Date of Meeting: October 23-24, 1959

Date of Memo: October 14, 1959

Memorandum No. 4

Subject: Arbitration - Study No. 32

There is attached to this memorandum a supplemental memorandum in regard to oral and written arbitration agreements. This study was made by the staff pursuant to the Commission's direction at the September meeting.

At the September meeting, the Commission approved the idea that arbitration shall be unenforceable unless written. On the basis of the additional information the Commission must decide whether (1) statutory provisions should be recommended which would require that written agreements to arbitrate be signed by the party to be charged to be enforceable, (2) statutory provisions should be recommended to provide that an agreement to arbitrate can be incorporated into a written agreement by reference in the same manner as other contractual provisions may be incorporated by reference, and (3) statutory provisions should be recommended which would provide that an agreement to arbitrate is enforceable even if it is made orally provided that the terms of the agreement are in writing as in the case of written contracts which are extended by oral agreement or by the conduct of the parties.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

(32)

10/12/59
(JBH)

SUPPLEMENTAL MEMORANDUM IN REGARD TO ORAL AND WRITTEN ARBITRATION AGREEMENTS

Although most arbitration statutes provide that the statutory procedures apply only to written arbitration agreements,[1] in most jurisdictions there has been virtually no litigation in regard to the meaning of the term "written agreement." No California cases have been decided interpreting this term.

The statute of frauds[2] in California provides that agreements that are subject to its terms are invalid unless the agreement, or some note or memorandum thereof be in writing, and subscribed by the party charged, or by his agent. Although the statute says that contracts are invalid, the cases hold the contracts valid but unenforceable if the defense of the statute is raised.[3] Supplementing this rule is section 2309 of the Civil Code which provides that an agent's authority must be written when the agent is authorized to enter into a contract required by law to be in writing. The requirement of the arbitration statute that the agreement be in writing may be held to be quite a different requirement than that imposed by the statute of frauds.

Although there has not been much litigation in regard to the meaning of "written agreement" elsewhere, the New York courts have considered problems in regard to written arbitration agreements at some length. This may be due, in part, to the fact that New York has more

litigation in regard to arbitration than does any other state.[4] It may be due in part too, to the form of statute adopted by New York in regard to this subject. The New York statute seems to create on its face a distinction between the statute of frauds requirement of a memorandum signed by the party to be charged and the arbitration requirement of a written agreement. The New York statute[5] provides:

> A contract to arbitrate a controversy thereafter arising between the parties must be in writing. Every submission to arbitrate an existing controversy is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent.

In accordance with this language the New York courts have held that the statute of frauds requirement of a memorandum signed by the party to be charged is required to validly create a contract to submit an existing controversy to arbitration. On the other hand, an agreement to submit future controversies to arbitration need only be in writing; it need not be signed by anyone.

In Japan Cotton Trading Company v. Harbin,[6] the parties executed two written contracts for the sale of raw silk. At a later date the plaintiff sent two more contract forms which it had signed ordering more of the same material. These forms were not signed by the defendant seller. All of the contract forms had an arbitration provision adopting the arbitration rules of the Silk Association of America. The defendant did not perform the contracts and the parties reached a compromise settlement. A dispute arose over the terms of the compromise settlement and the plaintiff requested arbitration. The defendant pointed out that it had not signed the arbitration agreement in the latter two contracts. A lower New York

court[7] indicated that the defendant could be bound to arbitrate without its signature as the provisions of the Civil Practice Act only required that the contract be in writing. It did not require that the writing be signed by the party to be charged.

In Helen Whiting, Inc. v. Trojan Textile Corp.,[8] the Court of Appeals of New York upheld the decision of the Japan Cotton Trading Company case. In the Helen Whiting case, the petitioner was a garment manufacturer and the respondent a textile manufacturer. The petitioner orally agreed with the respondent to buy 83,000 yards of three types of goods. The seller delivered three contract forms to the buyer, one for each type of merchandise. The buyer took delivery of a small portion of the order, signed one of the contracts relating to one type of merchandise, and indicated that it did not want the other two types of goods. The seller felt that the entire agreement for three types of goods was but one contract and did not want to give the buyer a favorable price on one item unless the buyer took the other two items as well. The contract forms had an arbitration clause. The seller demanded arbitration. The Court of Appeals held that the oral agreement was binding upon the buyer as the part delivery took the sales agreement out of the statute of frauds. So far as the arbitration agreement was concerned the court felt that it did not matter that the arbitration contract was not signed as long as it was in writing.

In Publishers Association v. Newspaper and Mail Delivery Union,[9] it was further held that if the contract to submit future disputes is in writing the submission of disputes as they arise under the agreement to arbitrate need not be written.

No discussion has been found indicating why New York adopted this

distinction. However, a review of some of their cases may reveal the reason. The cases indicate that ordinary business practices in the commercial world would be severely impaired if every agreement to arbitrate had to be signed by both parties.

In Belmore Dress Company v. Zanesville Fabrics Corp.[10] the buyer gave two purchase orders to the seller after some oral negotiation. Thereafter the seller sent two contract forms to the buyer containing the following words: "This order . . . shall become a contract either when signed and delivered by buyer to seller and accepted in writing by seller or when buyer or his agent has accepted the whole or any part of the goods herein described." It was held that the acceptance of the goods bound the buyer to the written arbitration clause contained in this agreement even though the buyer had not signed it.

In In re. Huxley,[11] a broker signed a "bought and sold note" and delivered it to the parties. The note contained an arbitration provision. The note with its arbitration clause were held binding upon the parties because they acted pursuant to it, and, in substance, the broker acted as agent for both parties.

In In re. American Rail & Steel Company,[12] the agreement to arbitrate was contained in a purchase order. However, under the particular circumstances of the case, it was held there had been no agreement to arbitrate.[13]

In In re. Princeton Rayon Corp.,[14] the arbitration clause was on a quotation sheet furnished by a textile finisher. The quotation sheet stated:

> The shipment of any goods for processing shall be deemed an acceptance by customer of all the terms of this quotation. The terms of this quotation shall not be superseded by the terms of any order form of the customer unless we shall so consent in writing.

The Court of Appeals reversed the case for a trial on the factual question of whether the respondent told the appellant to disregard the quotation sheet.

In Wilson & Company v. Fremont Cake and Meal Company,[15] an agreement for the sale of soy bean oil was signed by a broker and delivered to both parties. It was held that both parties adopted the document and its arbitration clause as their contract by acting under it.

In most of the foregoing situations the statute of frauds requirement of a memorandum signed by the party to be charged would have precluded enforcement of the arbitration agreement. The distinction between the statute of frauds standard and the simple requirement of a "written agreement" is pointed up in the case of In re Exeter Manufacturing Company.[16] There, the petitioner sold textiles in nine transactions, each of which involved more than $50. The statute of frauds in New York at that time required agreements for the sale of goods to be in writing if the value of the goods exceeded $50. These sales were made by the petitioner's salesman either personally or by telephone. They were later confirmed by a written standard form of sales note mailed by petitioner to the respondent and retained by the respondent without objection. In six of the transactions the respondent accepted delivery and paid for the goods. In three of the transactions the respondent refused to pay or to give shipping instructions to the petitioner. The sales notes were signed by the petitioner, not the respondent, and had arbitration provisions in them. The respondent refused to arbitrate and the petitioner began proceedings to compel arbitration. The respondent set up the statute of frauds. The court felt that Section 1449 of the Civil Practice Act is a special statute

of frauds applicable to arbitration agreements and that the applicability of the general statute of frauds should be determined by the arbitrator. Therefore, it did not matter to the court that the respondent had not executed the arbitration agreement. The arbitration agreement was in writing, and as the respondent had received and retained it without objection he was bound by its arbitration clause even though he did not sign it. A dissent pointed out that the arbitration agreement was just one provision of a contract subject to the statute of frauds. The dissent argued that the court should not enforce that provision any more than it would enforce any other provision of the same contract.

It has been suggested that the Exeter decision is sound[17] for the only question before the court on a motion to compel arbitration is the enforcibility of the agreement to arbitrate. The court should not go further than that decision and decide other defenses which might be raised such as the statute of frauds, for if it did, it would usurp the function of the arbitrators. As a result, arbitration would be compelled only in those cases where the court had already decided that there was no defense on the merits of the controversy.

The situations involved in the foregoing cases indicate that one of the principal reasons for the New York rule may be that it is impractical to require both parties to execute an agreement to arbitrate in the ordinary commercial situation. Although many commercial transactions involve bilateral contracts, a large number are unilateral, i.e., an order will be placed which calls only for performance and not for a promise to perform at some future date. In these situations such orders, or the seller's quotations, may indicate that arbitration is applicable in case of a dispute.

We are informed that arbitration is extensively used in the textile industry and arbitration provisions are usually incorporated in the forms used.[18] Such provisions usually incorporate the rules of the Silk Association of America, rules of the American Arbitration Association, the rules of the National Soy Bean Processors' Association or the rules of some other body which has adopted extensive arbitration rules. As the orders call for performance, and not a promise, the statute of frauds provision in regard to the sales of goods of a value exceeding $500 is inapplicable. Yet, the buyer may desire arbitration if a dispute arises as to the quality of the materials or the terms and conditions of delivery. If the statute of frauds requirement of a memorandum signed by the party to be charged were applied to arbitration agreements, only the buyer would be bound in these situations, and not the seller. Alabama has held[19] that an oral agreement arrived at in open court and dictated to the reporter -- but unsigned -- complies with a statute requiring that submissions to arbitration be both written and signed.[20]

In view of the problems that would be created by applying the statute of frauds to arbitration agreements, the staff recommends that the Commission go no further than the New York statute and Uniform Act. The staff does not recommend the application of the statute of frauds requirement to arbitration agreements. The requirement of a writing will accomplish the Commission's purpose.

Another area where the New York courts have had considerable litigation in regard to the problem of written agreements concerns the extent to which an arbitration agreement can be included in a written agreement by reference.

In re General Silk Importing Company, Inc.[21] was the initial New York case involving the problem. That case involved an application to compel arbitration of a matter arising from a contract for the sale of 100 bales of raw silk. The contract was embodied in a printed form of contract prepared by the respondent. The following printed clause was in the lower margin: "Sales are governed by raw silk rules adopted by the Silk Association of America." The raw silk rules of the Silk Association of America contained arbitration provisions. The court held that the statement on the contract might mean that the raw silk rules would govern in determining the rights and obligations of the parties under the terms of the contract without regard to the remedy to be used to enforce such rights. The court felt that the language did not clearly indicate that the remedy to be used was to be arbitration. The New York court felt that clearer language was needed to establish that the parties had agreed to arbitrate. Thus the respondent was able to escape arbitration under the rules despite the fact that it was the respondent that had prepared the printed form stating that the contract was subject to the rules of the Silk Association.

In Level Export Corp. v. Wolz Aiken & Company,[22] two written contracts were executed for the sale of cotton fabric. The printed portion of the contracts stated:

> This sales note is subject to the provisions of standard cotton textile sales note which, by this reference, was incorporated as a part of this agreement and together herewith constitutes the entire contract between buyer and seller.

The standard cotton textile sales note referred to contained a provision requiring arbitration of any controversies arising under the contract. The Court of Appeals held that arbitration was required under the terms of

this agreement. Yet, again, in Riverdale Fabrics Corporation v. Tillinghast-Stiles Company[23] the Court of Appeals held that there was no clear agreement to arbitrate when the sale memorandum stated: "This contract is also subject to the cotton yarn rules of 1938 as amended." The latter holding provoked a dissent which pointed out that in none of the contracts involved in the General Silk, Level and Riverdale Fabrics cases was there any actual mention of arbitration. Each contract was in terms made subject to an outside, unattached document which contained an arbitration clause. The dissenting judge did not feel that a different rule should be adopted merely because the agreement said "subject to" or "governed by" instead of "which, by this reference, is incorporated as a part of this agreement."

The weakness of the New York line of cases was ably pointed out in Wilson & Company v. Fremont Cake & Meal Company.[24] That case, too, involved an agreement which merely provided that it was subject to the rules of the National Soy Bean Processors' Association. These rules had an arbitration clause. The court indicated that the New York cases are a reflection of the common law theory that agreements which "oust the court from jurisdiction" should be strictly construed. The court rejected the validity of the argument that arbitration agreements "oust the court of jurisdiction" on the authority of Kulukundis v. Amtorg.[25] The court then said:[26]

> The plaintiff argues that the parties should be held, by their adoption of the Association's rules, to have submitted only to those of the rules which have to do with standards of quality, price, unit of weight, terms, time of shipment, weights, routing, tank cars, etc. . ., but not to the rule requiring arbitration. Qua auctoritate? The court may not lend its sanction to such post-contractual eclecticism, especially since it is invoked unilaterally.

> [T]he plaintiff urges . . . that the parties to the present contract might have manifested their agreement to arbitrate by a short and simple paragraph in the memorandum expressedly declaring such a purpose, or by a clause to the effect that, in adopting the association's rules, they intended to adopt Rule 115 dealing with arbitration. To this court, such a position seems utterly untenable. If any of the rules were not to be operative their omission ought, indeed, to have been expressly incorporated into the memorandum by appropriate language. But having adopted by adequate descriptive language the entire group of rules, the addition of such a phrase as, "and we intend to include Rule 115," would appear to be the ultimate in supererogation.

There is some authority which indicates that the New York rule may be the law in California. In Western Vegetable Oils Company v. Southern Cotton Oil Company,[27] a contract of sale of a tank car of coconut oil said:

> This contract is subject to the published rules and regulations of the National Institute of Oilseed Products -- and which are hereby made a part of this contract . . . .

The rules had an arbitration clause. The court held that there was no clear intent to arbitrate expressed in this agreement and denied a motion for a stay in the proceedings pending arbitration. However, this holding was principally based upon the fact that the oilseed products rules also had a standard contract form which contained an arbitration clause. In the instant case, the standard form was used with the arbitration clause omitted. The court felt that this indicated an intent not to incorporate the arbitration clause. Moreover, the case appears to be contrary to the rule which has been ultimately established in New York under the Level[28] case which held that an agreement to arbitrate is binding when the agreement expressly states that the rules are made a part of the contract. Hence, this case cannot be regarded as a holding that the New York rule is applicable.

In Commercial Factors Corporation v. Kurtzman Bros.[29] the defendant

ordered certain goods while he was in New York. The order form had a clause incorporating certain rules on its back. The form also consented to New York jurisdiction. However, it contained a clause which said that the contract became binding "only when signed by the seller or confirmed in writing by the seller." The form was never signed by the seller. The California court held that a judgment confirming an arbitration award obtained in a New York court was invalid because the New York Court did not have jurisdiction. The California court held that there was no agreement to arbitrate, relying on the fact that the seller had never signed the order form and on the New York case of Arthur Philip Export Company v. Leathertone.[30] The Leathertone case also involved an order form which said in small letters on the front and in parenthesis "(See also back)." There was an arbitration clause on the back. The New York court held that there was no agreement to arbitrate, stating:

> A party should not be bound by clauses printed on the reverse side of a document unless it be established that such matter was properly called to its attention and that it assented to the provisions there stated.

Because of the California court's reliance on the failure of the seller to sign, its decision cannot be regarded as clear-cut authority that the New York rule is applicable here.

The United States Supreme Court, without discussion of the matter, has indicated that it may recognize that an incorporation by reference of an arbitration clause is little different than an incorporation of any other provision in a contract. In Marine Transit Company v. Dreyfus,[31] the court considered a contract which stated that it was "subject to New York Produce Exchange Canal Grain Charter Party No. 1 as amended." The Charter Party had an arbitration clause which the Court said applied and was valid.

In view of the amount of litigation which has arisen in New York

and elsewhere involving this problem it is to be anticipated that similar problems will arise in California as commerce increases. Accordingly, it would seem to be desirable to include some language in an arbitration statute which would clarify this matter before litigation arises. This writer feels that the Commercial Factors[32] and Leathertone[33] cases are probably correct in principle and that no one should be bound to the small print on the back of an order form when there is no clear indication on the front of the order form that there are provisions on the back which are a part of the contract. However, it is also felt that there is no reason to distinguish an agreement to arbitrate from any other agreement which may be incorporated by reference into a contract.

California courts have held that a provision in a written contract stating that it is "subject to" rules and regulations or other provisions contained in a separate document is sufficient to incorporate such rules and regulations or other provisions into the contract.[34] The test seems to be whether a reasonable and prudent man would understand that the provisions of the outside document were to be a part of the contract.[35] It does not seem wise or in accordance with the ordinary understanding of parties to provide that such a reference will incorporate all the rules and regulations contained in an outside document unless one of the rules provides for arbitration. As a practical matter, the parties either intend to incorporate all of the rules or they do not, and if any of the rules should be enforced, all of them should be.

In view of the uncertainty in the law at the present time, and in view of the amount of litigation in New York over this very problem, it is recommended that the arbitration statute contain a provision indicating that

arbitration rules may be incorporated into a written contract by reference in the same manner that any other provisions may be incorporated by reference.

Another area where problems may be created and litigation generated unless appropriate provision is made involves written contracts which have expired but which are orally extended or are observed by the parties in their continuing relationships. A common example involves a lease of real property. A less common example involves insurance.

Under Civil Code Section 1945 a tenant that holds over after expiration of the term becomes a periodic tenant on the same terms and conditions that the property was held under the written lease.[36] However, those terms of the lease for which the statute of frauds requires a writing are not extended. For instance, in Hagenbuch v. Kosky[37] a written lease was entered into for a term of three years. The lease gave the lessee an option to buy the property at a price to be agreed upon. In case there was no agreement each party was to appoint an appraiser who would appoint a third appraiser. The appraisers would set the price. After expiration of the original term the lessee attempted to exercise the option under a claimed oral renewal of the lease. The lessee brought an action for declaratory relief. Judgment for the defendant was affirmed. The court held that the renewal of the lease was within the statute of frauds. Therefore, the renewal was from year to year on a one-year basis and the option itself was invalid and unenforceable in the absence of estoppel and no estoppel was made out.

A similar holding is contained in Spalding v. Yovino-Young.[38] That was an action for specific performance of an option to purchase which was contained in a written lease. The lease was for two years with a provision for holding over on a month to month basis after the end of the term. The

option was exercised after the expiration of the basic term. The Supreme Court held that the option expired at the end of the basic term.

Yet, if a provision of the original lease is not within the statute of frauds, the cases seem to hold that it will be extended into the periodic tenancy following the basic term. Such a provision is the right to remove trade fixtures. It is settled in California that a tenant has the right to remove trade fixtures before the end of the term in the absence of contrary agreement.[39] It is also settled that if the term expires and a new lease is executed the fixtures become the property of the lessor in the absence of contrary agreement.[40]

If the old lease is extended or if the lessee holds over under an oral agreement or on a month to month tenancy the tenant retains the right to remove trade fixtures. In Knox v. Wolf[41] the tenant leased property for five years and installed certain trade fixtures. The lease had a provision that if the lessee held over he would be a tenant from month to month on the same terms and conditions as in the lease. The court pointed out that this is no more than the law would require in the absence of agreement. The court said:

> Where a lease provides that the tenant may remove the fixtures which it installs and the tenant remains in possession with permission of the lessor for month to month after the expiration of the lease, the continued occupancy is regarded as an extension of the lease and the parties are deemed to have assented to the terms of the original lease, including the right to remove the fixtures.

From these authorities, it appears that a court would hold that an arbitration provision would not be extended along with the other terms of the lease if the lease were orally extended or the tenant held over if a statute required arbitration agreements to be in writing. Thus, if a lease contained a provision permitting a lessee to remove fixtures or to sell them to the

lessor at the end of the term at a price to be determined by arbitration, it is likely that all of the terms would be enforceable during an oral extension except the arbitration clause. Similarly, if a lease contained a clause providing that the parties would arbitrate the amount the lessee should pay the lessor to restore the property to its original condition at the end of the term, it is likely that the agreement to arbitrate would be held unenforceable if the lease were extended orally or by implication. These cases would be analogous to the situations involving options. Because of the writing requirement applicable to options to purchase real property, an option to purchase is not extended by an oral or implied extension of the basic lease. In the absence of a statute requiring arbitration agreements to be written, there would appear to be little doubt that Civil Code 1945 would make the arbitration provisions in the basic lease applicable during the holding-over period.

A similar problem might involve insurance contracts. There is a statutory standard form of fire insurance policy which contains a provision for appraisal or valuation.[42] Under some circumstances this could involve a statutory arbitration.[43] In the ordinary case the insured has to submit to arbitration before he can bring an action on the policy.[44] As an insurer usually has little reason to sue the insured (he denies liability instead), an insurer has little occasion to demand arbitration of the insured. Hence, the lack of the insured's signature on the customary insurance policy would be of no great moment to the insurance company even if the proposed arbitration statute adopted the statute of frauds requirement of a memorandum signed by the party to be charged. However, it is also settled in California that an insurance contract may be entered into or renewed orally.[45] Oral insurance

agreements are commonly used where time and space limitations prevent the parties from getting together to sign a written agreement.[46] If an existing policy were extended by oral agreement, there would be no uncertainty as to its terms as they would be the same as the existing policy. Similarly, there could be no uncertainty as to the terms of a fire insurance policy required by law to conform to the statute. In such situations, the insured might want to compel the insurance company to arbitrate so that he can enforce the insurance policy. Yet, in the absence of a written agreement, it would appear doubtful that a court could order an insurance company to arbitrate if the arbitration statute required all agreements to arbitrate to be in writing.

To meet these problems, it is recommended by the staff that arbitration agreements contained in expired written contracts which have been extended orally or by implication by the parties should be enforced. The reason that the Commission and the Uniform Law Commissioners decided not to include oral contracts within the Arbitration Statute was because it was felt that oral agreements would be too uncertain. This objection does not apply to an oral agreement to extend or to continue to operate under a written agreement. In such a case the arbitration provision is in writing and its terms are certain. Since the reason for the objection to an oral agreement does not exist in this case, it should follow that there would be no objection to enforcing the oral agreement. Therefore, it is suggested that a provision be incorporated in the statute which would provide in substance that an oral agreement to arbitrate controversies is enforceable if the terms of the arbitration agreement are in writing.

Respectfully submitted,

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FOOTNOTES

1. Stephens, Arbitration II, 3.
2. Civil Code §§ 1624, 1624a, 1724, Code of Civil Procedure §§ 1973, 1973a.
3. Ayoob v. Ayoob, 74 Cal. App.2d 236 (1946).
4. The American Digest under the key numbers relating to arbitration contains far more arbitration decisions from New York courts than from any other jurisdiction.
5. New York Civil Practice Act § 1449.
6. 253 N.Y.S. 290 (1931).
7. Supreme Court, Appellate Division.
8. 121 N.E. 2d 367 (N.Y. 1954).
9. 111 N.Y.S. 2d 725 (1952).
10. 112 N.Y.S. 2d 11 (1952).
11. 61 N.E. 2d 420 (N.Y. 1945).
12. 127 N.E. 2d 562 (N.Y. 1955).
13. The purchase order stated that contract was placed in accordance with the conditions of a particular contract form, a copy of which was attached. The arbitration clause was contained in the form referred to. The copy of the contract form was not attached to the purchase order as stated. Under the circumstances, the court felt there was no clear agreement to arbitrate.
14. 127 N.E. 2d 729 (N.Y. 1955).
15. 77 F. Supp. 364 (D.C. Neb. 1948).
16. 5 N.Y.S. 2d 438 (1938).
17. Watson, The Statute of Frauds as a Defense in a Proceeding To Compel Arbitration, 3 Arbitration Journal 83. (1939).

18. Enforceable Arbitration, 61 Yale Law Journal 686 (1952).

19. Carlisle v. McMclesky, 87 So. 2d 831 (Ala. 1956).

20. Ala. Code Tit. 7 § 831 (1940): "The parties must concisely state in writing, signed by them, the matter in dispute between them . . . ."

21. 138 N.E. 427 (N.Y. 1922).

22. 111 N.E. 2d 218 (N.Y. 1953).

23. 118 N.E. 2d 104 (N.Y. 1954).

24. 77 F. Supp. 364 (D.C. Neb. 1948).

25. 126 F.2d 978 (2d Cir. 1942). In this case Judge Frank stated the common law rule that arbitration agreements were unenforceable. He then stated: "It has been well said that 'the legal mind must assign some reason in order to decide anything with spiritual quiet.' And so, by way of rationalization, it became fashionable in the middle of the 18th century to say that such agreements were against public policy because they 'oust the jurisdiction' of the courts. But that was a quaint explanation, inasmuch as an award, under an arbitration agreement, enforced both at law and in equity, was no less an ouster; and the same is true of releases and covenants not to sue, which were given full effect. Moreover, the agreement to arbitrate was not illegal since suit could be maintained for its breach. Here was a clear instance of what Holmes called a 'right' to break a contract and to substitute payment of damages for nonperformance; as, in this type of case, the damages were only nominal, that 'right' was indeed meaningful.

"An effort has been made to justify this judicial hostility to the executory arbitration agreement on the ground that arbitrations,

if unsupervised by the courts, are undesirable, and that legislation was needed to make possible such supervision. But if that was the reason for unfriendliness to such executory agreements, then the court should also have refused to aid arbitrations when they ripened into awards. And what the English courts, especially the equity courts, did in other contexts, shows that, if they had had the will, they could have devised means of protecting parties to arbitrations. Instead they restrictively interpreted successive statutes intended to give effect to executory arbitrations. . . . Lord Campbell explained the English attitude as due to the desire of the judges at a time when the salaries came largely from fees, to avoid loss of income. . . . Perhaps the true explanation is the hypnotic power of the phrase 'oust the jurisdiction.' Give a bad dogma a good name and its bite may become as bad as its bark.

"[B]ut, despite later legislation, the hostility of the English courts to executory arbitrations . . . seems never to have been entirely dissipated.

"That English attitude was largely taken over in the 19th century by most courts in this country . . . .

"The [purpose of] United States Arbitration Act of 1925 . . . was deliberately to alter the judicial atmosphere previously existing . . . .

"In the light of the clear intention of Congress, it is our obligation to shake off the old judicial hostility to arbitration. Accordingly, in a case like this, involving the federal Act, we should not follow English or other decisions which have narrowly construed the terms of arbitration agreements or arbitration statutes."

26. Id.

27. 141 Fed.2d 235 (9th Cir. 1944).

28. Footnote 22 supra.

29. 131 Cal. App.2d 133 (1955).

30. 87 N.Y.S. 2d 665 (1949).

31. 284 U.S. 263 (1932).

32. Footnote 29 supra.

33. Footnote 30 supra.

34. Hischemoeller v. Nat'l Ice & Cold Storage Co. 46 Cal.2d 318 (1956; Forest Lawn Memorial Park Assoc. v. De Jarnette, 79 Cal. App. 601 (1926).

35. Hischemoeller v. Nat'l Ice & Cold Storage Co., Note 34 supra; Cf. William A. Davis Co. v. Berkman Seed Co., 94 Cal. App. 281 (1928).

36. Psihozios v. Humberg, 80 Cal. App.2d 215 (1947).

37. 142 Cal. App.2d 296 (1956).

38. 30 Cal.2d 138 (1947).

39. Civ. Code § 1019.

40. Wadman v. Burke, 147 Cal. 351 (1905).

41. 73 Cal. App.2d 194 (1946).

42. Insurance Code § 2071.

43. Some authorities would classify the appraisal provision of the standard fire insurance policy as a "valuation" or "appraisal" as distinguished from a "true arbitration" because they distinguish a true arbitration from an appraisal on the basis of the issue to be decided. If the ultimate issue involves the liability of the parties it is considered an arbitration; if ultimate liability is not involved it is considered a valuation or appraisal. (6 Williston on Contracts, rev. ed., § 1921A).

California courts seem to use a different standard. They have stated that if the person deciding the dispute receives no testimony, but inspects the premises and makes his own judgment as to its value, the proceeding is considered a valuation. If testimony is to be received and evaluated in determining the value of the property involved it is considered an arbitration. (Bewick v. Mecham, 26 Cal.2d 92, 97-98 (1945).)

44. The standard policy contained in Insurance Code § 2071 provides that no suit or action for the recovery of any claims under the insurance contract can be commenced in any court unless the requirements of the policy, including appraisal, are complied with.

45. Parlier Fruit Co. v. Fireman's Fund Ins. Co., 151 Cal. App.2d 6, 19 (1957).

46. Id. at 25: "While it may have been true that in 1909 and 1913, parol contracts of insurance were rarely made, such a statement is no longer true. Oral binders are now a common and necessary part of the insurance business."