offer a going business. To permit arbitration is to salvage the enterprise.

In the labor situation, the alternative to arbitration is industrial strife. A court cannot make a contract for the parties. Hence, unless non-justiciable disputes are included, the law would provide no remedy to solve the dispute.

IV. RECOMMENDATION

As California now enforces agreements to arbitrate non-justiciable disputes, it is recommended that the law in this regard be left unchanged.

As the only purpose for preserving the distinction between arbitrations and appraisals is to relieve appraisers from the statutory requirement of

giving notice and the parties an opportunity to present evidence, and as these matters can be fully controlled by the parties in their agreement, it is recommended that contracts calling for appraisals be enforced under the arbitration statutes.

The adoption of these recommendations will eliminate the last vestiges of Milnes v. Gery[126] from California law. They will eliminate the totally one-sided type of enforcement machinery now used to enforce appraisal agreements. They will permit resolution of disputes for which no other method of resolution exists and which would otherwise be resolved by industrial strife or dissolution of going concerns. They will give appraisers power to obtain all evidence necessary for decision. They will make available to appraisal proceedings the procedural advantages of the arbitration law, such as majority decisions, and correction and confirmation of awards.

The only disadvantage is that appraisals may be upset because of lack of notice and hearing if the parties forget to waive these requirements in their contract. However, notice to the parties may be desirable.[127] If after notice, the parties do not offer evidence, they will have waived any such right. Hence, in practice, it may be that the judicial fears may prove unwarranted.

Therefore, it is recommended that non-justiciable questions -- including valuations and appraisals -- be included within the arbitration statute.

FOOTNOTES

1. Brewer v. Bain, 60 Ala. 153 (1877); Sturges, Commercial Arbitration and Awards, 198 (1930).

2. Scott v. Avery, 5 H.L.C. 811, 10 E.R. 1121 (1856).

3. Shaw v. State, 125 Ala. 80, 28 So. 390 (1899); Woods v. Lafayette, 46 N.Y. 484 (1871).

4. Dore v. Southern Pacific Co., 163 Cal. 182 (1912); Dickinson v. Railroad Co., 7 W.Va. 390 (1874); Brown v. Bellows, 21 Mass. (4 Pick.) 179 (1826).

5. Underhill v. Van Cortlandt, 2 Johns. Ch. 339 (1817); Van Cortlandt v. Underhill, 17 Johns. R. 405 (1819).

6. Re Hopper, L.R. 2 Q.B. 367 (1867).

7. Continental Bank Supply Co. v. Internat'l Bro'd of Bookbinders, 239 Mo.App. 1247, 201 S.W.2d 531 (1947).

8. Matter of Kallus, 292 N.Y. 459, 55 N.E.2d 737 (1944).

9. Shepard & Morse Lumber Co. v. Collins, 198 Ore. 290; 256 P. 2d 500 (1953); Matter of Delmar Box Co., 309 N.Y. 60, 127 N.E.2d 808 (1955) 6 Williston, Contracts 5376 (Rev. Ed. 1938). Williston states:

> . . . the final test should be whether or not the parties intended the 'arbitrators' to determine ultimate liability or merely facts incidental thereto. Other tests . . . seem question begging and unhelpful." In the next paragraph, he concedes that "by proper agreement" a dispute concerning valuation may be submitted to arbitration; then he concludes, quite illogically, "it is thus the form of the agreement, that is, whether it allows third parties to determine fact alone or liability as well, which determines the nature of the proceedings . . . .

10. Re Hopper, L.R. 2 Q.B. 367 (1867); Dore v. Southern Pacific Co., 163 Cal. 182 (1912); and see cases collected in note, 157 A.L.R. 1286, 1290.

11. Compare Bewick v. Mecham, 26 Cal.2d 92 (1945) and Solari v. Oneto, 166 Cal. App.2d 145 (1958).

12. Flint v. Pearce, 11 R.I. 576 (1877); Garred v. Macey, 10 Mo. 161 (1846); Poland Coal Co. v. Hillman Coal & Coke Co. 357 Pa. 535, 55 Atl.2d 414 (1947); Matter of Fletcher, 237 N.Y. 440, 143 N.E. 248 (1924).

13. See cases in Note 12, supra.

14. Although this distinction appears very frequently in the cases, the principal writers in the field do not believe that it is at all helpful. See 6 Williston, Contracts 5376, note 9 (Rev. Ed. 1938); Sturges, Op. Cit. note 1, 19.

15. In Poland Coal Co. v. Hillman Coal & Coke Co., 357 Pa. 535, 55 Atl.2d 414 (1947), the contract called for a determination of the quantity of coal remaining in a mine by an "arbitrator" if the parties could not agree. Despite this provision, the court said:

> The only undetermined element in the trasaction was the quantity of coal and there was no dispute about that because the parties had long before provided that the quantity of coal to be paid for was to be determined by the [arbitrator].

See also Dworkin v. Caledonian Ins. Co. 285 Mo. 342, 226 S.W. 846 (1920).

16. Milhollin v. Milhollin, 71 Ind. App. 477, 125 N.E. 217 (1919).

17. Brown v. Wheeler, 17 Conn. 345 (1845).

18. Bewick v. Mecham, 26 Cal.2d 92 (1945); Solari v. Oneto, 166 Cal. App.2d 145 (1958).

19. 163 Cal. 182, 189 (1912).

20. Re Hopper, L.R. 2 Q.B. 367 (1867).

21. Note, 157 A.L.R. 1286, 1290, 1296-1299.

22. Dayton, Book Review, 45 Harv. L. Rev. 771, 773(1932); Kagel, California Arbitration Statute, 38 Cal. L. Rev. 799, 814-815 (1950).

23. Hayes, Specific Performance of Contracts for Arbitration or Valuation, 1 Corn. L. Q. 225 (1916); cf. Civ. Code sec. 1730, Uniform Sales Act §10.

24. 33 E.R. 574, 14 Ves.Jr. 400 (1807).

25. 36 E.R. 195, 3 Mer. 507 (1817).

26. L.R. 4 Eq. 529 (1867).

27. Dworkin v. Caledonian Ins. Co., 285 Mo. 342, 226 S.W. 846 (1920); Ball v. Doud, 26 Or. 14, 37 Pac. 70 (1894).

28. Scott v. Avery, 5 H.L.C. 811, 10 E.R. 1121 (1856); Knapp v. Bro. of Amer. Yeomen, 139 Ia. 136, 117 N.W. 298 (1908).

29. Blodgett Co. v. Bebe Co., 190 Cal.665, 214 Pac. 38 (1923).

30. Trainor v. Phoenix Fire Assur. Co., 65 L.T.N.S. 825 (1892); Scott v. Mercantile Acc. & Guar. Insur. Co., 66 L.T.N.S. 811 (1892); Spurrier v. La Cloche, [1902]A.C. 446.

31. Collins v. Collins, 26 Beav. 306, 53 E.R. 916 (1858); Vickers v. Vickers, L.R. 4 Eq. 529 (1867).

32. Koretz, Specific Enforcement of Agreement for Appraisal, Legislative Document (1958) No. 65(C) State of New York, Law Revision Commission.

33. 5 H.L.C. 811, 10 E.R. 1121 (1856).

34. Recognition of the doctrine can be found in Pintard v. Irwin, 20 N.J. Law 497 (1845), Garred v. Macey, 10 Mo. 161 (1846) and Elmendorf v. Harris, 5 Wend. 516 (N.Y. 1830), all of which antedate Scott v. Avery (1856).

35. Collins v. Collins, 26 Beav. 306, 53 E.R. 916 (1858); Leeds v. Burrows, 12 East 1, 104 E.R. 1 (1810).

36. Cases are collected in a note, 26 A.L.R. 1077.

37. 12 East 1, 104 E.R. 1 (1810).

38. This case seems to have been the one that established the distinction. No cases recognizing the distinction have been found antedating it. Later cases cite this case as the earliest authority for the distinction. Thus, it may be concluded that the entire body of law that has developed around this distinction was born because an appraisal stamp was purchased instead of an award stamp.

39. 3 L.J.K.B. (n.s.) 124 (1834).

40. 26 Beav. 306, 53 E.R. 916 (1858).

41. 17 & 18 Vict. c. 125, §12 (1854).

42. Loc. cit. note 37, supra.

43. Loc. cit. note 39, supra.

44. 33 E.R. 574, 14 Ves.Jr. 400 (1807). See note 24 and accompanying text.

45. Loc. cit. note 40, supra.

46. L.R. 2 Q.B. 367 (1867).

47. L.R. 2 Q.B. at 373.

48. 2 Johns.Ch. 339 (1817).

49. 17 Johns R. 405 (1819).

50. 5 Wend. 516 (N.Y. 1830).

51. 6 Cow. 103 (N.Y. 1826).

52. 23 Wend. 628 (N.Y. 1840).

53. 10 Mo. 161 (1846).

54. 12 East 1, 104 E.R. 1 (1810).

55. 35 Mo. 389 (1865).

56. Note 53, supra.

57. Note 55, supra.

58. 95 Ill. 533 (1880).

59. Note 50 and accompanying text.

60. Note 53, supra.

61. Note 55, supra.

62. Notes 37 through 40.

63. 20 N.J. Law 497 (1845).

64. 74 Cal. 287 (1887).

65. Note 58, supra.

66. Note 55, supra.

67. Note 40. supra.

68. 163 Cal. 182 (1912).

69. Ann. Laws of Massachusetts c. 251, §§ 1, 14 (Michie 1958).

70. Hubbell v. Bissell, 79 Mass. (13 Gray) 298 (1850).

71. Ark. Stat. Ann. § 34-502 (Bobbs-Merrill 1957), "All controversies, which might be the subject of a suit or action, ..."; Colo. Rules Civ. Proc. Rule 109 (Callaghan 1957), "All controversies which may be the subject of a civil action . . . ."; Ida. Code § 7-901 (Bobbs-Merrill 1959), "any controversy which might be the subject of a civil action"; Burns Ind. Stat.Ann. § 3-201 (1959), "any controversy existing between them which might be the subject of a suit at law"; Iowa Code § 679.1 (1958) "all controversies which might be the subject of a civil action"; Ky. Rev. Stat. § 417.010 (1959), "any controversy that might be the subject of an action"; Rev. Stat. of Maine c. 121 § 1 (Michie 1954) "all controversies which may be the subject of a personal action"; Mich. Comp. Laws § 645 (1948), "any controversy . . . which might be the subject of an action at law, or of a suit in chancery"; Miss. Code Ann. § 279 (Harrison 1958), "any controversy . . . which might be the subject of an action"; Mo. Rev. Stat. § 435.020 (1957), "any controversy which

might be the subject of an action"; Mont. Rev. Code § 93-201-1 (Allen Smith 1959) "any controversy which might be the subject of a civil action"; Neb. Rev. Stat. § 25-2103 (1956), "all controversies, which might be the subject of civil actions"; N. Mex. Stat. Ann. § 22-3-6 (Allen Smith 1959), "Any question or difficulty that might result in a suit"; N.Y. Civ. Prac. Act § 1448 (1959), "any controversy . . . which may be the subject of an action"; N.Dak. Rev. Code § 32-2901 (1957), "any controversy which might be the subject of a civil action"; Tenn. Code § 23-501 (Bobbs Merrill 1959), "all causes of action"; Wash. Rev. Code § 7.04.010 (1956), "any controversy which may be the subject of an action."

The New York, Michigan and Washington statutes quoted impose the justiciable question requirement upon agreements to submit existing disputes to arbitration. All three states provide that parties may also contract to settle by arbitration "any dispute thereafter arising."

72. Code of Civ. Proc. § 1281 (1872), "any controversy which might be the subject of a civil action."

73. Washington does not recognize common law arbitration, (Dickie Mfg. Co. v. Sound Contruction & Eng. Co., 92 Wash. 316, 159 Pac. 129 (1916). See generally, Sturges, op. cit., note 1, 2 - 5; Continental Bank Supply Co. v. International Bro'hood of Bookbinders, 239 Mo.App. 1247, 201 S.W.2d 531 (1947).

74. Alabama Code tit. 7 § 830 (Michie 1959); Ariz. Rev. Stat. § 12-1501 (West 1959); Gen. Stat. of Conn. § 52-408 (1958); Dela. Code Ann. § 5701 (Thompson 1959); Fla. Stat. § 57.11 (1957); Rev. Laws of Hawaii c. 188 § 1 (1955); Smith-Hurd Ill. Ann. Stat. c. 10 § 1 (1958); Gen. Stat. of Kans. § 5-201 (1957); La. Rev. Stat. tit. 9 § 42 (West 1958);

Minn. Stat. § 572.08 (1957); Nev. Rev. Stat. § 38.030 (1959); N.H. Rev. Stat. § 542.1 (Law. Coop. 1957); N.J. Stat. Ann. § 2A:24-1 (West 1958); N. C. Gen. Stat. § 1-544 (Michie 1959); Page's Ohio Rev. Code § 2711.01 (1959); Ore. Rev. Stat. § 33.210 (1957); Purdon's Penn. Stat. tit. 5 § 161 (1958); Gen. Laws of R. I. § 10-3-2 (Bobbs Merrill 1956); Vernon's Tex. Stat. art. 224 (1948); Utah Code § 78-31-1 (Allen Smith 1959); Virg. Code § 8-503 (Michie 1958); W. Va. Code § 5499 (Michie 1959); Wisc. Stat. § 298.01 (1957); Wyo. Stat. § 1-1027 (Michie 1959). Md. Ann. Code art. 7 § 3 (Michie 1958) "all subjects of dispute."

75. Code of Civ. Proc. § 1280.

76. Uniform Arbitration Act § 1.

77. 357 Pa. 535, 55 Atl.2d 414 (1947).

78. New York Civ. Prac. Act § 1448 - 1468.

79. N.Y. Laws 1920 c.275.

80. 237 N.Y. 440, 143 N.E. 248 (1924).

81. Matter of Buffalo & Erie Ry. Co., 250 N.Y. 275, 165 N.E. 291(1929).

82. New York Laws 1940 c. 851.

83. New York Laws 1941 c. 288.

84. 17 N.Y. Judicial Council Report 237 (1951) as quoted in Legislative Document (1958) No. 65 (C), New York Law Revision Commission 415.

85. 201 N.Y. 403, 94 N.E.2d 73 (1950).

86. Matter of Sigelman, 279 App. Div. 771, 109 N.Y.S.2d 115 (1951).

87. N.Y. Laws 1952 c. 757.

88. Legislative Document (1958) No. 65 (c), New York Law Revision Commission 417.

89. 309 N.Y. 60, 127 N.E.2d 808 (1955).

90. N.Y. Laws 1958 c. 702.

91. 163 Cal. 182 (1912).

92. Alpha Beta Food Markets v. Retail Clerks, 45 Cal.2d 764 (1955); Culinary Workers v. Stan's Drive-Ins, 136 Cal.App.2d 89 (1955); McKay v. Coca Cola Bottling Co., 110 Cal.App.2d 672 (1952). All of these cases involved the arbitration of wage provisions of collective bargaining contracts.

93. 26 Cal.2d 92 (1945).

94. Minton v. Mitchell, 89 Cal.App. 361, 370 (1928); cases are collected in a note, 117 A.L.R. 302, 305, supplemented at 161 A.L.R. 1427, 1428.

95. Note 24, supra.

96. 166 Cal. App.2d 145 (1958).

97. Note 93, supra.

98. See discussion in note, The Specific Performance of Appraisal Contracts -- A Further Repudiation of Milnes v. Gery, 33 Virg. L. Rev. 494, (1947).

99. Matter of Delmar Box Co., 309 N.Y. 60, 127 N.E.2d 808 (1955).

100. 26 Cal.2d 92 (1945).

101. Code of Civ. Proc. § 1286.

102. § 5.

103. Code of Civ. Proc. § 1286.

104. Curtis v. Sacramento, 64 Cal. 102 (1883); Stockwell v. Equitable F. & M. Ins. Co., 134 Cal.App. 534 (1933); Lang v. Badger, 157 Cal. App.2d 345 (1958).

105. Stockwell v. Equitable F. & M. Ins. Co., 134 Cal.App. 534 (1933); Gregory v. Pawtucket Mut. F. Ins. Co., 58 R.I. 434, 193 Atl. 508, 112 A.L.R. 1 (1937).

106. Gervant v. New Eng. Fire Ins. Co., 306 N.Y. 393, 118 N.E.2d 574 (1954).

107. Code of Civ. Proc. § 1286; Sapp v. Barenfeld, 34 Cal.2d 515 (1949).

108. Sapp v. Barenfeld, 34 Cal.2d 515, 520 (1949).

109. Sapp v. Barenfeld, note 107, supra.

110. Sapp v. Barenfeld, note 107, supra; Lang v. Badger, 157 Cal.App.2d 345 (1958).

111. New York Civil Practice Act § 1340 (1958).

112. Jacobs v. Schmidt, 231 Mich. 200, 203 N.W. 845 (1925).

113. Insurance Code § 2071.

114. 26 Cal.2d 92 (1945).

115. 1 N.Y.2d 534, 136 N.E.2d 842 (1956).

116. Note 114, supra.

117. Legislative Document (1958) No. 65(C), State of New York, Law Revision Commission. This proposal was made because appraisals under the standard fire insurance policy are excluded from the statute, enacted in 1958, which provides for the enforceability of appraisal agreements generally.

118. 159 Oh.St. 237, 50 Oh.Op. 269, 112 N.E.2d 1 (1953).

119. Glidden Co. v. Retail Hardware Mut. F. Ins. Co., 181 Minn. 518, 233 N.W. 310 (1930), aff'd 284 U.S. 151; Itasca Paper Co. v. Niagara Fire Ins. Co., 175 Minn. 73, 220 N.W. 425 (1928).

120. Rademaker v. Atlas Assur. Co., 98 Oh.App. 15, 57 Oh.Op. 40, 120 N.E.2d 592 (1954).

121. 6 Williston, Contracts 5379 (Revised Edition 1936).

122. Kagel, Study 4 (1958).

123. Solari v. Oneto, 166 Cal.App.2d 145 (1958).

124. This was done in Bewick v. Mecham, 26 Cal.2d 92 (1945).

125. O'Neal, Resolving Disputes in Closely Held Corporations: Intra- Institutional Arbitration, 67 Harv. L. Rev. 786 (1954).

126. Note 24, supra.

127. See the discussion in Curtis v. Sacramento, 64 Cal. 102 (1883).