Chapter 3

QUICK HITS

I. Arbitration in America: The Early History

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

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

Arbitration had been in use in Maryland since the early 1600s, as was true in a number of the original colonies.

A representative case from the late 18th century is *Borretts v. Patterson*,[2] a 1799 North Carolina action of debt on an arbitration bond. The defendant was a factor who, for a commission, received and offered for sale the merchant-plaintiffs' goods, and a dispute arose over accounts claimed by plaintiffs to be owing. The parties submitted the dispute to arbitration, and the arbitration bond recited the defendant's agreement to be bound by the decision of the named arbitrators, otherwise to forfeit the amount of the bond. The named arbitrators determined that the defendant owed the plaintiffs more than £400, but amounts owing to Patterson from buyers of the goods were to be deducted, provided Patterson had used due diligence in trying to collect from the buyers.

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[1]Record Group 360, National Archives, Washington, D.C. Turner added: "I would not mean to discourage the Study of Law, but I really find that the multiplicity of Students in that branch, in this State, has been an inconvenience to the Sons of reputable Parents and more so to the Parents themselves." (I am grateful to Maeva Marcus, Editor, The Documentary History of the Supreme Court of the United States, 1789–1800, for bringing this letter to my attention.)

[2]Tay. 37, 1 N.C. 126 (1799).

Patterson refused to honor the award, and defended in court by arguing that the award was too indefinite and open-ended to be enforced. The court rejected Patterson's argument, declaring that rigorous application of rules of construction of arbitration awards or the use of "endless subtlety of refinement would be, in truth, to render awards of no use, in the main purpose of their introduction—re-adjusting the controversies of men, before a domestic tribunal."

Notes from Pennsylvania

The Pennsylvania legislature adopted in 1806, and expanded in 1808 and subsequently, a full-fledged scheme for submissions to arbitration that could be made rules of court (i.e. court orders).[3] This meant that any failure to comply with the arbitration agreement or award was punishable as a contempt of court.

The pre-1806 experience in Pennsylvania with arbitration is unusual and illuminates how ready the courts were to embrace the arbitration process even without a clear statutory directive. The only pre-19th century statutory treatment of arbitration in Pennsylvania was a 1705 enactment entitled, "An Act for defalcation."[4] The third section of this statute provided that if the parties to a dispute over an accounting of monies agreed to a court order sending the case to arbitration, then the arbitrator's award, once entered in court records, was to have the same effect as a jury verdict.

Despite the narrow scope of this statute, court reporter James Dallas observed that in Pennsylvania as of 1790, arbitrators (also called referees) handled "a very great share of the administration of justice."[5] If so, how did this happen? The answer is, by the open encouragement of the courts, despite the absence of authorizing legislation.

The editor of the first American edition of Stuart Kyd's *Treatise on the Law of Awards*, published in Philadelphia in 1808, prepared detailed notes on Pennsylvania arbitration practice, and after pointing out the limited scope of the 1705 statute, declared, "But

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

[4]Laws of the Commonwealth of Pennsylvania, A.J. Dallas, comp. (Philadelphia, 1797) I:65–66.

[5]Dallas's Reports I:vi.

the law has been extended by construction . . . to every other cause of action . . . so that at this day there is no species of civil controversy known to the law of Pennsylvania" that could not be settled by arbitration under the authorization of the 1705 statute.[6] Later in the treatise, the editor remarked that the 1705 statute had been "completely twisted . . . from its spirit as well as its letter with a view to extend its benefits to every case."[7]

Here was the problem that prompted the Pennsylvania courts to permit the remedy of attachment for contempt in specific cases, even without statutory sanction. Arbitrators would at times issue awards that required one side to pay money and the other side to perform an act, such as to return specific property. Thus in a 1785 trover action,[8] arbitrators ordered the plaintiff to pay the defendant £3 and ordered the defendant to return certain articles for which the action had been brought. The defendant's counsel argued that the order could not be enforced because the 1705 statute declared that the referees' report was to be the equivalent of a verdict, and a verdict in a trover action could only decide money damages, but could never order the restoration of specific personal property. The court was impressed by this argument, but gave no firm opinion, instead referring the matter back to arbitration.[9]

In a 1799 case, however,[10] the Pennsylvania Supreme Court confirmed an arbitration award in a trespass action that included specific orders about the height of a dam—orders that could never have been issued by a common law jury. The submission, however, had expressly given the referees power to fix the height of the dam and to order any alterations to the dam that needed to be made, and this prompted the editor of the first American edition of Kyd's arbitration treatise to speculate that "the whole question is a question about terms; for if an award, totally unlike a verdict in the same cause, will nevertheless be confirmed by the court where the submission authorizes it, the only question will be, whether the award is within the submission"[11] This, of course, is an early version of a question with which we are all familiar—was

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[6] S. Kyd, A Treatise on the Law of Awards, first Amer. ed. (Philadelphia, 1808), 34a.
[7] *Id.* at 34d.
[8] *Buckley v. Durant,* 1 Dallas 129 (1785).
[9] *Id.* at 130.
[10] *Leveze y v. Gorgas*, 4 Dallas 71 (1799). The report in Dallas gives the arguments before and disposition by the High Court of Errors and Appeals, on error from the Supreme Court, which went off on other grounds.
[11] Kyd, *supra* n.6, at 326f.

the award within the scope of the arbitrator's authority according to the terms of the submission, which in a labor arbitration case would mean according to the grievance and arbitration procedures of the collective bargaining contract.

Thus the editor of the first American edition of Kyd's treatise concluded that the weight of the Pennsylvania cases was "in favour of the attachment," and the attachment for contempt, in turn, was a means of compelling the performance of an award.[12] He added that the fact that this remedy was not authorized by the 1705 statute should not be much of a worry, "for if by the liberal construction of that act, the remedy it prescribes has become incompetent to the distribution of perfect justice between the parties, the provision of a new remedy follows as a consequence from the extension of the rule to new cases."[13] To some, therefore, the story of arbitration in early Pennsylvania is a perfect illustration of the metamorphic genius of the common law. To others, it is a perfect illustration of the evils of judicial activism.

The Maryland Experience

Both printed and documentary records from the 17th to the 19th centuries for the state of Maryland reflect widespread use of arbitration. For the 17th century, extensive Maryland records are printed in the Archives of Maryland volumes.[14] There are, moreover, many manuscript records for county courts, mostly 18th and 19th centuries that reveal references to arbitration as well. Two unique early 19th century manuscript "booklets" are retrospective compilations made up entirely of arbitrations. One is for Montgomery County that records 546 arbitration cases from 1787 to

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[12]Kyd, *supra* n.6, at 326h.

[13]*Id.*

[14]*E.g.*, vol. VIII, p. 351, 1693. These volumes encompass Provincial Court proceedings from 1637–1683, where the earliest recorded arbitrations in Maryland can be found. Records of arbitrations appear as well in other documents printed in the Archives, such as the Proceedings of the Provincial Council; Proceedings of the Court of Chancery (*e.g.*, vol. LI, arbitration cases from the years 1669 (p. 20), 1670 (p. 36), 1677 (p. 544)); Proceedings of the County Courts of Kent County 1648–1679, Talbot County 1662–1674, Sommersett County 1665–1668 (Archives, vol. LIV—see pp. 10, 154, 234, 316. 382, 637, 646, 712, 727); Proceedings of the County Court of Charles County 1666–1674; Proceedings and Acts of the Assembly of Maryland June 1771–July 1773 (Vol. LXIII, p. 297).

1827.[15] The other is for Frederick County, recording 603 arbitration cases from 1786 to 1809.[16]

The principal archival source in Annapolis that I have had occasion to examine is the Judgment Record of the Provincial Court, 1658–1778. These manuscripts contain approximately 400 arbitration cases.[17]

Here is a representative early entry of an arbitration award as recorded in the Judgment Record for December 14, 1668, in which the plaintiff sued the defendant in Trespass on the Case for having lured away by "entertainment" one of the plaintiff's servants:

> Both parties having put their differences to Arbitration & Elected Mr. Thomas Nottley and Doctor John Pearce for the determining of same, doth into Court bring & present their Arbittmt, which was by the defendants Attorney Ordered that it might be accordingly Entered & Acknowledged, vizt that they the said Arbitrators do Deeme and award that the said Thomas Sprigg shall pay or cause to be paid to the said Edmund Lindsey his Executors or Assigns the Just quantity of Five Thousand pounds of good Arranoca tobacco in Caske at or near Portobacco Creek in Charles County at or before the last day of this instant month of December for which he the said Sprigg shall immediately pass his specialty to the said Lindsey for payment thereof accordingly and then the said Edmund Lindsey to give the said Sprigg a General release, witness their ands and seal,
>
> Thomas Nottley, John Pearce—(seal)[18]

Arbitrations in Maryland from the early days in the 1600s seem to have been almost as legalistic as court proceedings of the time. Occasionally one of the sitting judges would become one of the arbitrators;[19] counsel appear to have been active on both sides; and disputes customarily concerned business or property matters

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[15]MSA, C 1139-1.

[16]MSA C 863-1 ("actions referred by consent of parties & rule of court…see Act of Assembly November 1785, chapter 80, section 11").

[17]Docket and minute books for the Provincial Court also contain arbitration references. *See, e.g.,* MSA 548-1, September Term 1774 (docket book); MSA 553-1, April Term 765 (minute book).

[18]Maryland Archives, vol. LVII, Proceedings of the Provincial Court 1666-1670.

[19]Indeed in one case in 1702, the Chief Justice of the Provincial Court became one of the arbitrators in a suit in which one of the junior justices, Thomas Greenfield, was the plaintiff! *Greenfield v. Cox,* MSA, Provincial Court Judgment Record (hereafter "PCJR"), Liber TG. One of the judges of the Provincial Court in mid-18th century who acted as arbitrator in a number of cases was Bedddingfield Hands, Esq. *See, e.g., Harris v. Holt*, MSA/PCJR, Liber BT #3, 325, referred April 11, 1758.

that were settled in the currency of the day—tobacco.[20] Property disputes, of course, included occasional disagreements about slave ownership.[21] On occasion, an arbitrated dispute revealed the hard realities of the lives of the early settlers. For example, in the case of *Alcocks v. Robinson* (August 13, 1767),[22] plaintiff Thomas Alcocks's wife and child were killed by Indians, and some of the property taken by the Indians came into the possession of Jonathan Lumbrozo. Thomas Alcocks and Lumbrozo took out an arbitration bond of 10,000 pounds of tobacco. Arbitrators William Calvert, Esq. and Zachery Wade, gentleman, found for Alcocks, awarding him 900 pounds of tobacco.

Despite their legalistic flavor, most references resulted in decisionmaking by laymen, and reflected a popular sentiment that has been constant in England and America for centuries—a desire to control, if not avoid, the perceived avarice of the lawyers. During the early 19th century, anti-lawyer sentiment swept through Maryland, and one manifestation of this sentiment, according to J.K. Sawyer, was "an attempt to introduce a radical system of arbitration, to be available at the choice of either party, for the resolution of any civil litigation not cognizable by justices of the peace."[23] In the end, the campaign for the bill failed.

Conclusion

I hope that the summary I have given persuasively shows how misdirected the notion was, as Justice White observed in the *Gilmer* case, that "the longstanding judicial hostility to arbitration agreements that had existed at English common law" also "had been adopted by American courts."[24] The overwhelmingly positive reception given by American courts to the arbitration process is evident in manuscript sources such as those that have been described from the Maryland archives reaching back well into the 17th century. And the Pennsylvania courts' willingness in the late 18th century to erect upon a narrow defalcation statute an

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[20]See Day, *Lawyers in Colonial Maryland, 1660–1715*, Am. J. Legal Hist. XVII: 145, 163 (1973): "The population which quadrupled between 1660 and 1700 was overwhelmingly engaged in the production and marketing of tobacco. Specie of any kind was scarce and tobacco became the currency and the cash crop of the province." (Footnote omitted.)

[21]*See, e.g., Hall v. Ridgey*, MSA/PCJR, Liber BT #3, 159, referred September 13, 1757.

[22]Maryland Archives vol. LX, Proceedings of the County Court of Charles County 1666–1674, p. 92.

[23]Sawyer, *Distrust of the Legal Establishment in Perspective: Maryland During the Early National Years*, Ga. J. S. Legal Hist., II: 1, 22 (1993).

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

arbitration apparatus that served all types of civil disputes is an unusual example of judicial intervention designed to enlarge and support the arbitration process.

II. EMPLOYMENT DISCRIMINATION BASED ON GENDER IDENTITY

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In preparation for this presentation, we searched all reported labor arbitration decisions to locate those that include the terms "gender dysphoria," "gender identity," "transsexual," or "transgender." The search yielded no matches—a surprising result, given the active development of gender identity discrimination theories under Title VII.

To gain a better understanding of gender identity discrimination, it is useful to develop a working vocabulary.[1] Although the terms "sex" and "gender" often are used interchangeably in common parlance, we should distinguish them for purposes of this discussion. "Sex" refers to a person's biological or anatomical identity as male or female. By contrast, "gender" refers to cultural characteristics that we associate with masculinity or femininity. "Gender expression" is the external and socially perceived manifestation of gendered characteristics and behaviors, such as dress, speech, grooming, and mannerisms. On the other hand, "gender identity" is not visible to others. It is an individual's internal, deeply felt sense of being either male or female, or something other or in between. A "transsexual" person experiences a conflict between physical sex and gender identity. A person who is born with male anatomy, but has a female gender identity, might be referred to as "MTF," or a male-to-female transsexual, with "FTM" describing the opposite circumstance. Many, but not all, transsexual people undergo medical treatment to change their physical sex to cor-

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[1]The following discussion is borrowed in large part from Currah, Green & Minter, Transgender Equality: A Handbook for Activists and Policymakers (2001). This well-written (and free) reference guide provides useful and accessible information about these issues. This handbook is among the references I have included in the resource list at the end of this paper.