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## SOME CONFUSING MATTERS RELATING TO ARBITRATION IN PENNSYLVANIA \*

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A review of the Pennsylvania decisions relating to arbitration under the arbitration statute of 1927 points up several issues which are of importance to those who may be concerned with arbitration in either commercial or labor controversies. Some of these issues result in part from frailties of draftsmanship of the statute and in part from views advanced by the Supreme Court in the course of litigation involving those frailties. Others have accrued more directly from the case law made by the Supreme Court without special reference to uncertainties of statutory text.

The Supreme Court has varied from time to time in its expressions of its attitude and approach toward the statute and toward arbitration and arbitration agreements, leaving in doubt whether in a new case it will approach the statute and the arbitral process with purpose to facilitate their service as a legitimate servant of law administration or seek to restrict it.

In 1928 in one of the earliest decisions under the statute, the Court saw fit to comment as to its favorable intendment toward the arbitral process as follows: "Where parties to an executory contract agree to submit the matter in dispute to a named individual, they are bound by their contract . . . , and this rule is now applicable, under the Act of April 25, 1927, P.L. 381, where the contract provides for arbitration, but the arbitrators are not named. *It is clear every reasonable intendment will be made in favor of the validity of such agreements.*"<sup>1</sup> (Italics

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\* The substance of the present monograph is now planned by Dean Sturges to constitute a part of his forthcoming text on arbitration.

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1. *Bashford v. West Miami Land Co.*, 295 Pa. 560, 568, 145 Atl. 678, 681 (1928). See *Britex Waste Co., Ltd., v. Schwab & Sons, Inc.*, 139 Pa. Super. 474, 12 A.2d 473 (1939); *Couzens v. Wachtel*, 64 Pa. D. & C. 459 (1948).

supplied). On the other hand, in 1950 in *McDevitt v. McDevitt*, the Court declared that "*Arbitration agreements are strictly construed and are not to be extended by implication.*"<sup>2</sup> In 1934 the Court, while considering a question involving the enforceability under the statute of a provision for arbitration in a commercial contract, voiced it as being a "legal principle that it is our duty to sustain the act, if this can reasonably be done, and not to destroy it either in whole or in part."<sup>3</sup> But in an opinion in 1935<sup>4</sup> the Court saw fit expressly to indicate its judicial apprehension toward the arbitral process. Said the Court: "The parties elected to submit their disputes to arbitration. This method of trying issues of fact and law is now somewhat in fashion. It may well be that after other experiences such as the present litigants have had, it will be determined that the ancient method of trial in duly

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2. 365 Pa. 18, 23, 73 A.2d 394, 397 (1950). To the foregoing text the Court cited *J. S. Cornell & Son, Inc., v. Rosenwald*, 339 Pa. 18, 13 A.2d 716 (1940); *Margolies v. Zimmerman*, 341 Pa. 493, 19 A.2d 737 (1941). In *J. S. Cornell & Son, Inc., v. Rosenwald*, *supra*, the Court observed as follows: "The rule is that arbitration agreements are strictly construed and are not to be extended by implication. In *Jacob v. Weisser*, 207 Pa. 484, 489, 56 Atl. 1065, in limiting the jurisdiction of an architect, the court quoted *Chandley Bros. v. Cambridge Springs*, 200 Pa. 230, 49 Atl. 772, that 'The terms of the agreement are not to be strained to discover it. They must be clear and unmistakable to oust the jurisdiction of the courts; for trial by jury cannot be taken away by implication merely in any case.'" *Id.* at 23, 13 A.2d at 717. In the *Margolies* case, *supra*, the Court repeated that "The rule is that arbitration agreements are strictly construed and are not to be extended by implication." *Id.* at 496, 19 A.2d at 738. Compare the opinion of Chief Judge Cardozo for the majority of the New York Court of Appeals with the opinion of Crane J., dissenting, in *Marchant v. Mead-Morrison Mfg. Co.*, 252 N.Y. 284, 169 N.E. 386 (1929), *appeal dismissed*, 282 U.S. 808 (1930).

For a case attempting to blend the favorable approach to arbitration of *Bashford v. West Miami Land Co.*, *supra* note 1, with the strict construction doctrine of the cases cited *supra*, see *Wm. Linker Co., Inc. v. Feinberg*, 360 Pa. 601, 62 A.2d 839 (1949). See also *Schreiber v. Ostroff*, 65 Pa. D. & C. 601 (1948).

Whatever basis there may have been for strict construction of arbitration provisions at common law, whether in furtherance of a principle that "trial by jury cannot be taken away by implication merely," or otherwise, it is of dubious applicability to arbitration provisions which qualify under the statute. This is true because § 163 of the statute provides an orderly judicial procedure for determining the scope of the provision (by the court if jury trial is waived; otherwise by jury). See, e.g., *Goldstein v. Garment Workers' Union*, 328 Pa. 385, 196 Atl. 43 (1938); *Justice Stern*, concurring in *J. S. Cornell & Son, Inc., v. Rosenwald*, *supra*; *Stofflet & Tillotson v. Chester Hous. Auth.*, 346 Pa. 574, 31 A.2d 274 (1943); *Ellwood City Motor Coach Co. v. Ellwood City Traction Workers' Union*, 67 Pa. D. & C. 401 (1948). Furthermore, § 171(d) provides for judicial review of an arbitration and award to determine whether or not the award "is against the law, and is such that had it been a verdict of the jury the court would have entered different or other judgment notwithstanding the verdict." While the purport of this subsection and the practicability of administering it are questioned below, its existence in the statute and the effect already given to it by the Supreme Court prompt caution in posing the applicability of the rule of strict construction of arbitration provisions as declared at common law to arbitration provisions which qualify under the statute and become subject to the foregoing sections of the statute.

3. *Nippon Ki-Ito Kaisha, Ltd., v. Ewing-Thomas Corp.*, 313 Pa. 442, 449, 170 Atl. 286, 289 (1934).

4. *Pierce Steel Pile Corp. v. Flannery*, 319 Pa. 332, 179 Atl. 558 (1935).

constituted courts of law is a more satisfactory way to settle controversies. This is for further experience to demonstrate.”<sup>5</sup>

The arbitration statute<sup>6</sup> purports to embrace (1) provisions in written contracts, except contracts for personal services, to settle by arbitration controversies which may thereafter arise out of the contract, or out of the refusal to perform the whole or any part thereof, and (2) written agreements of submission of any controversies existing between the parties at the time of the agreement. The statute declares that such arbitration agreements shall be valid, irrevocable and enforceable (§ 161) and provides remedies to effectuate the declaration. These include motion proceedings to stay the trial of any action, suit or proceeding brought upon a cause embraced in such agreements (§ 162), to require a recalcitrant party to proceed in accord with the arbitration agreement (§ 163), and to procure court appointment of arbitrators when a party fails or refuses to participate in the original appointment or in filling a vacancy on the arbitral board (§ 164). Provisions also are made for the confirmation, correction and vacation of awards in motion proceedings (§§ 169, 170, 171). Accordingly, the statute follows the general scope and pattern of the general arbitration statutes of California, Connecticut, Hawaii, Louisiana, Massachusetts, New Hampshire, New Jersey, New York, Ohio, Oregon, Rhode Island, Washington and Wisconsin, and the United States Arbitration Act.

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5. *Id.* at 339, 179 Atl. at 561. Concerning the tradition of the arbitral process and its judicial reputability in Pennsylvania, see *Noble v. Peebles*, 13 S. & R. 319 (Pa. 1825); *Monongahela Navigation Co. v. Fenlon*, 4 W. & S. 205 (Pa. 1842); *Adinolfi v. Hazlett*, 242 Pa. 25, 88 Atl. 869 (1913). See also Note, 48 L.R.A. (N.S.) 885 (1914).

6. PA. STAT. ANN. tit. 5, §§ 161-181 (PS 1930). This statute will be referred to hereinafter by section number only.

The general arbitration statute was first enacted in 1927 (Laws 1927, Act. No. 248, §§ 1-19, approved April 25, 1927). Present §§ 162 and 175 became effective by amendment of the corresponding original sections (§§ 2, 15) in 1935 (Laws 1935, Act No. 400 approved June 21, 1935). Sections 180 and 181 as now included were enacted before the general statute in 1925 (Laws 1925, Act No. 670, approved May 13, 1925).

Section 180 also has been declared repealed by implication. *Phila. Hous. Auth. v. Turner Const. Co.*, 343 Pa. 512, 23 A.2d 426 (1942). Reported *infra*, p. 745 *et seq.*

The constitutionality of the statute was sustained in *Katakura & Co., Ltd., v. Vogue S.H. Co.*, 307 Pa. 544, 161 Atl. 529 (1932). The grounds of the challenge and the rulings thereon are reported by the Court as follows: "We overrule defendant's contention as to the unconstitutionality of the Arbitration Act of 1927. The act is not special legislation within the meaning of article III, section 7, of the Constitution of Pennsylvania: *Mason-Hefflin Coal Co. v. Currie*, 270 Pa. 221; *Com. v. Puder*, 261 Pa. 129. It is not unconstitutional as an abridgement of the right of trial by jury as it does not provide for compulsory arbitration: *Cutter and Hinds v. Richley*, 151 Pa. 195." *Id.* at 549, 161 Atl. at 530.

In *J. M. Davis Co. v. Shaler Twp.*, 332 Pa. 134, 2 A.2d 708 (1938), another suggestion of unconstitutionality was advanced. It was argued that court appointment of an arbitrator upon an application under § 164 of the statute in substitution for an arbitrator named in an arbitration provision who had become disqualified was unconstitutional, since the parties had made no provision in their agreement for

EFFECT OF THE GENERAL STATUTE UPON COMMON LAW  
ARBITRATION

There is no provision in the general statute which expressly reserves or outlaws the privilege of parties to arbitrate outside the statute as at common law. The Supreme Court, however, has declared from time to time that the statute does not displace common law arbitration.<sup>7</sup> It also may be noted that § 166 recognizes arbitrations outside the statute. It provides that "the arbitrators selected, *either* as prescribed in this act *or otherwise*, may summon in writing any person to attend before them . . . as a witness." (Italics supplied.)

If the arbitration agreement is oral, rather than written, it seems clear that the agreement and proceedings and award thereunder will be judged at common law.<sup>8</sup> If the agreement is written, and thereby formally complies with the statute, but the controversy to be arbitrated thereunder is deemed not to be arbitrable under the statute, apparently the agreement and any award thereunder will be judged at common law.<sup>9</sup> If an arbitration agreement qualifies as to form and as to the arbitrability of the cause under the statute, but the parties stipulate that the statute shall not apply, it seems probable that the stipulation of the parties will generally be honored.<sup>10</sup> Again, in certain cases,<sup>11</sup>

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any such substitution. The Supreme Court rejected this argument saying that when the parties entered into an arbitration provision qualifying under the statute they thereby invoked all of the remedies therein provided—"they voluntarily placed in the hands of the court the power it exercised and neither party can now successfully challenge the exercise of that power." *Id.* at 140, 2 A.2d at 711.

7. *Isaac v. Donegal & Conoy Mut. Fire Ins. Co.*, 301 Pa. 351, 152 Atl. 95 (1930); *Goldstein v. Garment Workers' Union*, 328 Pa. 385, 196 Atl. 43 (1938); *Sukonik v. Shapiro*, 333 Pa. 289, 5 A.2d 108 (1939); *Rosenbaum v. Drucker*, 346 Pa. 434, 31 A.2d 117 (1943); *Scheckter v. Rubin*, 362 Pa. 187, 66 A.2d 777 (1949). That this is the prevailing view in other jurisdictions see STURGES, *COMMERCIAL ARBITRATIONS AND AWARDS* § 1 (1930).

Compare, however, *J. M. Davis Co. v. Shaler Twp.* *supra* note 6, in which the Supreme Court remarked that arbitrations growing out of arbitration agreements made after the act of 1927 "must be proceeded with according to the terms of that statute. . . . When the parties entered into the arbitration agreement now before us they ipso facto embodied in that agreement all of the provisions of the Arbitration Act." *Id.* at 138, 2 A.2d at 710. Although this case is distinguishable on the grounds that § 176 of the statute was involved, since one of the parties was a subdivision of the Commonwealth, the opinion made no reference to that section, and the case has been broadly applied—though with some hesitation—by lower courts in cases between private litigants. *Kuzman v. Kamien*, 139 Pa. Super. 538, 12 A.2d 471 (1940) (judicial review of award); *Couzens v. Wachtel*, 64 Pa. D. & C. 459 (1948) (court appointment of arbitrator before award rendered).

8. *Scholler Bros., Inc., v. Hagen Corp.*, 158 Pa. Super. 170, 44 A.2d 321 (1945).

9. *Goldstein v. Garment Workers' Union*, 328 Pa. 385, 196 Atl. 43 (1938).

10. In several cases a stipulation that arbitration be conducted under the statute has been noticed by the Court. *E.g.*, *Pierce Steel Pile Corp. v. Flannery*, 319 Pa. 332, 179 Atl. 558 (1935).

11. *Sukonik v. Shapiro*, 333 Pa. 289, 5 A.2d 108 (1939); *Rosenbaum v. Drucker*, 346 Pa. 434, 31 A.2d 117 (1943); *Scheckter v. Rubin*, 362 Pa. 187, 66 A.2d 777 (1949).

although the arbitration agreement was in writing and the controversy seems to have been arbitrable under the statute, the Supreme Court appears to have concluded from the actions of the parties with respect to the proceedings or award that they intended to forego the statute, and, accordingly, the proceedings and award were judged as at common law. It was not made clear, however, what conduct of the parties in the particular case justified this conclusion, nor why it should be so construed.<sup>12</sup>

#### WHETHER THE STATUTE OR COMMON LAW IS PREFERABLE

Parties concerned with the use of arbitration and arbitration agreements in Pennsylvania will find it difficult to determine whether it is more expedient to conform to the statute if they can or to proceed at common law. If they desire to use a written arbitration agreement and have it and the proceedings and award at common law rather than under the statute, caution will prompt them to stipulate expressly to that effect in the agreement.<sup>13</sup>

It is true that there are advantages to be gained under the general statute whereby qualifying agreements are made valid, irrevocable and enforceable by the specified remedies; and the motion proceedings therein provided to enforce, correct and vacate awards are likely to be superior to those at common law. Formal requirements to qualify an arbitration agreement under the statute and other provisions of the statute governing the arbitral proceedings and the award are scarcely more exacting than common law rules.

On the other hand, the Supreme Court has strongly suggested, if not decided, in *Goldstein v. Garment Workers' Union*<sup>14</sup> a drastic limitation upon the kind of controversies which may be arbitrated under the statute. The statute, it has been declared, "*is not broad enough in its scope, and apparently was not designed, to cover arbitration proceedings where the remedy sought and awarded is a mandatory decree.*"<sup>15</sup>

Again, awards appear to be stripped of their common law finality and conclusiveness by § 171(d) of the statute which provides that an

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12. In both *Sukonik v. Shapiro* and *Rosenbaum v. Drucker*, *supra* note 11, the parties evidenced their selection of *common law* procedure by bringing independent actions to enforce the award, rather than using the statutory motion procedure. In the *Rosenbaum* case, the Court remarked, "As neither side attempted, in any particular, to follow the Arbitration Act, it is manifest that the award of the arbitrators was a common law award." *Id.* at 436, 31 A.2d at 118. No other guides have been found.

13. See *infra*, p. 744 *et seq.*

14. 328 Pa. 385, 196 Atl. 43 (1938).

15. *Id.* at 388, 196 Atl. at 45. (Italics supplied). See discussion of this case at p. 732 *infra*.

arbitration and award are subject to judicial review to determine if the award "is against the law, and is such that had it been a verdict of the jury the court would have entered different or other judgment notwithstanding the verdict." (Italics supplied.) Whether or not this subsection can be effectively waived by agreement of the parties has not been determined. This matter is reviewed below.

The foregoing cause for judicial review of arbitration and awards is accorded by the statute in addition to the provisions in § 177 whereby the arbitrators, or the parties to the arbitration with the approval of the arbitrators, may make application under the declaratory judgments act, at any time during the arbitral proceedings, for the determination of any legal question.

If the view of the Supreme Court in *Goldstein v. Garment Workers' Union* imposes an indefinite, but apparently substantial, restriction upon what controversies may be covered by arbitration agreements under the statute, and if it shall be determined that § 171 (d) may not be effectively waived by stipulation, it seems probable that parties will often find it more expedient to proceed at common law rather than invoke the statute.<sup>16</sup>

#### CAUSES WHICH MAY BE SUBMITTED UNDER THE STATUTE

By the first section of the statute (§ 161), parties may include a provision in a written contract (except a contract for "personal services") to arbitrate "a controversy" thereafter arising in connection with the contract, and they may by agreement of submission in writing embrace "any controversy" existing between them at that time. This section of the statute indicates a comprehensive coverage of controversies which may be arbitrated under the statute. There is no express restriction anywhere in the statute curtailing this generality as to what controversies may be arbitrated thereunder. The Supreme Court, however, has advanced an ominous restriction upon this generality of the statute. It did so in *Goldstein v. Garment Workers' Union* while con-

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16. In Pennsylvania, traditional common law revocability of provisions to arbitrate future disputes may be readily overcome by "naming" the arbitrators therein. *Gowen v. Pierson*, 166 Pa. 258, 31 Atl. 83 (1895). See *STURGES, op. cit. supra* note 7, at 48.

On the other hand, agreements to submit present disputes apparently are revocable according to traditional common law doctrine. See *Gray v. Wilson*, 4 Watts 39 (Pa. 1835) and *STURGES op. cit. supra* note 7, at 241.

Specific performance will apparently not be accorded either class of agreements at common law. See *STURGES, op. cit. supra* note 7, at 83 and 262.

Apparently also common law awards may be enforced only by bringing action thereon, and they may be vacated or modified or corrected only by equitable proceeding. See *Richardson v. Cassily*, 3 Watts 320 (Pa. 1834) and *STURGES, op. cit. supra* note 7, at 674.

sidering the first section (§ 161) of the statute and by declaring in that connection that the statute "*is not broad enough in its scope, and apparently was not designed, to cover arbitration proceedings where the remedy sought and awarded is a mandatory decree.*"<sup>16a</sup> (Italics supplied.) Apparently the Court intended that only such controversies as might properly be litigated in an action at law (and not in an equitable suit or proceeding) may be arbitrable under the statute. It is not clear what would be the result as to claims looking, formally at least, only to declaratory relief—such as an award of title, of right to possession or of responsibility under a contract, or of the validity of a discharge from employment.<sup>17</sup> Nor is it made to appear at what point in the course of proceedings it shall be determined whether or not "the remedy sought and awarded is a mandatory decree."

*Goldstein v. Garment Workers' Union* involved an arbitration and award under a provision for arbitration in a written collective bargaining agreement. The arbitrator, who was named in the agreement, found, among other matters, that the employer had moved his manufacturing operations from Philadelphia in violation of a provision in the collective bargaining agreement. His award required, among other things, that the employer reestablish his manufacturing operations in Philadelphia and reemploy certain personnel within a stated time. The Supreme Court reversed the lower court which had granted the Union's petition to confirm the award and had entered judgment thereon in accordance with its terms.

In support of its conclusion, as quoted above, the Supreme Court relied upon § 174 of the statute. It called attention to the text of the section as follows: "The act provides, . . . that 'The arbitration shall be docketed in the prothonotary's office as if it were an action *at law* in the prothonotary's office, with the moving party as plaintiff and the other parties as defendant or defendants. The judgment so entered shall have the same force and effect, in all respects as, and be subject to, all the provisions of law relating to a judgment in an action *at law*, and it may be *enforced as such* in accordance with existing law.'"<sup>18</sup> (Italics by the Court.)

The Court also declared that, in the light of § 174 "there does not exist in Pennsylvania *any statutory provision for the enforcement of*

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16a. *Goldstein v. Garment Workers' Union*, 328 Pa. 385, 196 Atl. 43 (1938).

17. In *McDevitt v. McDevitt*, 365 Pa. 18, 73 A.2d 394 (1950), the Court refused to vacate a statutory award apparently only declaratory in nature; it does appear that an argument based on the *Goldstein* case was made. Cf. *McLean Piece Dye Works v. Verga*, 13 N.J. Misc. 416, 178 Atl. 625 (1935).

18. 328 Pa. at 393, 196 Atl. at 47. As an alternate ground of decision, the Supreme Court reversed the lower court's holding that it must treat as conclusive the arbitrator's finding of the existence of a contract to arbitrate future disputes between the union and the particular employer here involved.

*arbitration awards other than those which could be made the subject of judgments in actions at law.*"<sup>19</sup> (Italics supplied.)

It is doubted that even the latter part of the Court's position, namely, that there is no statutory provision for the enforcement of awards other than those which can be made the subject of judgments in actions at law, is well conceived under the statute. This will be considered first and by way of preface to a consideration of the foregoing more general restriction on the type of causes which may be arbitrable under the statute.

Of course, it is not entirely clear what was meant by "enforcement" of awards. If the Court meant direct levy and execution (as upon a money judgment) the validity of the statement should be conceded. But if, as is assumed, the statement intends that the statute does not provide for the processing of awards to judgments which do not fit the matrix of judgments in actions at law, it seems questionable. It is assumed that this is the intent of the statement because the Court advanced it in support of the earlier part of its position that the statute "is not adaptable to controversies in which the relief sought is in the nature of a mandatory decree." It seems clear, as set forth below, that the statute does provide for the processing of awards to judgments which do not fit within the confines of judgments in actions at law and that it contemplates in such cases that, while compliance may not be obtained by traditional execution as upon a judgment at law, it may be forced by auxiliary common law or equitable remedies.

The Court seems to have placed undue emphasis upon the role of § 174. It is clear that the provision therein that the *arbitration* shall be docketed in the prothonotary's office "as if it were an action at law," does not become applicable until the initiation of a statutory motion to confirm, modify or correct an award. Then, as the text of the section provides, the docketing shall be "*as if* it were an action at law." Certainly the statutory motion proceeding (whether to confirm, modify or correct) is not an "action at law," nor any part of one. This

19. *Ibid.* The Court also has stated in another case, apparently thinking in general line with the foregoing view, that an award of money to be paid on stated conditions "was not one upon which a judgment at law could be entered because of the conditions which were attached to it." *Pierce Steel File Corp. v. Flannery*, 319 Pa. 332, 338, 179 Atl. 558, 560 (1935).

In *Retail Cigar, Drug, etc., Union v. Sun Ray Drug Co.*, 67 Pa. D. & C. 512 (1949) on motion by the Union under the statute to require the defendant employer to arbitrate the issue whether defendant wrongfully discharged an employee-union member, the Court observed as follows: "In a hearing before an arbitrator, if she asks to be reinstated as an employe(sic) of defendant, even if the arbitrator so found that she should be reinstated, we do not believe that the court should enforce such a mandatory conjunction. It is even admitted by counsel for plaintiff, at the bar of the Court, that the Pennsylvania Arbitration Act of 1927 is not broad enough in its scope to cover arbitration proceedings where the remedy sought is a mandatory decree to replace a discharged employee." *Id.* at 515.



provision for docketing seems to intend no more than to designate a known and orderly procedure for handling these statutory motions by providing that they shall be docketed *in like manner* as actions at law.

If the motion to confirm is approved, the Court "shall grant" an order confirming (§ 169), and if a motion to modify or correct is approved, the Court "shall make an order modifying or correcting" the award (§ 171). *The order* of the Court in each case is *its final adjudication* upon the merits of the motion. Again, the order is not a step in any "action at law."

Section 172 covers the next step in proceedings under the statute. It prescribes that, upon granting any one of the foregoing orders, "judgment [not designating that it shall be as in an "action at law"] *shall be entered in conformity therewith*" by the Court in which the order was granted. It thus appears that a conforming judgment *must* be entered whether the award could be made the subject of a judgment in an action at law or not. Such conforming judgment appears to be required, and its entry seems to be required, whatever may have been the relief sought and awarded and even if it is in the nature of a "mandatory decree." Such an entry is not impossible; the judgment entered in the lower court in the *Goldstein* case appears to have conformed to the terms of the order.

It also appears from § 174 that the entry of the judgment is largely, if not wholly, ministerial; the order "is filed with the prothonotary for entry of the judgment thereon"; the judicial functions of the Court are completed with the order.<sup>20</sup> As the *order of the Court* is the conclusion of the final adjudication upon the merits of the motion, so is it the end of judicial review of the arbitration and award. Appeal may be taken as provided in § 175—either from the order or from "a judgment entered" thereon.

Up to this point we have been in no "action at law" and, if the statutory mandate has been followed, "a judgment" has been entered upon the order confirming, modifying or correcting, "in conformity therewith."

Next comes the last sentence of § 174. "The judgment *so entered* shall have the same force and effect, in all respects as, *and be subject to*, all the provisions of law relating to a judgment in an action at law, *and* it may be enforced *as such* in accordance with existing law." (Italics supplied.)

In the light of the foregoing review of the steps contemplated by the statute for processing an award to "a judgment," this sentence of

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20. See, e.g., *Temple v. Riverland Co.*, 228 S.W. 605 (Tex. Civ. App. 1921); *Evans v. DeSpain*, 37 S.W.2d 231 (Tex. Civ. App. 1930).

the section may be regarded as largely a postscript. In view of the procedure for bringing the award to a judgment conforming to the terms of the order, it should have taken clear and positive provisions in § 174, or elsewhere, to recast the proceedings and judgment entirely and exclusively into the matrix of an "action at law." It is apparent, however, that the tenor of § 174 is almost wholly enabling; the statutory nature of the proceedings leading to and including the entry of judgment puts that section in the role of *simulating* the judgment to a "judgment in an action at law"; and the effect of the section in limiting or restricting the judgment entered in conformity with the order upon the award must be found chiefly in the words, "*and be subject to.*". The Supreme Court, however, seems to have considered them strong and direct enough to overcome the statutory mandate as to the judgment—that it be one entered in conformity with the order of the Court upon the award—and to force the judgment into the pattern of a judgment in an "action at law," thereby restricting the scope of awards that may be enforced under the statute to those which might fit under such a judgment.

It seems quite clear that the judgment entered under the mandate of the statute may well be recognized as a *statutory* judgment and that § 174 was not intended to limit the broad range of statutory judgments to the confines of those judgments which could be entered in "an action at law." It is believed that it would have been more consistent with the statute as a whole and with the foregoing proceedings thereunder if the Court had vested the words "and be subject to" with less absolute effect. This could have been done by giving them the role of making the judgment "subject to the provisions of law relating to a judgment at law," *except in so far as those provisions may, in a given case, be inconsistent with the scope and effect of prior proceedings under the statute, including the terms and provisions of the judgment entered pursuant to the statute.* This would justify the inference that if the judgment did not fit the matrix of a judgment in an "action at law" and hence would not support direct execution, other common law and equitable remedies could be invoked to force compliance.<sup>21</sup> The availa-

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21. Note that the normal means of enforcing judgments at law—by writs of execution—are also available to enforce equitable decrees. Under Equity Rule No. 86, such a writ "in the form used in the same court in suits at law" may be employed rather than the more traditional methods of gaining compliance with decrees in equity. The existence of this rule shows further the difficulty in basing any dichotomy between law and equity upon the method of enforcing the court's decision.

It is true, however, as the Court noted, that arbitration statutes in other states provide that a judgment *or decree* shall be entered upon the award, or that a judgment entered upon an award shall have the effect of a judgment "in an action at law or a suit in equity." In other jurisdictions the term *judgment* as used in the arbitration statute will, under local law, include both *judgment* (at law) and *decree* (in equity). It is also true that the Pennsylvania statute says only "judgment in an action at law." Nevertheless, it cannot be concluded from this variation of statu-

bility of these remedies is necessary to give full faith to the given award and its statutory judgment; their use would place § 174 in proper relation to the remainder of the statute.

The most important consequence, however, of the Supreme Court's view concerning the status of the judgment and the restrictions upon its enforcement is its view "*that the act is not adaptable to controversies in which the relief sought is in the nature of a mandatory decree.*"<sup>22</sup> Thus, the same section (§ 174) not only excludes, according to the Court, the use of common law and equitable remedies normally available for enforcement of judgments out-of-court from judgments at law, but also renders all claims looking to relief of an equitable nature totally unarbitrable under the statute. This drastic abridgement obviously entails destructive amendment of the generality of the first section of the statute (§ 161); its broad coverage of "a controversy" arising in the future out of a given contract and of "any controversy existing" between the parties is retroactively recast to exclude all controversies not sounding in the historical category of "action at law."<sup>23</sup> Parties with equitable claims (and, presumably, claims for declaratory relief) lose the substantial benefits conferred by the statute—including the provisions making arbitration agreements both non-revocable and specifically enforceable and those according court appointment of arbitrators and expeditious enforcement or vacation of the award in motion proceedings. No reasons of policy were advanced by the Court for discrimination between legal and equitable claims; neither historically nor functionally is the one less arbitrable than the other.

As heretofore observed, procedures under the statute for judicial confirmation of an award and the provision for entry of judgment in conformity with the order entered upon the award are as fully adapted

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tory text that the legislature of Pennsylvania intended to excise from the statute all or any claims looking to "equitable relief." It is felt that the matter lies in a procedural zone in which the Court was peculiarly competent to interpret away any want of precision in statutory draftsmanship in order to preserve the dominant remedial intent of the arbitration statute. See Charles Evans Hughes, *THE SUPREME COURT OF THE UNITED STATES*, at 229-230 (New York, 1928).

22. It must be observed that this consequence of the Court's conclusion as to the type of judgment which may be entered under the statute does not necessarily follow from the premise. A statutory award on an "equitable" question upon which the statutory judgment might not be entered still might have considerable significance. Although not entered as a judgment of court, the award should be a bar to any action or suit on the cause determined by the award. See, *e.g.*, *McLean Piece Dye* remedies should be available to enforce the execution of an award rendered under the statute; in several jurisdictions the statutory enforcement procedure has been held not exclusive of common law actions. See *STURGES*, *op. cit. supra* note 7, § 3.

23. The Supreme Court has recently found an argument based on the generality of § 161 persuasive in another context. *Shannon v. Pennsylvania Electric Co.*, 364 Pa. 379, 72 A.2d 564 (1950). The broadness of that section was invoked in support of a rejection of an argument that "pure questions of law" can not be submitted to arbitration under the statute.

to an award of relief in the nature of a mandatory decree as to any other award. Rather than restrict the scope and service of this remedial legislation as the Court seems to have been prone to do, it should have honored the first section of the statute as to what controversies may be brought under the statute for arbitration and the adaptability of the foregoing procedures to confirm awards; it could have done so with only modest restraint upon the force which it seems to have accorded to a very small part of the text of § 174. By doing so it would have been more consistent with the legal principle it had previously accepted that "it is our duty to sustain the act, if this can reasonably be done, and not to destroy it in whole or in part."<sup>24</sup>

#### CONCERNING JUDICIAL REVIEW UNDER SECTION 171(d)

Section 171(d) of the arbitration statute reads as follows:

*"Modifying or correcting award, grounds.* In either of the following cases the Court shall make an order modifying or correcting the award upon the application of any party to the arbitration: . . .

"(d) Where the award is against the law, and is such that had it been a verdict of the jury the Court would have entered different or other judgment notwithstanding the verdict."

Under this section arbitrations and awards under the statute are subject to judicial review to ascertain whether or not the award is "against the law." In *Navarro Corp. v. Pittsburgh School District*,<sup>25</sup> the Supreme Court said, "The Act of 1927 [the arbitration statute] under which this proceeding was instituted, places an award on the same footing as the verdict of a jury, and, therefore, mistakes of law may be rectified on appeal . . ." <sup>25a</sup>

It also should be noted that the *Navarro* case held that the party challenging the award may raise the issue that the award is "against the law" by opposing a petition under § 169 by the successful party to have the award confirmed and judgment entered. If, upon review by the Court, the matter is determined in favor of the defending party, the petition to confirm will be denied. The defending party in the *Navarro* case put the matter in issue in the lower court and defeated enforcement of the award by a petition to enter judgment "in the nature of a judg-

24. *Nippon Ki-Ito Kaisha, Ltd., v. Ewing-Thomas Corp.*, 313 Pa. 442, 449, 170 Atl. 286, 289 (1934).

25. 344 Pa. 429, 25 A.2d 808 (1942). To like effect: *Philadelphia Hous. Auth. v. Turner Const. Co.*, *supra* note 6. The Court has recently remarked: "Mistakes of law, but *only* mistakes of law may be rectified on appeal" . . . under § 171(d). *McDevitt v. McDevitt*, *supra* note 17 at 21, 73 A.2d at 396.

25a. 344 Pa. at 432, 25 A.2d at 810.

ment n.o.v.” Similarly, the losing party may raise the issue in a motion to vacate an award under § 170.<sup>26</sup> Apparently also, a formal motion to modify or correct may be used to the same end.<sup>27</sup> In short, while § 171 purports by its title to cover only motions to *modify or correct* awards, under subsection (d) an award may be denied enforcement or it may be vacated as if the proceedings were under § 170 dealing with motions and causes to vacate awards.<sup>28</sup> Accordingly, more than reformation or correction as contemplated in the rest of the section is involved in subsection (d).

Some caution, however, should be observed in accepting the holding of the *Navarro* case as the Supreme Court’s final conclusion on the nature of review. In a 1950 decision, *Shannon v. Pennsylvania Electric Co.*,<sup>29</sup> the Court held that “pure issues of law” can be submitted to arbitration under a contract clause stipulating for statutory arbitration of disputes. In doing so the Court disapproved a lower court dictum that since a statutory award is only the equivalent of a jury verdict, questions of law are not arbitrable under the statute.<sup>30</sup> The lower court’s view seemed to be a formalistically logical extension of the *Navarro* doctrine.<sup>31</sup>

Moreover, as the Supreme Court has recognized in stating the statutory rule,<sup>32</sup> the rendering of an award reviewable as to whether

26. Philadelphia Hous. Auth. v. Turner Const. Co., *supra* note 6. The holding was not altered by the fact that the agreement to submit disputes specified that the decision of the arbitrator would be “conclusive.”

27. See *Acchione v. Commonwealth*, 347 Pa. 562, 32 A.2d 764 (1943), in which, by such motion, the party who gained a money award on only one of several items of his claim, sought to have it “modified” to include allowances on all items of his claim. After hearing in the lower court the award was “modified” by cutting down the amount allowed on the one item.

28. Compare the approach manifested in *Westinghouse Air Brake Company Appeal*, 166 Pa. Super. 91, 70 A.2d 681 (1950), in which the Court remarked in another connection, “We may vacate an award only for the reasons stated in the Act of April 25, 1927, § 10 [170] . . .” *Id.* at 97, 70 A.2d at 684.

29. 364 Pa. 379, 72 A.2d 564 (1950).

30. *Commonwealth Mutual Fire Ins. Co. v. Eagle Fire Ins. Co.*, 163 Pa. Super. 163, 60 A.2d 411 (1948).

31. Although its holding is distinguishable from *Navarro v. Pittsburgh School Dist.*, *supra* note 25, the reasoning in *Shannon v. Pennsylvania Electric Co.*, suggests a restriction of the rule of the *Navarro* case. See, for example, the material quoted in footnote 3 of the *Shannon* opinion and *infra*, note 35. Cf. *McDevitt v. McDevitt*, *supra* note 17.

The Court also is reported in the *Shannon* case to have said, “If arbitrators should be limited to questions of fact, they could not pass upon the admissibility of evidence for such questions are questions of law.” *Id.* at 386, 72 A.2d at 567. Quite clearly the nature or scope of the function of arbitrators in ruling upon questions of “admissibility of evidence” which may arise during an arbitral hearing does not have any bearing upon what controversies may be covered by an arbitration agreement between the parties or be submitted by them under the terms of the statute or at common law.

32. Philadelphia Hous. Auth. v. Turner Const. Co., *supra* note 6, and *McDevitt v. McDevitt*, *supra* note 17.

or not it is "against the law," is alien to the common law rules of finality and conclusiveness, whereby "the arbitrators are the final judges of law and fact." In at least two earlier cases the Court seems to have thought that these common law rules governed statutory awards. It must be admitted, however, that in one of these cases the question was not in issue,<sup>33</sup> though it was very nearly so in the other.<sup>34</sup> The statutory rule of the *Navarro* case is, of course, open to the criticism offered in these two cases in support of the opposing common law rule: "An arbitrator, in the absence of any agreement limiting his authority, is the final judge of both law and fact, and his award will not be reviewed or set aside for mistake in either; *otherwise arbitration proceedings, instead of facilitating the settlement of disputes, would serve but to delay the final determination of the rights of the parties.*"<sup>35</sup> (Italics supplied).

This critique is particularly apposite since it appears that under § 171(d) and the *Navarro* case it may well be that a trial *de novo* will be required of the facts as well as on the law. In other words, the Court may be required to make its judgment "on the law" from the facts as established before it rather than upon the cause as presented to the arbitrators. At all events, the Court must have before it such a record of the evidence as will enable it to ascertain whether or not the award is "against the law" and whether or not the case made before the arbitrators fell short of sustaining the determinations of the award as a matter of law—i.e., was the proof so inadequate that a trial judge in similar circumstances would have had to direct a verdict or enter a judgment *n.o.v.*?<sup>36</sup> The statute does not require a stenographic

33. *Goldstein v. Garment Workers' Union*, *supra* note 7.

34. *Pierce Steel Pile Corp. v. Flannery*, 319 Pa. 332, 179 Atl. 558 (1935), where, in a statutory proceeding the Court remarked, "Even if the arbitrators did not measure the terms of the contract properly, that is not a sufficient ground to set aside their award. . . ." *Id.* at 338, 179 Atl. at 561. The fatal weakness of the awards in both *Navarro v. Pittsburgh School Dist.* and *Philadelphia Hous. Auth. v. Turner Const. Co.*, was that the arbitrators had misconstrued the contracts involved.

35. Like text is quoted by the Court in the 1950 case of *Shannon v. Pennsylvania Electric Co.*, *supra* note 29. See also *Patriotic Order Hall Assn. v. Hartford Fire Ins. Co.*, 305 Pa. 107, 157 Atl. 259 (1931) (appraisal); *Martin-Parry Corp. v. General Motors Corp.*, 22 Pa. D. & C. 608 (1935) (contract of sale); *Bowles v. Biberman Bros.*, 61 F. Supp. 614 (E.D. Pa.), *rev'd on other grounds* 152 F. 2d 700 (3d Cir. 1945). A recent statement of the common law rule appears in *Kingston Coal Co. v. Glen Alden Coal Co.*, 312 Pa. 546, 168 Atl. 677 (1933).

In the *Shannon* case, in considering the arbitrability of questions of law, the Court pointed out that the arbitration statute "would become of doubtful workability if we should hold that it is inapplicable to questions of law in any dispute for it is sometimes difficult to determine whether certain disputes are questions of law or fact." *Id.* at 385, 72 A.2d at 567. The question of workability is, of course, equally involved if an arbitral award is not given some status of conclusiveness against judicial review.

36. In the *Navarro* case the award was reviewed under a petition to enter judgment "in the nature of a judgment *n.o.v.*"

record of the arbitral proceedings unless specifically requested by one of the parties (§ 166), and such requests are rare. A trial in court will, of course, be necessary in order to make a record if no transcript is available.

If trial *de novo* of the facts to determine whether or not the award is "against the law"<sup>37</sup> is to be required, reconstruction of the case in Court presumably would be governed by rules of evidence and civil procedure plus those special rules pertaining to proof of causes heard by arbitrators. Thus, it seems that the burden of proof would be allocated as in other civil proceedings, that rules as to competency, relevance, and materiality of evidence would be applicable, and that the special rules limiting the competency of arbitrators to testify concerning their conduct at the arbitral hearing and in rendering the award would govern. In consonance with this requirement of trial *de novo* of the facts is the Supreme Court's remark in *Philadelphia Hous. Auth. v. Turner Const. Company*.<sup>37</sup> On appeal from an order setting aside an award on the grounds that it was "against the law," the appellant advanced the view that the lower court did not have authority to enter final judgment against it "because the Court did not have before it all the evidence which the arbitrators heard." The Supreme Court responded: "We are of the opinion that there is full authority to do so under the act."

This apprehension as to the necessity of trial *de novo* of the facts also is prompted notwithstanding the statement of the Supreme Court in *Pennsylvania Turnpike Comm. v. Smith*<sup>38</sup> that "on a motion to vacate the award of arbitrators, *every inference of fact must be drawn in favor of the party having the award.*"<sup>38a</sup> (Italics supplied.) While this is generally valid doctrine with respect to common law awards, it is of dubious application to arbitrations and awards when subjected to review under the foregoing subsection of the statute. Inferences of fact favorable to the party having the award might be required to be postponed at least until after the facts had been duly proved on the review. The foregoing statement was voiced in connection with a record wherein the arbitrators' findings "were found by the court below to be supported by substantial evidence." It is not apparent that the inferences required to be indulged by the Supreme Court determined or had any substantial effect upon the scope of the hearing or functions of the lower court in the trial on the motion to vacate.

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37. See note 6 *supra*.

38. 350 Pa. 355, 39 A.2d 139 (1944).

38a. *Id.* at 359, 39 A.2d at 141.

The conclusion that trial *de novo* of the facts may be required also may be anticipated notwithstanding remarks by the Supreme Court in *Bancroft Inc. v. Millcreek Twp.*<sup>39</sup> and other cases suggesting the analogy of a statutory award to a verdict. In this case the arbitration agreement expressly reserved "all matters of law arising thereupon for the decision of the Court" in accordance with the Arbitration Act of 1836, but "otherwise said decision . . . [shall] be final . . . and shall have the same force and effect as a verdict of a jury." In the course of its opinion the Supreme Court remarked as follows: "The decision of the arbitrators by agreement, here, has the force and effect of a verdict of a jury *and will not be disturbed on appeal if there is evidence to support it*"<sup>39a</sup> (Italics supplied). The very question now under consideration, namely, whether or not there is to be a trial *de novo* of the facts when judicial review is duly invoked under § 171 (d) was not before the Court. On the other hand, the stipulation of the parties that the award should be final and have "the same force and effect as a verdict of a jury" suggests the text of § 171 (d), which makes an award subject to "modification" or "correction" if it is "against the law, *and is such that had it been a verdict of the jury* the Court would have entered different or other judgment notwithstanding the verdict." (Italics supplied.)<sup>40</sup> And as reported above in the *Navarro* case, the Court declared that the statute "places an award on the same footing as the verdict of a jury."

*Analogy of Award to Verdict.* This provision of § 171 (d) of the statute, as well as the foregoing arbitration provision in *Bancroft Inc. v. Millcreek Twp.* and the view expressed in the *Navarro* case, prompt reference to the difficulty of analogizing an award to a verdict of a jury and attempting to allocate rules of civil procedure relating to appeals involving verdicts to arbitrations and awards under the statute. The analogy is remote and in so far as the foregoing subsection is predicated upon that analogy it can be given little effect.<sup>41</sup> Only very limited simulation can be truthfully undertaken. This is true because an award will not come to rendition in compliance with the judicial process as prescribed for the trial of causes in civil actions before a jury. The law of evidence applicable in such actions will not be applicable in the arbitration unless the parties so stipulate, provided only that the arbi-

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39. *Id.* at 534, 6 A.2d 918.

39a. 335 Pa. 529, 534, 6 A.2d 916, 918 (1939).

40. See also *Pennsylvania Turnpike Comm. v. Smith*, *supra* note 38.

41. At common law it has been traditional to analogize awards to judgments rather than verdicts—an award "is another name for a judgment." *Brazill v. Isham*, 12 N.Y. 9 (1854); *STURGES, op. cit. supra* note 7, § 235.



trators may not refuse to hear evidence which is pertinent and material to the controversy (§ 170(c)). Unless the parties require it, the arbitral board need not purport to make or report any findings of fact (or "verdict").<sup>42</sup> And, as pointed out above, if, but only if, a party or the arbitrators request it, shall testimony be taken stenographically in the arbitral hearing (§ 166). Accordingly will the record of the arbitral hearing and the award generally coming before the reviewing court in proceedings under § 171(d) be quite different both as to content and course of proceeding from that of a verdict in a civil action (either at law or in equity). In no place in the statute other than in this subsection does intent appear to divide and distribute the functions of statutory arbitrators and reviewing court according to those allocated to a jury and court in civil actions; and the hypothesis of such division and distribution can be given little reality even under this subsection. These are the considerations which point to caution in posing an award rendered in usual arbitration proceedings in the image or innuendo of a verdict of a jury.

The fallacy of the suggested analogy of the statutory award to verdict approached full light in the opinion of the Superior Court in *Commonwealth Mutual Fire Ins. Co. v. Eagle Fire Ins. Co.*,<sup>43</sup> wherein it was declared that "pure questions of law" are not arbitrable under the statute. "Since it has been held," said the Court, "that the Arbitration Act of 1927, under which the rule in this case was taken, places an award on the same footing as the verdict of a jury and therefore mistakes of law may be rectified on appeal (*Pennsylvania Turnpike Commission v. Smith et al.*, 350 Pa. 355, 39 A.2d 139), there would appear to be no more valid reason for referring a pure question of law to arbitrators than there would be for submitting such question to a jury. That, of course, would be error." The necessary inference from this view would be that "mixed questions of fact and law" could be submitted under the statute only in part—namely, as to "the facts." Rare indeed would be the controversy which might be fully submitted under the statute. Accordingly, this remedial legislation would be brought

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42. The statute contains no requirement that the arbitrators make or publish findings. *Martin-Parry Corp. v. General Motors Corp.*, *supra* note 35.

The Nebraska arbitration statute has been construed to require separate statement of facts found and conclusions of law. The difficulties in applying such a requirement are shown in the following litigation involving it: *Murry v. Mills*, 1 Neb. 456 (1871); *Sides v. Brendlinger*, 14 Neb. 491, 17 N.W. 113 (1883); *Graves v. Scoville*, 17 Neb. 593, 24 N.W. 222 (1885); *Westover v. Armstrong*, 24 Neb. 391, 38 N.W. 843 (1888); *Burkland v. Johnson*, 50 Neb. 858, 70 N.W. 388 (1897); *City of O'Neill v. Clark*, 57 Neb. 760, 78 N.W. 256 (1899); *In re Johnson*, 87 Neb. 375, 127 N.W. 133 (1910). For review of these cases see *STURGES, op. cit. supra* note 7, § 264.

43. *Supra* note 30.

near to naught. And preliminary litigation would often be necessary to determine arbitrability. This would result notwithstanding that provisions in written contracts to arbitrate "a controversy thereafter arising out of such contract, or out of the refusal to perform the whole or any part thereof" and an agreement to submit "any controversy" existing between the parties at the time of such agreement to submit are expressly subject to the statute as provided in its first section (§ 161). Suffice it to note again that the Supreme Court has repudiated the view of the lower court.<sup>44</sup>

But granting that "pure questions of law" may be submitted under the statute, it seems clear that under such submissions the analogy of award to verdict in § 171(d) becomes *functus officio in toto*. And if "mixed questions of fact and law" are involved, it seems to follow that in such cases the analogy is likewise displaced—at least as to more or less of the cause.

No decisions have been discovered which disclose the requirements of pleading or proof which a party must meet to invoke judicial review under the above subsection. Perhaps in connection with these particulars some favorable intendment will be accorded statutory arbitrations and awards. Otherwise arbitrations and awards under the statute generally are likely to take on the role of mere transient engagements in anticipation of the statutory proceeding to retry the cause in court.<sup>45</sup>

*Whether or Not Judicial Review Under the Above Subsection May Be Waived.* No decision has been discovered which precisely determines whether or not parties may effectively stipulate to waive recourse to the above subsection. If they do so stipulate will they thereby displace the application of the statute *in toto*, or will the stipulation be disregarded? Opinions of the Supreme Court have indicated that the stipulation might be disregarded. In connection with the construction of § 176 of the statute, the Court, in giving it the mandatory effect which it has, has reiterated that when the statute is once engaged by execution of an arbitration agreement in writing, that section makes the statute applicable in its entirety; "neither of the parties could waive any part of the statute, but both are bound by the act in its entirety." These views were voiced, however, in cases in which the Commonwealth (or an agency or subdivision thereof) was a party to the arbitration agreement.<sup>46</sup> Decisions under the Act of 1836 (Purdon Pa. Stat.

44. *Shannon v. Penn Edison Co.*, *supra* note 29. See *Stofflet & Tillotson v. Chester Hous. Auth.* 32 Del. Co. 317 (Pa. 1943).

45. The futility of this role has been referred to in such cases as *Goldstein v. Garment Workers' Union*, *supra* note 7. See, also, cases cited in note 35 *supra*.

46. See cases as reviewed *infra* p. 745, *et seq.*

tit. 5, Ch. 1 § 4) indicate that such stipulation might be honored without displacing the application of the statute.<sup>47</sup>

*General.* The irony of § 171(d) lies in its caution to parties against too ready resort to the use of arbitration agreements and arbitrations under the statute notwithstanding its probable over-all purpose to facilitate their use. Thus, as one result of this subsection and the foregoing decisions and opinions of the courts, parties must reconsider the expediency of following the long-standing practice of designating architects or engineers in construction and installation contracts as arbitrators unless they are learned in the law. This caution, indeed, is equally pertinent to any designation of laymen in arbitration agreements under the statute. It also seems clear that a court, in proceedings under § 164 of the statute to gain court appointment of arbitrators, must bear these matters in mind in considering and determining the qualifications of a person for appointment as arbitrator.

#### ARBITRATION PROVISIONS IN CONTRACTS WITH THE COMMONWEALTH, ITS AGENCIES OR SUBDIVISIONS

Section 176 of the arbitration statute reads as follows:

*“State and municipal contracts.* The provisions of this act shall apply to any written contract to which the Commonwealth of Pennsylvania, or any agency or subdivision thereof, or any municipal corporation or political division of the Commonwealth shall be a party.”

The Supreme Court has reiterated that this section makes arbitration provisions in written contracts to which the Commonwealth, or its agencies or subdivisions, is a party automatically subject to the statute. In *Phila. Hous. Auth. v. Turner Const. Co.*<sup>48</sup> the Court stated the matter as follows: “With this legislative declaration in view, it is impossible to conclude that the law-making body did not intend that all arbitrations provided for in contracts with the Commonwealth or its agencies should be under the act.” The Court advanced this view in connection with its determination that the arbitration provision in the contract in question was subject to the statute and was not effective as a common law provision and, accordingly, that § 171(d) providing for judicial review of an arbitration and award to determine whether or not the award was “against the law,” was applicable. The Court relied upon

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47. See *McCahan v. Reamey*, 33 Pa. 535 (1859); *Bancroft, Inc. v. Twp. of Millcreek*, 21 Erie 29 (Pa. 1938); Cf. *Speer v. Bidwell*, 44 Pa. 23 (1863).

48. 343 Pa. 512, 23 A.2d 426 (1942).

its earlier opinion and decision in *J. M. Davis Co. v. Shaler Twp.*<sup>49</sup> In that case a contract with the township for construction of sewers contained a provision for arbitration of disputes arising thereunder. The arbitration provision was general in scope covering all disputes arising in connection with the contract; "the Engineer" (not naming him) was designated therein as arbitrator. He was employed by the township. It was subsequently stipulated by the parties that Ross, who was the engineer, was disqualified to act—for reasons not disclosed in the opinion of the Court. *Held*: That § 164 was properly invoked to gain court appointment of a substitute. In this connection the Court remarked: "When the parties entered into the arbitration agreement now before us they *ipso facto* embodied in that agreement all of the provisions of the Arbitration Act," including, of course, the remedy of court appointment of arbitrators as provided in § 164. It may be noted, in passing, that this *ipso facto* embodiment of the provisions of the Arbitration Act in the foregoing arbitration provision was not attributed in any way to the above quoted section (§ 176) of the statute; that section was not mentioned in the opinion of the Court.<sup>50</sup>

The Court also took the position in *Phila. Hous. Auth. v. Turner Const. Co.* that § 176 impliedly repealed § 1 of the Act of 1925 (Purdon Pa. Stat. tit. 5, § 180) authorizing the inclusion in contracts entered into by the Commonwealth, or its agencies or subdivisions, of provisions to arbitrate in accordance with the provisions of the Arbitration Act of 1836. The Court advanced this view in overruling an argument for the appellant, the contractor, to the effect that § 176 was designed to do no more than authorize public officials to use arbitration provisions in such public contracts; that it did not necessarily nor automatically render such provisions subject to the present arbitration statute. Ruling the implied repeal the Court said: "Attention is called to the Act of May 13, 1925, P. L. 670, Sec. 1, 5 PS § 180, which sets forth, that after the date of the act it shall be lawful to include in any contract executed by the Commonwealth or any agency thereof a provision that any matter in dispute arising under the contract shall be submitted to arbitration in accordance with the Arbitration Act of June 16, 1836, P. L. 715, 5 PS § 1 *et seq.*, and it is suggested that section 16 of the Act of 1927 [§ 176] is but confirmatory of this provision. The two enactments differ entirely in language and in scope and we are unable to accept the suggestion. Section 16 [§ 176] is mandatory and applies the provisions of the act of which it is a part to any written contract to

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49. 332 Pa. 134, 2 A.2d 708 (1938).

50. See note 8 *supra*.

which the Commonwealth or any agency thereof is a party. This section impliedly repeals the Act of 1925.”<sup>51</sup>

The Supreme Court reaffirmed the automatic application of the arbitration statute to arbitration provisions in written contracts with the Commonwealth in *Seaboard Surety Co. v. Commonwealth*.<sup>52</sup> The arbitration provision in this case was contained in a contract for the construction of a highway and bridge for the Commonwealth. It provided for the arbitration of all disputes arising in connection with the contract; that they were to be “referred to the Secretary of Highways and the Attorney General;” and that their decision and award “shall be final, binding, and conclusive upon all parties without exception or appeal; and all rights of any action at law or in equity under and by virtue of this contract and all matters connected with it and relative thereto are hereby expressly waived . . .” Dispute arose; an arbitration was had and an award was rendered in favor of the Commonwealth. The contractor moved to vacate relying upon several grounds specified in § 170, including the following: that the arbitrators refused to hear testimony; that they did not act in due quorum; that they caused *ex parte* investigations of the matters in issue to be made by a third person; and the plaintiff was not accorded opportunity to examine or be heard on the matters reported. The Commonwealth filed a counterpetition challenging the jurisdiction of the lower court to entertain the motion to vacate relying upon the stipulations in the arbitration provision that an award thereunder should be final and binding without exception or appeal and the waiver of all remedies at law and equity with respect to the contract. The Supreme Court set forth the question at issue and its ruling as follows: “The sole question for our determination is whether the Act of 1927 [the arbitration statute], which is not mentioned in the

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51. In the earlier case of *W. Bancroft, Inc. v. Millcreek Twp.*, 335 Pa. 529, 6 A.2d 916 (1939), apparently in a written submission after dispute had arisen between the contractor and the township, the parties expressly reserved “right of appeal on questions of law, in accordance with the Act of June 16, 1836, P.L. 715, 5 PS § 1.” The Supreme Court apparently considered the stipulation effective and obligatory; it said at 532: “The authority in the township supervisors to submit to arbitration under the Act of 1836 can be found in the Act of May 13, 1925, P.L. 670, sec. 2, 5 PS 181.” In *Philadelphia Hous. Auth. v. Turner Const. Co.*, *supra* note 6, the Court commented at 520, on the Bancroft case as follows: “What was said about the arbitration agreement in accordance with the arbitration Act of 1836 was but incidental and was not intended to mean that we thereby sanctioned an arbitration of a dispute as to the liability of the township to the contractor for extra work under the Act of 1836.”

The truth seems to be that the proceedings in the Bancroft case—on the assumption that the Act of May 13, 1925, P.L. 670, 5 Purdon § 180 was effective—were so similar to those under the present statute as involved in *Philadelphia Hous. Auth. v. Turner Const. Co.* that the declared repeal of this Act was more formal than substantial. See, however, the cases cited note 47 *supra*, concerning the possibility of waiver of review of an award under the Act of 1836 for being against the law.

52. 345 Pa. 147, 27 A.2d 27 (1942).

written contract here involved, governs the arbitration therein provided for. This question must be answered in the affirmative . . .” The Court relied upon the “shall” in § 176 and reiterated its views as voiced in *Phila. Hous. Auth. v. Turner Const. Co.*, that the section “is mandatory and applied the provisions of the act of which it is a part to any written contract to which the Commonwealth or any agency thereof is a party.” “Thus,” the Court concluded, “it is clear that the Act of 1927 governs the award under consideration, even though the arbitration clause of the contract provides that the award shall be final and conclusive and there shall be no right of appeal. Since section 16 [§ 176] is mandatory, neither of the parties could waive any part of the statute, but both are bound by the act in its entirety.” Accordingly, it was held that the Court had jurisdiction to entertain the foregoing statutory motion to vacate the award.

This ruling also prevailed over the further objection of the Commonwealth that it could not be sued without express statutory authority. The Court remarked as to this objection that, since the above section of the statute is mandatory, “the Legislature granted express authority to institute such proceedings as are here under consideration against the Commonwealth where it is a party to a contract containing an arbitration clause.”<sup>53</sup>

*May Parties Stipulate Themselves Out of the Statute?* In considering the foregoing views the following question naturally occurs: May parties (whether or not one of them is the Commonwealth or an agency or subdivision thereof) stipulate in an arbitration provision in a written contract *that the statute shall not apply* and have the stipulation respected? Obviously, parties may wish to do so, for example, to avoid judicial review of an arbitration and award under § 171(d) of the statute on the ground that the award is “against the law,” unless they can effectively stipulate to waive recourse to that subsection and keep within the statute.<sup>54</sup>

It seems that such stipulation should be accorded full faith and credit by the Court. None of the foregoing cases indicates a contrary conclusion when the Commonwealth is not a party. It is even doubted that the holdings of any of those cases foreclose such ruling when the Commonwealth is a party. In none of them did the parties *expressly*

53. The view that § 176 makes the arbitration act automatically applicable to any written contract with the Commonwealth notwithstanding stipulations that the award shall be final and binding and that there shall be no right to appeal was expressly reaffirmed and applied in *Acchione v. Commonwealth*, *supra* note 27. The precise issue in the case was the same as in *Philadelphia Hous. Auth. v. Turner Const. Co.*

54. See discussion *supra* as to whether or not a stipulation to waive recourse to § 171(d) will be honored.

stipulate away the whole statute. The statute as a whole is an enabling one in the field of remedies. Section 176 of the statute is made most consistent with this principle when it is read as *authorizing* the Commonwealth to use the statute and without placing such emphasis on the "shall" therein as would strip the Commonwealth of its power and privilege to choose its contracts in this connection. It seems very doubtful that the "shall" was intended so to single out the Commonwealth from all other parties and restrict its power in the use of arbitration provisions. It also seems entirely clear that the Commonwealth (or its agencies or subdivisions) stands in no special need of protection while determining the scope and status of the arbitration provisions to be included in its contracts. Its competence and facilities for contracting are adequate enough to warrant trusting its choice whether to stipulate for common law arbitration or arbitration under the statute—as, indeed, whether to stipulate for any arbitration in its contracts.<sup>55</sup>

As heretofore noted, the Supreme Court has adopted the generally prevailing view that the arbitration statute does not displace the privilege of parties to arbitrate at common law—and that they may do so under written agreements of arbitration. While the agreement for arbitration may be adequately formalized (by writing) to qualify under and engage the statute, if parties further expressly and precisely stipulate therein that the statute shall not apply, it seems that the Court may deem itself free to honor their contract whether or not the Commonwealth is one of the parties and notwithstanding its foregoing views. The general solicitude of the Supreme Court that contracts, including arbitration agreements, be respected and carried out according to their terms is illustrated in *Nippon Ki-Ito Kaisha, Ltd. v. Ewing-Thomas Corp.*<sup>56</sup> In that case the Court ordered a party to an arbitration provision in a written contract to proceed with an out-of-state arbitration in accordance with the terms of the arbitration provision which required that the arbitration be held in New York and according to the rules of arbitration of the Silk Association of America, Inc. It expressed its "entire accord" with the opinion of the New York Court of Appeals in *Gilbert v. Burnstine*,<sup>57</sup> wherein the Court observed, among other things, that "Contracts made by mature men, who are not wards of the Court should, in the absence of potent objections, be enforced." And the Supreme Court of Pennsylvania continued: "That

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55. The Commonwealth may be especially concerned to stipulate for arbitration at common law if § 171(d) of the statute is going to have the effect of disqualifying non-lawyer public officials from serving as arbitrators under its construction, installation and similar contracts.

56. 313 Pa. 442, 170 Atl. 286 (1934). This case is reviewed further *infra*.

57. 255 N.Y. 348, 174 N.E. 706 (1931).

decision is based upon the doctrine of inviolability of contracts which has been a cardinal principle in the constitutional law of both the nation and the state ever since they have existed as such. As the years go by, and we are brought face to face with many ingenious attempts to evade or qualify it, we are increasingly convinced of the necessity for holding fast to this ancient landmark of our constitutional existence."<sup>58</sup>

It also seems probable that parties to a written arbitration agreement, whether under the statute or stipulated out of it, may include provisions governing the arbitral proceedings and award, or incorporate by reference arbitration rules of an organization like the American Arbitration Association or of a trade association, provided that, if the arbitration agreement is under the statute, the arbitration may not be inconsistent with the statute or rules of court duly promulgated thereunder.<sup>59</sup>

#### ARCHITECT AND ENGINEER CLAUSES—WHETHER "PROVISIONS FOR ARBITRATION"

In *Phila. Hous. Auth. v. Turner Const. Co.*<sup>60</sup> the Supreme Court voiced the quite radical innovation that: "Provisions in contracts which give engineers or architects or heads of municipal or state departments power to decide questions are *not arbitration provisions in the sense that the Arbitration Act provides.*" (Italics supplied.)<sup>61</sup> As to why this was so—and *indirectly* indicating what the Court thought was the idea back of the term "arbitration provisions" in the sense that "the Arbitration Act provides"—the Court continued as follows: "Boards of arbitration under that act are *judicial bodies*. Individuals given the right to decide in their own favor or in favor of the person who employs them cannot be said to be exercising *a judicial function at all*. They exercise *a power given them by the contract to decide, not to judicially hear and determine.*" (Italics supplied.) The Court entered upon these generalizations in rejecting an argument that the arbitration provision in the case was at common law and, therefore, not subject to § 171(d) of the arbitration statute providing for judicial review of an arbitration and award to determine whether or not the award is

58. See also *Adinolfi v. Hazlett*, 242 Pa. 25, 88 Atl. 869 (1913), which held unconstitutional as a violation of the right to contract a statute which said that contracts for the submission of disputes to engineers and architects should not deprive the courts of jurisdiction.

59. See *Katakura & Co. v. Vogue Silk Hosiery Co.*, *supra* note 6. This case is reported further *infra*.

60. 343 Pa. 512, 23 A.2d 426 (1942).

61. That this was a radical innovation upon the common law of Pennsylvania see *STURGES*, *op. cit. supra* note 7, §§ 11, 20; and *Adinolfi v. Hazlett*, *supra* note 42.



“against the law.” It also appears that counsel cited the ruling of the Court in *Canuso v. Philadelphia*<sup>62</sup> in support of their argument that the arbitration provision in *Phila. Hous. Auth. v. Turner Const. Cō.* should be considered as at common law and that, therefore, the award thereunder should not be subject to judicial review under § 171(d). The Court replied that in *Canuso v. Philadelphia* “there was no arbitration”; hence no provision for arbitration, and no award. This statement seems open to criticism for judicial haste in citation of prior decisions. Reference to *Canuso v. Philadelphia* will disclose that not only the parties and the trial court, but also the Supreme Court fully understood and accepted that the issues therein presented involved an *arbitration provision* and an *arbitration* and *award* thereunder. In that case a provision in a construction contract between a contractor and the City of Philadelphia designated the Director of Public Works of the City to decide “on any questions arising in connection with the performance of [the] contract.” Controversy arose as to which of the two parties was responsible for the buckling of certain temporary work when the permanent construction was superimposed and for the cost of adequately repairing the temporary work to carry the permanent construction. The question of responsibility was referred to the director;<sup>63</sup> after hearing the respective parties and making certain investigations in which the parties acquiesced, he returned his award that the City bore the liability. Said the Supreme Court: “We are not impressed with defendant’s contention that there was no valid *award* binding upon the municipality. The jurisdiction of the *arbitrator* extended to ‘any question arising in connection with the performance of [the] contract.’ His authority was broad; it clearly included the power to settle the controversy in the instant case. . . . The designation of the Director of Public Works, under whose supervision the construction was to be effected, as the *arbitrator* of any dispute that might arise between the parties, was only logical. *The practice of making a municipal officer arbitrator of controversies arising between the municipality and a private contractor is well established*”—citing earlier Pennsylvania cases.<sup>64</sup> (Italics supplied.)

It may be conceded that no consideration was given in *Canuso v. Philadelphia* as to whether or not the arbitration statute was applicable.

62. 326 Pa. 302, 192 Atl. 133 (1937).

63. The question of damages for the extra work entailed by the collapse was not submitted to the Director along with the question of liability because the parties had previously reached an agreement on this issue. Only liability was controverted.

64. The Court cited Commonwealth *ex rel.* Mercantile Trust Co. v. Pittsburgh, 206 Pa. 379, 55 Atl. 1058 (1903); Werneberg v. Pittsburg, 210 Pa. 267, 59 Atl. 1000 (1904); Clark & Sons Co. v. Pittsburg, 217 Pa. 46, 66 Atl. 154 (1907); Curran v. Philadelphia, 264 Pa. 111, 107 Atl. 636 (1919).

It is inferred that none of the parties, nor the lower court, nor the Supreme Court, gave thought to the statute or its applicability. The award was sustained and held to be enforceable; the plaintiff recovered thereon according to its terms.

If the award, as rendered under the foregoing arbitration provision in *Canuso v. Philadelphia* was valid outside the statute as at common law, the question occurs: What was there in the statute to disqualify the arbitration and award and the provision under which the proceedings were had in *Phila. Hous. Auth. v. Turner Const. Co.* from being valid under the statute? Nothing explicit in the statute requires that "boards of arbitration under the act" shall be "judicial bodies" as suggested in the latter case, and nothing explicit in the statute sustains the further statement of the Court in that case that: "Provisions in contracts which give engineers or architects or heads of municipal or state departments power to decide questions are not arbitration provisions in the sense that the Arbitration Act provides." Accordingly, the foregoing thesis of the Court seems to have had no apparent support either at common law or under the statute—and the Court cited none.

The status of architect and engineer clauses in construction contracts received further attention from the Supreme Court in the subsequent case of *Seaboard Surety Co. v. Commonwealth*.<sup>65</sup> Issue was raised whether or not an award rendered in favor of the Commonwealth under an arbitration provision in a construction contract between a contractor and the Commonwealth was subject to the contractor's motion to vacate for one or more causes set forth in § 170 of the statute. The arbitration provision designated the Secretary of Highways and the Attorney General as the arbitrators. The Commonwealth argued, among other matters, that under the foregoing doctrine of *Phila. Hous. Auth. v. Turner Const. Co.* the statute could not be invoked. It contended that the statement: "Provisions in contracts which give engineers or architects or heads of municipal or state departments power to decide questions are not arbitration provisions in the sense that the Arbitration Act provides," as uttered in *Phila. Hous. Auth. v. Turner Const. Co.*, indicated that the statute was not intended to govern arbitration when provided for in a contract to which the Commonwealth was a party and in which the Secretary of Highways and the Attorney General were designated as arbitrators. The Supreme Court overruled the argument as follows: "*There is no merit in this argument. The practice of making a state or municipal official arbi-*

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65. 345 Pa. 147, 27 A.2d 27 (1942).

trator of a controversy arising between the state or municipality and a contractor is well established (Commonwealth v. Eastern Pav. Co., 288 Pa. 571; Curran v. Philadelphia, 264 Pa. 111; Werneberg v. Pittsburgh, 210 Pa. 267; Commonwealth ex rel. v. Pittsburgh, 206 Pa. 379), and the Act of 1927 [the arbitration statute] contains no limitation as to who may serve as arbitrators." (Italics supplied.)

The Court did, however, indicate its continued support for its foregoing statement in *Phila. Hous. Auth. v. Turner Const. Co.*, by suggesting that it was there made "merely to distinguish the provisions of the contract there under consideration from those involved" in the *Canuso* case. It was not made apparent why that distinction would be any longer significant after the ruling in *Seaboard Surety Co. v. Commonwealth*.

The Court further declared that the award in *Phila. Hous. Auth. v. Turner Const. Co.* "was made under an arbitration . . . contract which provided for a decision of a dispute between the parties by quasi-judicial means for the purpose of settling the entire subject matter in issue; while in the *Canuso* case there was a mere decision, made by the Director of Public Works of the City of Philadelphia, of a fact relating to performance in order to expedite the progress of the work, which decision was not intended to terminate the whole controversy between the parties, but instead left to them the right to resort to suit or arbitration." (Italics supplied.) While it is true that the Director's award in the *Canuso* case decided only the question of the City's liability, the making of that decision involved a determination of the facts in the case and of the parties' liability, in the light of those facts, under the terms of their contract. Accordingly, there seems to be nothing in that case to support the foregoing allocation of insignificance to the arbitral proceedings and award therein; indeed, the Court sustained the award as valid in law.

In both *Phila. Hous. Auth. v. Turner Const. Co.* and *Seaboard Surety Co. v. Commonwealth* the Court also advanced the view that the parties in *Canuso v. Philadelphia* did not intend that the Director of Public Works should serve as an arbitrator because the construction contract further provided that "nothing in this clause shall be taken to indicate that the Contractor, with the consent of the Director, cannot appeal to arbitration in accordance with the Pennsylvania State Law approved April 25, 1927 [the arbitration statute]." (Italics supplied.) "From this," the court has reiterated, "it is apparent that the parties did not regard the position of the director to be the equivalent of an arbitrator." This conclusion does not seem as apparent as the Court

indicates. While the reference of "this clause" in the foregoing text of the agreement is not reported, it seems clear that if the parties were to proceed with an arbitration under the statute, they were to do so only with the consent of the director and that such arbitration would be in lieu of his own proceeding with respect to the given controversy. That this alternative was stipulated seems scarcely to lend weight to the view that the director was not regarded by the parties as "the equivalent of an arbitrator" when he was called upon to act and he did so.

From this review of the cases it seems doubtful that the thesis with respect to architect or engineer clauses as originally advanced in *Phila. Hous. Auth. v. Turner Const. Co.* now has any vitality in the arbitration law of Pennsylvania.

PROVISIONS FOR VALUATIONS AND PRICE FIXING—WHETHER  
"PROVISIONS FOR ARBITRATION"

Plaintiff agreed to buy and defendants to sell certain land "at a price to be fixed by appraisement to be made by the Pittsburgh Real Estate Board." The amount to be paid was decided and reported to the parties. *Held*, that a motion by the plaintiff under the statute to vacate or modify the award would not lie since the whole affair constituted no arbitration or award. And this was so because there had been no dispute arising or existing between the parties which was susceptible of arbitration. Said the Court: "The record shows that when they made their agreement there was no controversy; one had land that the other wished to buy, but he could not require the owner to sell; the owner could not require his neighbor to buy; the parties were under no obligation to each other; there was neither contract nor duty. If they differed about the price to be paid, that difference was not an existing controversy in the sense that it furnished either with rights against the other, such, for example, as might have existed if one had the power of condemning the land of the other and proposed to exercise it. . . . They agreed to have the property appraised by a named appraiser, and to buy and sell at that appraisement. *The appraisement was made but it is not an award of arbitrators.*" (Italics supplied.)<sup>66</sup>

66. *Grote v. Stein*, 99 Pa. Super. 556 (1930), noted 35 DICK. L. REV. 240 (1931). The court quoted 1 HALSBURY, LAWS OF ENGLAND 440, to the effect that "In order to constitute a submission to arbitration there must be some difference or dispute, either existing or prospective, between the parties, and they must intend that it should be determined in a quasi-judicial manner . . . in the case of a valuation there is not, as a rule, any difference or dispute between the parties. . . ."

*Accord*, *Poland Coal Co. v. Hillman Coke & Coal Co.*, 357 Pa. 535, 55 A.2d 414 (1947), *cert. denied*, 333 U.S. 862 (1948) (provision in a lease of coal properties for one named as "arbitrator" to determine amount of recoverable coal and its value in connection with the exercise of an option to purchase. The vendor claimed only

*Appraisal Provisions in Insurance Policies.* Whether or not appraisal provisions in insurance policies covering loss of property or awards thereunder qualify under the arbitration statute is undetermined. Although it is not clear, the Supreme Court may have assumed in *P. O. S. of A. Hall Assn. v. Hartford Fire Ins. Co.*<sup>67</sup> that such awards are subject to the statute, but on the other hand, in other cases<sup>68</sup> it has been declared that it is questionable whether such provisions come within the statute.

#### ARBITRATION PROVISIONS IN COLLECTIVE BARGAINING AGREEMENTS

By the first section of the statute (§ 161), provisions for arbitration in contracts for "personal services" are excepted from the act. It has not been decided by the Supreme Court whether or not a collective bargaining agreement between an employer and his employees or their union is a contract for "personal services" under the statute. While an arbitration and an award rendered under a provision for arbitration in a written collective bargaining agreement were involved in *Goldstein v. Garment Workers' Union*,<sup>69</sup> the Court did not consider this question in its opinion. Collective bargaining agreements as presently used by employers and labor unions were little known at the time the statute was enacted. And, though they may fix terms of employment, collective bargaining agreements do not constitute contracts which obligate or assure employment of any specific person. Accordingly, it seems reasonable to give contracts "for personal services," as used in the statute, a more restricted meaning.<sup>70</sup>

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that the option itself was void and refused to discuss other issues. *Held*: there was no controversy, within the meaning of the word as used in the Arbitration Act, to be settled by an arbitration.)

In *McDevitt v. McDevitt*, *supra* note 2, an award fixing the value of decedent's interest in a partnership was considered as being within the statute; there was no discussion of the issue now under consideration. The future disputes provision was predicated upon disagreement of the parties as to the value; and they had in fact disagreed.

67. 305 Pa. 107, 157 Atl. 259 (1931).

68. *Isaac v. Donegal & Conoy Mut. Fire Ins. Co.*, 301 Pa. 351, 152 Atl. 95 (1930); see also, *Robinson v. Lumbermen's Mut. Cas. Co.*, 110 Pa. Super. 396, 168 Atl. 321 (1933); *Boll v. United States Fire Ins. Co.*, 20 Pa. D. & C. 511 (1934).

69. *Supra*, note 7.

70. It was so held in *Kaplan v. Bagrier*, 12 Pa. D. & C. 693 (1929). See *Campbell v. Industrial Union of Marine & Shipbuilding Workers*, 33 Pa. Del. Co. 204 (1944). Consult, also, *Levy v. Superior Court*, 15 Cal.2d 692, 104 P.2d 770 (1940). But in *Retail Cigar, Drug and Luncheonette Employees Union v. Sun Ray Drug Co.*, 67 Pa. D. & C. 512 (1949), the Court declared, at 515, that it was not in accord with *Kaplan v. Bagrier*, *supra* and that: "The collective bargaining agreement itself is a contract for personal services between a union representing its members and the employer of members of the union. . . . All of the provisions of the agreement relate to the personal services of the employe members of the union to the employer, the Sun Ray Drug Company."

An agency contract with an actor to gain engagements for the actor in return for a share of his income has been held not to be a "contract for personal services"

It also may be noted that controversies which are existing between parties to a contract for "personal services" may well qualify for submission by written agreement under the statute.<sup>71</sup> The foregoing section purports to except from the statute only provisions to arbitrate future disputes in contracts for personal services.

#### DETERMINATION OF THE "MAKING" OF ARBITRATION AGREEMENTS

It seems clear that "the making" of an arbitration agreement may be put in issue and made subject to trial according to § 163 not only (1), with respect to the validity of its original consummation, but also (2), with respect to its coverage, namely, whether a given controversy is or is not within the intent of the agreement, and (3), with respect to its alteration, substitution, or rescission by express or implied agreement of the parties, or by its expiration under its own terms.<sup>72</sup> Thus, in *Goldstein v. Garment Workers' Union*, the matter was regarded as put in issue and subject to trial as provided in § 163 when it was made to appear that the parties may have come to an agreement upon an express contract which displaced the arbitration provision.<sup>73</sup>

Moreover, the matter may be put in issue after arbitration and after the award has been rendered; as, for example, in opposition to a petition to confirm the award. And the arbitrator's ruling at the arbitral hearing that the defendant was a party to, and bound by, the main contract and arbitration provision therein should generally be disregarded at the trial. Said the Court in the *Goldstein* case in this connection: "Appellants having raised the issue as to whether they were

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under this exception. *Layne v. Phillips*, 67 Pa. D. & C. 40 (1948). The court described the situation and expressed its ruling as follows: "The long and short of the relationship between plaintiff and defendant is a written contract whereby defendant, an actor's agent, undertook to secure and guarantee engagements for plaintiff, an actor, for a consideration—a percentage of what plaintiff-actor would get from those engagements. From that relationship, I do not see one of personal services; certainly, when I follow the master-and-servant line drawn by other judges. See *Kaplan et al. v. Bagrier et al.*, 12 D. & C. 693; *Couzens v. Wachtel et al.*, 64 D. & C. 459, 462." In the *Couzens* case, arbitration of disputes growing out of a partnership relationship were held not to be within the "personal service" exception.

71. As, for example, in *Ellwood City Motor Coach Co. v. Ellwood City Traction Workers Union*, 67 Pa. D. & C. 401 (1948).

72. *Goldstein v. Garment Workers' Union*, *supra* note 7. See, also, Justice Stern, concurring in *J. S. Cornell & Son, Inc. v. Rosenwald*, *supra* note 2; *Stofflet & Tillotson v. Chester Hous. Auth.*, *supra* note 2; *Dickens v. Pennsylvania Tpke. Comm.*, 351 Pa. 252, 40 A.2d 421 (1945).

In the *Goldstein* case, the Court further quoted with approval from *Finsilver, Still & Moss, Inc. v. Goldberg, Maas & Co.*, 253 N.Y. 382, 117 N.E. 579 (1930), to the effect that court determination of jurisdictional issues is required by due process.

Concerning the construction of arbitration agreements, see cases cited notes 1 and 2 *supra*.

73. *Supra* note 7. Compare *Weldon & Kelly Co. v. Pavia Co.*, 354 Pa. 75, 46 A.2d 466 (1946), in which the matter seems to have escaped any attention.

parties to the contract under which the arbitration was to be conducted, that question had to be preliminarily determined by the court (appellants having waived a jury trial), and the arbitrator could not, in contravention of the statute, determine his own status and jurisdiction by finding that appellants were bound by the contract under which he purported to act.”<sup>74</sup>

Furthermore, a bill for declaratory judgment will not lie to determine whether a given controversy is within the terms of an arbitration provision which qualified under the arbitration statute. In *Stofflet & Tillotson v. Chester Hous. Auth.*<sup>75</sup> the Court noted that petition under the Uniform Declaratory Judgments Act “is not an optional substitute for established and available remedies. . . . Sections 3 and 4 of the Arbitration Act (5 PS §§ 163, 164) provide an adequate remedy for determining just such questions as are raised here. It is even provided by § 17 (5 PS § 177) that if difficult legal questions arise before the arbitrators, they may have access to the court of common pleas for a declaratory judgment on such questions of law.” Noting further that the pleadings may have raised issues of fact, the Court further observed, “While § 9 (12 PS § 839) of the Declaratory Judgments Act provides for submitting disputed questions of fact to a jury, § 3 (5 PS § 163) of the Arbitration Act makes like provision. Such a situation should be taken into consideration in determining the availability of remedies. ‘Ordinarily, it [the court] will not act [under the Declaratory Judgments Act] where there is a dispute as to facts, or such controversy may arise.’”

Notwithstanding this ruling, a bill for injunction to restrain arbitration proceedings raising the same issue as under the foregoing bill for declaratory judgment was heard and allowed in *Elkwood City Motor Coach Co. v. Elkwood City Traction Workers' Union*.<sup>76</sup>

#### ENFORCEMENT OF ARBITRATION PROVISIONS BY ORDERING OUT-OF-STATE ARBITRATIONS

The Supreme Court has taken a worthy position in determining the enforcement of arbitration agreements by ordering out-of-state arbitrations when the agreements so provide. In order to fulfill the terms of an arbitration agreement a party may be ordered under § 163 to proceed with an arbitration in another state. In *Nippon Ki-Ito*

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74. That the prevailing common law view is in accord as to judicial review of an arbitrator's jurisdiction, see STURGES, *op cit. supra* note 7, § 45.

75. 346 Pa. 574, 31 A.2d 274 (1943).

76. 67 Pa. D. & C. 401 (1948).

*Kaisha, Ltd. v. Ewing-Thomas Corp.*,<sup>77</sup> the arbitration clause provided that: "Every dispute, of whatever character, arising out of this contract, *must be settled by arbitration in New York*, to be conducted in the manner provided by the by-laws, rules and regulations of the Silk Association of America, Inc., governing arbitrations." (Italics supplied.)

Plaintiff was a Japanese corporation with an office in New York City. It had contracted with the defendant, a Pennsylvania corporation having its principal office in Pennsylvania, for the sale of silk by the plaintiff to the defendant. Defendant refused to make payments under the contract, alleging defects in the silk delivered.

The court below denied plaintiff's petition for an order to arbitrate in New York. This was held to be erroneous. The Supreme Court disposed of several objections to granting the order.

(1) Defendant argued that the Pennsylvania court should not order the New York arbitration because the New York courts would not, in like case, order a Pennsylvania arbitration. In overruling this point the Court said: "It is difficult to see upon what principle we could so decide, even if the courts of New York had so held, since it is our duty to determine all legal questions raised in accordance with the law as we understand it, no matter what the courts of other states may do. . . ." <sup>78</sup>

(2) The defendant also based its objection to granting an order for the New York arbitration on the ground that the Pennsylvania arbitration statute related only to arbitrations held in Pennsylvania. The Supreme Court indicated that the court below relied mainly upon this point in denying plaintiff's petition. Proceedings under § 166 (relating to the arbitral hearings and the summoning of witnesses), § 170 (providing motion proceedings to vacate awards for causes there-

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77. 313 Pa. 442, 170 Atl. 286 (1934).

78. The Court also indicated that defendant was in error in its view that the New York courts would not order an out-of-state arbitration in a parallel case, relying upon the decision of the New York Court of Appeals in *Gilbert v. Burnstine*, 255 N.Y. 348, 174 N.E. 706 (1931). Upon reference to the New York decisions precisely in point it seems that the defendant was correct that the New York courts refuse to order a party to proceed with an arbitration outside New York State. Application of *Inter-Ocean Food Products, Inc.*, 206 App. Div. 426, 201 N.Y.S. 536 (1st Dep't. 1923); *In re California Packing Corp.*, 121 Misc. 212 (Sup. Ct.), 201 N. Y. Supp. 158 (1923). See also *Kelvin Engineering Co. v. Blanco*, 210 N.Y. Supp. 10, (1925); *Cardozo J.*, concurring in *Meacham v. Jamestown, F. & C.R.R.*, 211 N.Y. 346, 105 N.E. 653 (1914). Concededly, however, these decisions were before that in *Gilbert v. Burnstine*. It seems further, however, that the New York view as voiced in the pre-*Gilbert v. Burnstine* cases is of dubious validity and that the decision of the Pennsylvania Supreme Court in the *Nippon Ki-Ito Kaisha* case is more in accord with the provisions of the statute. New Jersey had sustained the order for the out-of-state arbitration in 1931. *In Re California Lima Bean Growers Assn.* 9 N. J. Misc. 367, 154 Atl. 532 (1931).



in set forth) and § 171 (providing like proceedings to modify or correct an award for causes therein stated) were cited by the lower court to fix the locale in Pennsylvania of arbitrations under the statute.

With respect to the localizing effect of § 166 the Supreme Court observed as follows: "The court below calls attention to the fact that section 6 [§ 166] says that if witnesses summoned by the arbitrators refuse . . . to obey said summons, upon petition, *the court of common pleas of the county in which such arbitrators are sitting* may compel them to appear and testify. [Quoting from the statute.] It does so say, but therefrom there is no justification for the conclusion of the court below 'that this clearly indicates that the legislature intended that the act should only apply to situations where the arbitrators were sitting in Pennsylvania.'" (Italics supplied.) The Supreme Court added: "If the arbitrators were sitting in New York and the witnesses were in Pennsylvania, that provision could be applied, but it could not be applied to cases where the witnesses were not in Pennsylvania, no matter where the arbitrators were sitting." This statement is not clear for, upon referring to the above text of § 166 (and especially the part in italics), it is not manifest how it could be invoked if the arbitrators were sitting in New York.

By way of conclusion on this point the Supreme Court stated that: "What the provision under consideration does mean is, that in the case of recalcitrant witnesses, the court of common pleas of the county where the arbitrators are sitting *cannot escape acting because the suit is pending in some other county.*" (Italics supplied.) This statement also is not clear and seems as dubious as the preceding one.

However, the fallacy of the view of the lower court on the point under consideration seems quite manifest for other reasons. It is clear that the remedy to gain an order to proceed "in accordance with the terms" of the arbitration agreement as provided in § 163 of the statute was not expressly restricted to arbitration agreements providing for arbitration in Pennsylvania only. And if, "in accordance with the terms" of an arbitration agreement, a party is ordered to proceed with an arbitration outside the State and the arbitration is had in the other state, it seems clear that there will be no occasion or opportunity for the arbitrators sitting in the other state to invoke or use § 166 of the Pennsylvania statute; the arbitral board will have recourse to such comparable remedies (including, of course, limitations upon subpoenas of out-of-state witnesses) as the law of the forum may afford.

With respect to the significance of §§ 170 and 171 on the question at hand the Supreme Court reported the position taken by the court

below by quoting from its opinion as follows: "Furthermore, sections 10 [§ 170] and 11 [§ 171] indicate that the court should have jurisdiction over the arbitrators themselves. Section 10 provides that 'where an award is vacated . . . the court may, in its discretion, direct a rehearing by the arbitrators.' Should this situation later arise, and we should direct a rehearing, we would have no means of enforcing such an order. The legislature certainly never intended that the court should issue a useless order, and it further indicates that the act refers only to cases where the arbitration is proceeding within the State of Pennsylvania. The same reasoning applies to section 11 [§ 171] which provides that 'the court may modify and correct the award or re-submit the matter to the arbitrators.'"

To these considerations the Supreme Court replied: "If we assume that all these difficulties are possibilities, defendant is not helped. It was bound to know the law, and yet, notwithstanding that, agreed, for a valuable consideration, to the arbitration out of which these difficulties are conjured. Suppose, as here, *the jurisdictional county was Delaware*, and the arbitrators chose to sit in Erie, nearly all of the difficulties suggested would exist, exactly as if they were sitting in New York, and in many respects the annoyances would be greater. . . . The proceeding in the court below is, in effect, a bill for specific performance of the arbitration provisions of the contracts (*Red Cross Line v. Atlantic Fruit Co.*, 264 U. S. 109, 124), and the scope of the chancellor's power in that character of case is probably broad enough to overcome all such difficulties." (Italics supplied.) Just what the Supreme Court meant by "the jurisdictional county" in the precise illustration which it posed is not clear. It is not clear how Delaware might be "the jurisdictional county" for any pertinent purpose under the statute after arbitrators had been appointed and were duly convened in hearing in Erie.<sup>79</sup> But to return to the general views of the lower court: It seems first to have assumed that in event of an out-of-state arbitration and award, the losing party would not, or could not, have recourse to the remedies provided by the law of that state to vacate or to modify or correct the award. This was a speculative and unwarranted assumption. Again, apparently that court expected that the losing party would invoke the statutory procedure under the Pennsylvania arbitration statute to vacate or modify or correct the foreign award rather than common law remedies. This assumption is equally speculative.<sup>80</sup> The

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79. See Act of April 25, 1927, P.L. 381, 5 PURDON § 178.

80. In *Britex Waste Co., v. Nathan Schwab & Sons, Inc.*, 139 Pa. Super. 474, 12 A.2d 473 (1939), the award of a default arbitration in England was enforced in an action of assumpsit on the award.

lower court also seems to have overlooked the fact that the provision in § 170 for directing a rehearing by the arbitrators when an award is vacated, gives discretion to the Court to direct or not direct such rehearing. Full regard for this discretionary power should have dissipated the Court's concern about the issuance of useless orders in such cases.

The arbitration statute provides in its first section (§ 161) that arbitration agreements which qualify thereunder, including provisions in written contracts to arbitrate future disputes arising in connection therewith, "shall be valid, irrevocable, and enforceable." This means, in effect, that *the courts of the state shall make them enforceable*. The remedies for so doing are made explicit in subsequent sections, including § 163 which provides for the specific enforcement of such arbitration agreements "in accordance with the terms of the agreement." It can scarcely be denied that the arbitration provision in the foregoing case carried a term requiring the arbitration to be held in New York.

In view of these considerations, there seems to be much merit in the Supreme Court's over-all statement in reversing the lower Court's view that the arbitration statute relates only to arbitrations to be held in Pennsylvania. The Supreme Court's statement was as follows: "The statute does not say so, and the argument brought forward to show that under sections 6, 10 and 11 [§ 166, 170, 171] that conclusion must be implied, is not only both labored and inconclusive, but also wholly overlooks other sections of the act. Moreover, it ignores the legal principle that it is our duty to sustain the act, if this can reasonably be done, and not to destroy it either in whole or in part."

In an earlier case, *Katakura & Co. Ltd. v. Vogue Silk Hosiery Co.*,<sup>81</sup> the Court had expressly passed by the question whether or not out-of-state arbitrations might be ordered under the statute. It there held that since the arbitration clause did not clearly *require* out-of-state arbitration, arbitration would be ordered within the state. In this case the seller, a Japanese corporation with an office in New York City, entered into a contract of sale with the respondent, a Pennsylvania corporation with its principal office in Philadelphia. Disputes arose between the parties and the seller petitioned for an order against the respondent to proceed with arbitration. The arbitration provision declared that disputes arising in connection with the contract "must be settled by arbitration to be conducted in the manner provided by the by-laws, rules and regulations of the Silk Association of America, Inc., governing arbitration." The Court reported that the arbitration provision fur-

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81. 307 Pa. 544, 161 Atl. 529 (1932).

ther provided that "Hearings shall be held customarily at Association Headquarters where adequate room will be provided;" and that: "This Arbitration shall be governed by the arbitration law of New York and the Arbitration Rules of the Silk Association of America, Inc." It held that the lower court had jurisdiction to determine whether or not arbitration should be ordered in New York or elsewhere, and, since the arbitration provision did not *require* the arbitration to be held in New York, it should be ordered in Pennsylvania. "This arbitration," said the Court, "may be conducted in Pennsylvania in the manner provided by the by-laws, rules and regulations of the Silk Association of America, Inc., governing arbitration so far as they are not inconsistent with the laws of Pennsylvania and with the rules of the appropriate court of common pleas concerning procedure and practice under the Pennsylvania Arbitration Act, and subject to all the other pertinent provisions of that act." <sup>82</sup>

#### RIGHT OF HEARING—QUORUM—EX PARTE INVESTIGATIONS

In *Seaboard Surety Co. v. Commonwealth* <sup>83</sup> a motion to vacate an award alleged that the arbitrators "did not," to quote the Court, "hear the testimony or sit together as a Board to consider it." The Court held that if the motion was proved true, the award should be vacated for misbehavior of the arbitrators. The Court declared that an arbitral proceeding "is in the nature of a judicial inquiry, and involves, ordinarily, a hearing and all that is hereby implied. . . . Section 6 [§ 166] of the statute expressly requires that all of them [the arbitrators] shall sit at the hearing of the case, unless by consent in writing all parties agree to proceed with a less number." <sup>84</sup>

The foregoing motion further alleged, to quote the Court, "that after the hearings were concluded the arbitrators commissioned the State Geologist to make a laboratory analysis of samples of test borings, that the geologist made his report to the arbitrators more than a year and a half before their decision was rendered, but no opportunity was afforded plaintiff to examine the report until after the award had been made, and that plaintiff was deprived of its right to cross-examine the State Geologist on his report or to introduce evidence to explain or contradict it." Indicating that motion to vacate on this ground was well conceived and within the jurisdiction of the court below the Supreme Court said: "Furthermore, it is well established that they [arbi-

82. The Court had previously noted the similarity between the New York and Pennsylvania arbitration statutes.

83. *Supra*, note 52.

84. *Accord* as to the requirement of quorum, *Kuzman v. Kamien*, *supra* note 7.

trators] should not proceed independently, and without notice to the parties, to make personal inquiries or investigations upon which they intend to base their award.”<sup>85</sup>

In subsequent proceedings upon the petition to vacate the foregoing views were reaffirmed and the award was vacated.<sup>86</sup>

In this second court suit the Commonwealth's answer to the petition to vacate raised a further issue. It set forth allegations to the effect that the geologist's investigation was made only after the arbitrators already had come to their decision upon the matters covered in the investigation. From this it was argued that the *ex parte* investigation did no harm because it had no effect upon the making of the award and, therefore, was no cause to vacate the award. The lower court overruled this argument as follows: “That the report may or may not have been used as a basis for the award is immaterial.”<sup>87</sup>

The Supreme Court, however, has left the matter in some doubt. Early in the opinion the Court commented as follows: “An award may be properly set aside for misconduct of the arbitrators if after the hearings are at an end they receive testimony or evidence on behalf of one of the parties without notice to the other. *This rule is generally qualified by the requirement that there has been no possibility of injury to the offended party.*”<sup>88</sup> (Italics supplied.) Whatever may have been the intent of the last quoted sentence, the authorities cited do not seem to justify a departure from the precise ruling of the court below. The Supreme Court further observed: “It is clear that the action of the arbitrators in securing an independent report on a matter at issue constitutes misconduct within the meaning of the arbitration act. *It cannot be seriously contended that appellee was not injured as a result of the acts of the arbitrators.*” (Italics supplied.) But does this mean that the ruling of the lower court is adopted or rejected? This question is further involved in the following views of the Court by which the opinion expressly purports to dispose of the appellant's contention “that the report of the state geologist in no way affected the decision of the Board” and was, therefore, innocuous. In this connection the Court made the point that the appellant's averment that the arbitrators had made their decision upon the matter involved in the report before

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85. Here the Court cited and quoted from the famous case of *Berizzi Co. v. Krausz*, 239 N.Y. 315, 146 N.E. 436 (1925).

86. *Seaboard Surety Co. v. Commonwealth*, 54 Dauphin 95 (1943); 350 Pa. 87, 38 A.2d 58 (1944).

87. That this appears to be the prevailing common law view, see *STURGES, op. cit. supra* note 7, § 217.

88. The court's authorities, “3 Am. Jur. pgs. 933, 966; *Curran v. Philadelphia*, 264 Pa. 111, 119.”

the geologist made his investigation and that it was not used as the basis of the decision in the award was "inconsistent with paragraph twelve of its answer wherein it avers that the decision was prepared only after the Board of Arbitrators met and considered the testimony." The Court then cited matters of fact in the case from which the conclusion was deduced that the board could not have arrived at a decision before the report was filed. The Court thereupon seemed to drop further consideration of the foregoing contention by the appellant. It is not made clear what bearing the Court's discussion of the foregoing inconsistency in the appellant's averments in its answer had upon that contention.

The Court entered next upon a quite confusing commentary upon the case as follows: "If it is assumed that they [the arbitrators] did not read the *report as part of the testimony in the case* then appellee's allegation that the arbitrators who made the award did not consider the testimony and merely adopted an opinion of their predecessors is true." (Italics supplied.) How this report, so improperly received, came to be rated as "testimony in the case" is not apparent; and the remoteness of this statement from any issue presented by the parties seems quite apparent. The Court then concluded: "Appellant [Appellee, it seems] by its averments has established misconduct by the arbitrators in considering *ex parte* evidence upon a fundamental issue of fact without the consent of appellee and *by reason of the failure of the Board of Arbitrators to study the testimony and arrive at a conclusion based thereon.*" (Italics supplied.) Superficially it appears that it should be concluded from these remarks that the Court intended as follows: the initiation of the *ex parte* investigation by the geologist and the acceptance of his report constituted misconduct by the arbitrators and cause to vacate the award, but if the arbitrators did not take account of it as "testimony in the case" and "arrive at a conclusion based thereon," they were guilty of misconduct. Such contrariety cannot be justified, and it may be doubted that it was really intended. But what was really intended does not appear.

At all events, the order of the lower court vacating the award was affirmed and its concise ruling: "That the report may or may not have been used as a basis for the award is immaterial," was not declared by the Supreme Court to be reversed.

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It seems clear from this review that the Supreme Court, by its decisions, and the Legislature, by inadequacies in draftsmanship, have failed to facilitate arbitration under the arbitration statute of 1927. It

also seems probable that these impedimenta to statutory arbitration may best be overcome by amendatory legislation. Legislative action is necessary to revise § 171(d) and eliminate judicial review of arbitrations and awards which is now based on analogy between award and verdict. Probably legislative amendment is the surest recourse to eliminate the limitations upon arbitrability voiced in *Goldstein v. Garment Workers' Union*. Unless and until these two matters in particular are clarified, the Pennsylvania arbitration statute is scarcely inviting to parties who would arbitrate or use arbitration agreements in Pennsylvania.