

opinion of Chief Justice Vinson holding that state judicial enforcement of restrictive agreements directed at Negroes is an unconstitutional denial by the state of the equal protection of the laws.²² As succinctly stated by appellate Justice Edgerton, who dissented in *Mays v. Burgess*²³ and in *Hurd v. Hodge*,²⁴ "Restrictive covenants are not self-executing."²⁵ That what the state legislature is prohibited from achieving openly should be accomplished through individually created but judicially enforced constrictions was a reflection upon the judicial system of the nation. In companion cases²⁶ the Supreme Court, speaking again through the Chief Justice, held that judicial enforcements of racial restrictions is improper when undertaken by *federal* courts, for such enforcement is a denial of rights intended by Congress to be protected by the Civil Rights Act of 1866 and is contrary to the public policy of the United States. Therefore, as a result of these decisions, judicial sanction of a discriminatory device, the use of which has subjected the nation to criticism both at home and abroad, has finally been withdrawn.

Robert J Lynn

Enforcement of Submission Agreements

The significance of the enforceability of voluntary industrial arbitration agreements becomes apparent when one realizes the widespread usage of arbitration clauses in industry-union collective bargaining agreements. Conservative appraisals have shown that three out of every four of the collectively bargained contracts operative today between labor and management contain some proviso for the prospective arbitration of grievances and complaints. "In recent years the prevailing pattern has made practically automatic the acceptance of arbitration upon entering into contractual relations with a union."¹ "In the battle-scarred field of labor-management relations, where practically every issue is bitterly controversial, the principle of voluntary arbitration stands almost alone

²² *Shelley v. Kraemer, McGhee v. Sipes*, 16 U.S.L. WEEK 4426 (U.S. May 4, 1948)

²³ 147 F 2d 869, 873 (App. D.C. 1945)

²⁴ 162 F 2d 233, 235 (App. D.C. 1947) This opinion is especially notable for its discussion of the public policy argument.

²⁵ *Supra* note 24, at 239.

²⁶ *Hurd v Hodge, Urciolo v. Hodge*, 16 U.S.L. Week 4432 (U.S. May 4, 1948)

¹ NATIONAL FOREMEN'S INSTITUTE INC., PITFALLS TO AVOID IN LABOR ARBITRATION 1 (1947)

in having a virtual unanimity of acceptance."² Behind this trend has been the impetus of labor, management, and the public.

The current status of the Ohio law on this question has been concisely stated in a recent Common Pleas opinion.³ A labor union sought specific performance, by mandatory injunction, of arbitration provisions in a labor agreement between the union and a corporate employer. The court in sustaining the defendant employer's demurrer to the petition held, that in the absence of a statute giving jurisdiction to the court to decree specific performance of the agreement to arbitrate, such relief must be denied. The court indicated that contracts between employers and employees in respect to the terms or conditions of employment are excluded by the provisions of The Ohio Arbitration Act⁴ and cannot be specifically enforced prior to issuance of an award. No appeal was taken from the decision.

The term "arbitration" is loosely applied to all extra-judicial determination of causes between parties in controversy.⁵ The dictionary broadly classifies arbitration into three groups: (A) international arbitration, between nations; (B) commercial arbitration, between business men; and (C) industrial arbitration between management and labor.⁶ Each of these three general classifications is subdivided into: "submission agreement," an agreement to submit an *existing* controversy; "arbitration clause," an agreement to submit *future* controversies arising from an existing agreement.

Distinctions among these three species of arbitration were primarily terminological and of limited practical significance until passage of recent arbitration laws.⁷ At common law, the judicial

² *Ibid.* It is not the object of this note to discuss compulsory arbitration. "Compulsory arbitration is distinguished from voluntary arbitration by the fact that the parties to a dispute are under statutory obligation to submit unresolved differences to settlement through the arbitral process. Employers and employees may be bound by outstanding labor contracts to refer certain types of disputes to an arbitral board, but the arbitration is classified as voluntary so long as it results from an agreement freely entered into by both sides, whether currently or in the past. Voluntary arbitration is an accepted method of adjusting labor disputes, usually being urged on the parties when conciliation and mediation have failed to bring about a settlement." 2 PATCH, COMPULSORY ARBITRATION, EDITORIAL RESEARCH REPORTS 595 (1947)

³ *Utility Workers Union v Ohio Power Co.*, 49 Ohio L. Abs. 619 (Ct. of C.P., Tuscarawas County 1948)

⁴ OHIO GEN. CODE §§12148-1 to 12148-17.

⁵ WEBSTER, INTERNATIONAL DICTIONARY 138 (2d ed. 1938)

⁶ *Ibid.* "The essence of arbitration is the passing of judgment by third persons on a dispute between two parties at interest." 2 PATCH, COMPULSORY ARBITRATION, EDITORIAL RESEARCH REPORTS 596 (1947)

⁷ Phillips, *The Function of Arbitration in the Settlement of Industrial Disputes*, 33 COL. L. REV. 1366 (1933)

fiat was against enforcement of arbitration agreements regardless of their classification. An agreement to arbitrate either an existing dispute, or a future dispute, though not declared illegal, was nevertheless not specifically enforceable prior to the making of an award. Nor would the courts compel the arbiter to act.⁸

Common law decisions further provided for a revocation of the authority of the arbitrator, or of the agreement to submit, at any period prior to the making of the award.⁹ "Only an award in final form could bar the right to revoke the submission. This was true even though the parties had an express covenant not to revoke, because the parties could not make that irrevocable which was in its nature revocable."¹⁰

The following reasons have been offered for refusal to give effect to arbitration agreements: because arbitration agreements ousted courts from jurisdiction they were contrary to public policy;¹¹ such clauses by nature were revocable;¹² arbitral processes prevented legal action and needlessly restricted individual rights;¹³ arbitrators at common law were without authority to administer oaths or compel attendance of witnesses, and were therefore incompetent completely and accurately to administer true justice.¹⁴

"It has been asserted and never denied that this hostility probably originated 'in the contests of courts of ancient times for extensions of jurisdiction—all of them being opposed to anything that would altogether deprive every one of them of jurisdiction.'"¹⁵ "A more unworthy genesis cannot be imagined"¹⁶ but this judicial antipathy to usurpation of court duties has survived to the present to harass the enforcement of labor arbitration agreements.¹⁷

⁸ *Conner v. Drake*, 1 Ohio St. 166 (1853); *Dayton and Union Ry. v. P.C.C. and St.L. Ry.*, 6 Ohio C.C. (N.S.) 537, 549 (1902), *Shafer v. M.G.M. Corp.*, 36 Ohio App. 31, 172 N.E. 689 (1929), 3 AM. JUR. 906; 6 WILLISTON, CONTRACTS §1919 (Rev. ed. 1938).

⁹ *Tilden v. Bernard*, 12 Ohio C.C. (N.S.) 193 (1909), *State v. Jackson*, 36 Ohio St. 281, 284 (1880); *Polk v. The Cleveland Ry.*, 20 Ohio App. 317, 151 N.E. 808 (1925)

¹⁰ 3 OHIO JUR. 76.

¹¹ *Baltimore and O.R.R. v. Stankard*, 56 Ohio St. 224, 46 N.E. 577 (1897).

¹² See notes 10 and 11 *supra*.

¹³ See note 12 *supra*.

¹⁴ *Shafer v. M.G.M. Corp.*, 36 Ohio App. 31, 172 N.E. 689 (1929).

¹⁵ 6 WILLISTON, CONTRACTS §1919 n. 2 (Rev. ed. 1938) See opinion of Lord Campbell in *Scott v. Avery*, 5 H.L.C. 811.

¹⁶ *U. S. Asphalt Refining Co. v. Trinidad Lake Petroleum Co.*, 22 Fed. 1006; Wolaver, *The Historical Background of Commercial Arbitration*, 33 U. OF PA. L. REV. 132 (1934)

¹⁷ *Myers v. Jenkins*, 63 Ohio St. 101, 57 N.E. 1089 (1900), *Tilden v. Bernard*, 12 Ohio C.C. (N.S.) 193, 21 Ohio C.D. 225 (1909).

The single common law remedy for a violation of an agreement to arbitrate consisted of an action for damages for breach of the agreement.¹⁸ Because of the difficulty of proving any but nominal damages, this relief was obviously inadequate.¹⁹

Courts distinguished cases where compliance with the arbitration clause was made a condition precedent to action on the principal contract, and then refused to take jurisdiction unless and until the condition precedent were performed.²⁰ But this relief was limited to clauses, as conditions precedent, which stipulated for the ascertainment of certain preliminary or incidental matters, the determination of which was essential to the right of action on the main contract. If the condition involved determinations of substantive liability, or if it provided for a waiver of the litigant's right to seek court redress, it was disregarded.²¹ Any attempt to stipulate for the determination of the ultimate legal issue, the liability or non-liability of the parties, no matter its form, encountered the traditional antagonism and was held void.

If the clause making the award a condition precedent was not an integral and specific part of the contract, it was construed as a collateral covenant and not a bar to legal action on the primary contract. This concept was followed even where the action was brought without a prior arbitration and award.²² Judicial reticence to construe a clause to be a condition precedent to the right to maintain an action made it an essential requirement that the wording of the contract expressly declare the clause to be a condition.

Because of this status of judicial opinion, many states passed arbitration statutes specifically authorizing and providing for the specific performance of arbitration clauses. Some passed in substance the provisions of the Draft State Arbitration Act.²³ Other states greatly modified this recommended legislation to suit special needs. It is at this juncture that the nomenclature of the agreement ceases to be academic and acquires important legal consequences. Statutory distinctions are now drawn between commercial and industrial arbitration, between "submission agreements" and "arbitration clauses." Seven states, including Ohio, have affirmatively excluded labor disputes from the jurisdiction of their arbitration

¹⁸ 3 AM. JUR. 904; See note, 47 L.R.A. (N.S.) 409 (1914), *Utility Workers Union v Ohio Power Co.*, 49 Ohio L. Abs. 619 (1948)

¹⁹ See note 18 *supra*.

²⁰ *Graham v German American Insurance Co.*, 75 Ohio St. 374, 79 N.E. 930 (1907)

²¹ *Myers v. Jenkins*, 63 Ohio St. 101, 57 N.E. 1089 (1900)

²² *Hamilton v. Home Insurance Co.*, 137 U.S. 370 (1890), Note, 94 A.L.R. 518 (1935)

²³ Sponsored by the American Arbitration Association.

statutes.²⁴ "Submission agreements" are irrevocable and specifically enforceable by statutes in all but two states.²⁵ "Arbitration agreements" are specifically enforceable in only thirteen states and under Federal arbitration laws.²⁶

The Draft State Act was designed primarily to meet the necessity of commercial arbitration,²⁷ but industrial arbitration is included within its provisions.²⁸ Thus in the absence of specific statutory exclusions, labor disputes arising under labor agreements providing for submission of the dispute to arbitration are within the purview of the Draft State Act and are deemed specifically enforceable.²⁹

Those states that have passed the Draft State Act, or similar arbitration legislation, have tussled with the question of whether industrial disputes are also to be covered by the Draft State Act. The wisdom of such inclusion is questioned by some authorities who point out that commercial arbitration has as its ultimate motive the substitution of the arbitrator for a court, whereas ". . . industrial arbitration in any but interpretative cases provides a tribunal for the settlement of fundamental disputes, for there is no court in which such disputes can be settled."³⁰

In 1931, Ohio repealed its former arbitration statutes³¹ and substituted therefor substantially the provisions of the Draft State

²⁴ ARIZ. CODE §§ 27-301 to 27-311 (1939); MICH. STAT. §§ 27.2483 to 27.2505 (1936) as amended by Public Acts (1941) No. 182, and § 27.2505 (1); N. H. PUB. LAWS (1926), Ch. 358, as amended by laws 1929, Ch. 147, §§ 1 to 10; OHIO GEN. CODE §§ 12148-1 to 12148-17; ORE. COMP. LAWS ANN. §§ 11-601 to 11-613 (1940); R. I. GEN. LAWS (1938) Ch. 475, §§ 1 to 17; WIS. REV. STAT. §§ 298.01 to 298.18 (1939).

²⁵ Oklahoma and South Dakota. In these two states submissions of existing controversies are capable of specific performance without statute provisions. 1 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING AGREEMENTS 540 (1940).

²⁶ Ariz., Cal., Conn., La., Mass., N. H., N. J., N. Y., Ohio, Orè., Pa., R. I., Wis.

²⁷ Draft State Act, American Arbitration Association, New York. Phillips, *The Function of Arbitration in the Settlement of Industrial Disputes*, 33 COL. L. REV. 1367 (1933).

²⁸ "The provisions of this Act shall apply to any arbitration agreement between employers and employees or between employers and associations of employees, unless such agreement specifically provides that it shall not be subject to the provisions of this Act." Draft State Act, American Arbitration Association, New York, Section 1.

²⁹ *Ibid.*

³⁰ 6 WILLISTON, CONTRACTS § 1930 (Rev. ed. 1938).

³¹ In 1931 Ohio enacted arbitration legislation which had the effect of making the arbitration provision clause legal but did little else. The common law rules were still used in deciding arbitration questions. Columbus, H. V. and T.R.R. v. Burke, 54 Ohio St. 98, 43 N. E. 282 (1896); Torrence v. Amden, 2 Ohio Fed. Dec. 325, 24 Fed. Cas. 62 (1844).

Arbitration Act.³² Under this new Ohio legislation, certain contracts to arbitrate were declared directly enforceable by mandatory injunction decreeing specific performance;³³ indirectly enforceable by court order staying contractual actions brought in violation of an agreement to arbitrate;³⁴ and collaterally enforceable by court order appointing arbitrators empowered to proceed with the arbitration.³⁵ This constituted a radical departure from previous common law principles.³⁶

However, this Ohio act excludes collective or individual agreements between employers and employees in respect to terms or conditions of employment.³⁷ Ohio law therefore excludes industrial arbitration from the statutory provision allowing specific performance of commercial arbitration clauses.

Under certain sections of the Ohio General Code,³⁸ employers and employees may voluntarily submit an *existing* controversy to the Industrial Commission of Ohio. The Industrial Commission has authority to hear the dispute and make a finding. This finding is enforceable by court order, provided the parties to the controversy have stipulated beforehand that the decision of the Commission shall be binding.³⁹

In no code provision can there be found statutes providing for the enforceability of agreements for the arbitration of *future* labor disputes. Since arbitration clauses in collective agreements invariably concern issues yet to arise, the present Ohio view as to the enforceability of labor arbitration remains unchanged.

It is submitted that the law should provide a method of enforcement for industrial arbitration agreements which will be as effective as those provided for the commercial counterpart. Enforcement of commercial arbitration has been legislatively approved as a method of avoiding the concomitant expense, technicality, inexpediency, and undesirable bias, often created in a jury trial.

Arbitration in labor controversies is a flexible, orderly, and established preventative substitute for industrial battle. It is not hailed as an attempted cure. Arbitrative processes offers to contractual participants a voluntary, satisfactory, and amicable pro-

³² OHIO GEN. CODE §12148-1 et seq.

³³ OHIO GEN. CODE §12148-3.

³⁴ OHIO GEN. CODE §12148-2.

³⁵ OHIO GEN. CODE §12148-4. *American Laundry Machinery Co. v. Prosperity Gas Co.*, 27 Ohio Op. 393 (1944).

³⁶ The Ohio Code Sections provide for the three enforcement devices recommended by The Draft State Act in Sections 3, 4 and 5.

³⁷ OHIO GEN. CODE §12148-1.

³⁸ OHIO GEN. CODE §§871-12, 871-22.

³⁹ OHIO GEN. CODE §§1066, 1063, 1074.

cedure of adjudication of prospective discord where otherwise the dispute would be non-justiciable. Artifice should not be resorted to to evade such provisions for evasion negates the goal of labor arbitration if the proviso for arbitration becomes the threshold rather than the conclusion of litigation.⁴⁰ A great percentage of arbitration clauses are carried to completion and the results accepted because of the integrity of the parties concerned, and their mutual-respect for a promise made. The auspicious record of the use of the arbitration method in labor contracts, however successful, does not suture the incision of non-enforceability. As a consequence the contractual provision for arbitration is left precariously balanced on the caprice of the parties and its inclusion in the collective agreement settles nothing. Its inclusion actually provides a means for reopening the controversies supposedly settled in the bargaining process instead of merely interpreting that which was bargained. Thus an agreement to arbitrate becomes an advantageous wedge to prolong a dispute rather than to provide a mechanism for its settlement.

Legislation is needed in Ohio if it be desired to enforce labor arbitration agreements, and until the legislature sees fit to modernize legal thinking on this issue, voluntary collective labor agreements to arbitrate future disputes will remain ". . . worthless guarantees against the necessity for recourse to the traditional judicial process."⁴¹

Robert L. Perdue

⁴⁰ "Sometimes in voluntary arbitration the parties reserve the right to reject the award of the arbitrators, but this is not the usual practice. In fact there is little point in resorting to arbitration unless the parties agree in advance to accept the award." 2 PATCH, COMPULSORY ARBITRATION, EDITORIAL RESEARCH REPORTS 595 (1947).

⁴¹ 1 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING AGREEMENTS 539 (1940).