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In rejecting the government's proposed test for uniform decisions, Mr. Justice Brennan said:

If there is fear of undue uncertainty or overmuch litigation, Congress may make more precise its treatment of the matter by singling out certain factors and making them determinative of the matter. . . .⁶⁷

Thus the Supreme Court has passed up a golden opportunity to eliminate the diversity that will continue in the federal courts over this distinction between transfers of income and those of gifts. Until Congress or the Supreme Court eventually take the initiative in bringing *some* symmetry and precision to this area of income tax law, all that one can do is to understand the problem and hope the jury's determination of the facts is not too far from the actual intention of the parties to the transaction.

ability because of the balancing consideration that the acquisition must not go untaxed, irrespective of any statutory construction or niceties of power.

⁶⁷ 363 U.S. 278, 290 (1960).

THE REVOCABILITY DOCTRINE AS APPLIED TO LABOR ARBITRATION AGREEMENTS

In the past twenty years there has been an increased use of arbitration agreements in Illinois to settle industrial disputes between labor and management.¹ These extra judicial procedures are, by no means, to be considered a new approach to the determination of disputes. Indeed, the Illinois common-law doctrines relating to arbitration merely re-echo the English view of the seventeenth century. Lord Coke, as early as 1609, expressed the existing judicial distemperance for these agreements by holding that agreements to submit to arbitration were revocable by either party.² It appears to this writer that this pronouncement of Lord Coke is still the law in Illinois today, so far as it relates to labor arbitration agreements. The purpose, therefore, of this paper is to trace the development of this doctrine of revocability in Illinois, and to point out the important differences between labor and commercial arbitration agreements. This is a significant distinction, but one which the Illinois courts have failed to perceive.

EARLY ACCEPTANCE OF THE REVOCABILITY DOCTRINE

In 1841, the Illinois Supreme Court in *Frink v. Ryan*,³ a case of first impression, was presented with the question of revocability of arbitra-

¹ For a further discussion of the development, consult Gitelman, *The Evolution of Labor Arbitration*, 9 DE PAUL L. REV. 181 (1960).

² *Vynior's Case*, 77 Eng. Rep. 597 (1609).

³ 3 Ill. 322 (1841); *accord*, *Waugh v. Schlenk*, 23 Ill. App. 433 (1887).

tion agreements. The plaintiff in this action was the assignee of a promissory note which contained a special proviso relating to the indebtedness of the maker to a third person. In an action of special assumpsit the plaintiff sued the maker on the note. By way of defense, the maker pleaded that pursuant to the proviso in the note, he had submitted to arbitration the question of his indebtedness to the third person. He contended that until the arbitration was concluded, the court had no jurisdiction in an action on the note. In dealing with this argument, the court held that the act of submitting to arbitration merely constituted an issuance of authority. They further pointed out that this authority was subject to revocation by the parties at any time prior to the granting of the arbitration award. Since the agreement was not conclusive on the parties, the court held that it could not be of such finality as to oust the jurisdiction of the courts. In buttressing their position the court stated, relying on *Thompson v. Charnock*:⁴ "It has been decided again and again that an agreement to refer all matters in difference to arbitration is not sufficient to oust the Courts of Law or Equity of their jurisdiction."⁵ Thus we can see that the first time the Illinois Supreme Court was presented with the issue of revocability they adopted the long standing English common-law view.

Barely four years had elapsed when the doctrine was again placed in issue in the case of *Ross v. Nesbit*.⁶ The plaintiff in the *Ross* case brought an action of trespass *quare clausum fregit*. In defense to this action the defendants asserted that after the commencement of the litigation the plaintiff and defendant had submitted the question of trespass to arbitration. To this matter of defense, Mr. Abraham Lincoln counsel for the plaintiff, filed a demurrer. In sustaining Lincoln's demurrer, the court rebuffed several New York decisions advanced by the counsel for the defendant. They instead chose to rely upon *Frink v. Ryan*⁷ as precedent to be followed. The doctrine that arbitration agreements, when entered in prior to the commencement of litigation, are revocable by either party was reasserted. The court went on to say that the enforceable characteristics of these agreements remained the same whether they were entered in to before or after the law suit had been filed.

There can be no dispute that the first two Illinois decisions, mentioned above, formulated the basic Illinois common-law rule, that agreements to submit to arbitration are revocable at the instance of either party. However, an examination of these factual situations indicates that the arbitration agreements in question related solely to issues between two private citizens. Disputes of this nature, when submitted to arbitration, may be referred to as commercial arbitration agreements. This type of agreement

⁴ 101 Eng. Rep. 1310 (1799).

⁶ 7 Ill. 252 (1845).

⁵ *Id.* at 1310.

⁷ 3 Ill. 322 (1841).

is to be distinguished from a labor arbitration agreement, which is one involving a labor-management dispute. It is important for the reader to keep this vital distinction in mind when analyzing these early arbitration cases.

The question of acceptance of the revocability doctrine was clearly decided in the case of *Paulsen v. Manske*.⁸ In this case the plaintiff provided materials and labor to the defendant, who subsequently refused to pay for them. Their dispute was submitted to arbitration, which submission provided that the plaintiff thereby waived his right to any claim of lien he might have. Prior to an award, the plaintiff brought this action to file a mechanic's lien. Defendant contended that the court had no jurisdiction due to the finality of the arbitration agreement. In the alternative, he pleaded that the plaintiff had waived his right to a lien due to the provisions of the arbitration agreement. The court summarily disposed of the question of its lack of jurisdiction by declaring the general rule to be that anyone who is a party to an arbitration agreement may revoke their submission prior to an award, thus terminating the agreement.

It seems, however, that the importance of the decision is to be found in the court's determination of the second defense submitted by counsel. It was contended that the submission agreement, by its terms, operated as a waiver of the plaintiff's right to a lien. The court held that the subsequent initiation of the law suit operated as an implied revocation, as a matter of law, of the prior agreement. The court concluded that the revocation extinguished the agreement, thereby leaving the parties with their original rights and obligations. It should be noted, if not emphasized, that the court's indulgence in the common-law doctrine of revocability was not one merely of tolerance. Judicial sanction of revocation by implication can only be interpreted as a forceful extension of the basic doctrine.

The next development was to come in the case of *Niagara Fire Ins. v. Bishop*.⁹ The plaintiff was the owner of a fire insurance policy upon which he had sustained fire losses. Each of the parties was required, by a provision in the policy, to appoint an arbitrator for the purpose of determining the value of the loss sustained by the insured. This provision operated as a condition precedent to the insured's right to sue on the policy. The arbitrator appointed by the insurance company conducted himself as a partisan and advocate of the defendant. In acting in such a partial manner he prevented the rendering of an award. If such had been the conduct of the defendant himself, there could have been, in accordance with the decision last discussed, an implied revocation. However, the court concluded that the "arbitrator" was in fact an agent of the defendant, and

⁸ 126 Ill. 72, 18 N.E. 275 (1888); see also *Peters' Adm'r v. Craig*, 36 Ky. 307 (1838); *Crilly v. Rinn*, 135 Ill. App. 198 (1907); MORSE: THE LAW OF ARBITRATION AND AWARD (1872).

⁹ 154 Ill. 9, 39 N.E. 1102 (1894).

therefore his acts were the acts of the defendant. Thus the court applied the principle of agency law which states that the acts of an agent are deemed to be the acts of his principal. This application of agency law creates a new method for effectuating the revocability doctrine.

Phenomenal growth of industry in the late nineteenth century opened new avenues into which arbitration could be introduced. In 1895, Illinois sought to encourage this by the enactment of sections 19 through 30 of the Illinois Arbitration Act.¹⁰ The title of this section, "Controversies Between Employer and Employees," specifically identified a new area in which arbitration might be used. Since the 1895 statute restricted itself exclusively to the settlement of *labor disputes*, it was a special or limited enactment. There were no reported decisions involving labor arbitration prior to this time. Thus the statute carved out a new area in which rights and liabilities could be settled by the use of arbitration agreements.

STATUTORY REJECTION OF THE REVOCABILITY DOCTRINE

In the early days of the twentieth century the trend toward the increased use of commercial arbitration agreements was being throttled by the archaic common-law revocability doctrine. It was in the light of this inadequacy that Illinois enacted, in 1917, section 3 of the Arbitration Act.¹¹ The section provided that an agreement to arbitration was irrevocable unless a contrary intention was manifested in the document. The addition of section 3 was a part of a nineteen section supplement to the act. These sections were of a general nature and no reference was made therein to labor arbitration agreements.

In 1921, the question of the constitutionality of section 3 was raised in the case of *White Eagle Laundry Co. v. Slawek*.¹² In this case the parties had been involved in an automobile accident, and they submitted the question of their liability to an arbitrator. The agreement provided that a judgment was to be entered upon the award. The plaintiff withdrew prior to the award, but the arbitrator entered the award against him anyway. The plaintiff moved to have the award vacated, alleging that section 3 was unconstitutional. The court upheld the constitutionality of the section and recognized that it was abrogating the common law. In referring to the statute, they pointed out that by making agreements irrevocable the legislature had conferred no new power nor had it taken away any inalienable right. The effect was to recognize the agreement as irrevocable and thereby capable of specific performance. The court pointed out that this was within the power of the legislature, and that to do it did

¹⁰ ILL. REV. STAT. ch. 10 §§ 19-30 (1959).

¹¹ ILL. REV. STAT. ch. 10 § 3 (1959).

¹² 296 Ill. 240, 129 N.E. 753 (1921).

not violate any constitutional right. It must be remembered that in this case the dispute was of a commercial nature; the court was not faced with a factual situation involving a labor dispute. Two years later in another suit involving commercial arbitration, although presented with a different issue, the supreme court, by way of dictum, affirmed this decision.¹³

In 1944, the statutory distinction between the general and specific sections of the Illinois act was finally examined. *In Re Matter of Creager*,¹⁴ the case in which it was considered, involved a labor-management arbitration agreement. The National War Labor Board had assumed jurisdiction over the arbitration; subsequently however, the plaintiff sought relief in the courts of Illinois. The court decided that it had no jurisdiction over the arbitration because the federal War Labor Disputes Act had preempted the field.¹⁵ The court also made the observation that the Illinois Arbitration Act of 1917 was a general statute which made no mention of labor disputes. While the court's language was dictum, it is persuasive because the plaintiff based his allegation of jurisdiction upon the general statute.¹⁶ Thus this statute was construed as not applying to labor-management disputes because "*the Act of 1895, as amended in 1943, pertains particularly and exclusively to labor disputes.*"¹⁷ The court reasoned that where there is a special statute within an enactment it will control as against a general statute therein.¹⁸ Upon this principle they concluded that labor disputes would not be cognizable by the trial court under sections 1 through 19 of the act. In summary, it is submitted that each statute was enacted to deal with a separate and distinct situation—one with labor and the other with commercial arbitration.

RECENT DEVELOPMENTS

Sixteen years have elapsed since the *In re Creager* ruling. During this time the Illinois courts were never confronted with a factual situation that would require them to make the aforementioned distinction. Then on July 1, 1960 the Illinois Appellate Court in the case of *West Towns Bus v. Division 241 Amalgamated Ass'n of St. Elec. Ry. & Motor Coach Employees*¹⁹ apparently decided the question of enforceability of labor arbitration agreements. In this case the company and union being unable to

¹³ *Cocales v. Nazlides*, 308 Ill. 152, 139 N.E. 95 (1923).

¹⁴ 323 Ill. App. 594, 56 N.E. 2d 649 (1944).

¹⁵ War Labor Disputes Act of 1943, ch. 144, § 7 (A), 57 Stat. 163 (1943).

¹⁶ ILL. REV. STAT. ch. 10, §§ 1-19 (1959).

¹⁷ *In re Creager*, 323 Ill. App. 594, 56 N.E. 2d 649 (1944). (Emphasis added.)

¹⁸ *Frank v. Salomon*, 376 Ill. 439, 34 N.E. 2d 424 (1941).

¹⁹ 168 N.E. 2d 473 (Ill. App. 1960).

agree upon the terms of a renewal contract, submitted the problem to arbitration. Each party was to appoint its own arbitrator, and in turn they were to appoint a third member who was to act as an impartial arbitrator and chairman. The party-appointed "arbitrators" were clearly recognized as partisans by the parties and the court.²⁰ After the evidence had been offered and argument had been heard the board of arbitrators being unable to agree upon an award *unanimously* agreed to terminate the proceedings. Subsequently, the chairman reconvened the board. The company "arbitrator" was not present at this meeting, although he had received notice of it. Instead, the company sent a telegram to the impartial arbitrator objecting to the holding of the meeting because the unanimous agreement of the arbitrators had terminated the arbitration proceedings. The chairman disregarded the company's objection and joined with the union's "arbitrator" to execute an award. The company thereafter brought an action, by way of declaratory judgment, to impeach the award and to restrain its enforcement. The court sustained the defendant's motion to strike and dismissed the complaint. On appeal the decision was affirmed.

In reading the court's decision it appears that the question of the revocability of this labor submission agreement was not presented to the court as a matter of first impression. However, after an exhaustive examination by this author of all the Illinois decisions on revocability of submission agreements, it appears that this was a case of first impression. The court's reliance upon the *White Eagle Laundry* case, *Cocalis v. Nazlides*,²¹ and section 3²² of the Illinois Arbitration Act as authority for their conclusion was erroneous. These two cases involved factual situations which would be controlling in commercial arbitration, but *not* in labor arbitration. Section 3 as previously mentioned, is a part of a general statute which is not applicable to labor agreements.²³ Furthermore, in *White Eagle Laundry* the court was careful to say that section 3 "confers no new power and takes away no inalienable right."²⁴ In holding the section constitutional they indicated that the legislative purpose was to provide for the specific enforcement of submission agreements.

The question which now arises is whether labor arbitration agreements like commercial arbitration agreements, are the proper subject matter for an action in specific performance. Generally, the Illinois courts have held that they will not specifically enforce contracts requiring personal serv-

²⁰ *Ibid.*

²¹ 308 Ill. 152, 139 N.E. 95 (1923).

²² ILL. REV. STAT. ch. 10, § 3 (1959).

²³ *In re Creager*, 323 Ill. App. 594, 56 N.E. 2d 649 (1944).

²⁴ *White Eagle Laundry Co. v. Slawek*, 296 Ill. 240, 244, 129 N.E. 753, 755 (1921).

ices to be performed.²⁵ But, the enforcement of a labor agreement such as in the *West Towns Bus* case would require personal services to be performed by the employees. Nor will Equity specifically enforce personal service contracts that require the exercise of judgment or mechanical skill.²⁶ However, both of these skills are required of employees in situations such as that in the *West Towns Bus* case.²⁷ Nor will Equity specifically enforce a contract which calls for a succession of acts which would require the court's continuous supervision over a long period of time.²⁸ But a contract of the type found in the *West Towns Bus* case was to be performed over a period of twelve months. It may be concluded that the proposed application of section 3 to labor agreements would do violence to established equitable rules of specific performance. Accordingly, the section cannot possibly be considered to be applicable to labor arbitration agreements.

CONCLUSION

As previously indicated, in 1894, the Illinois Supreme Court decided that when an "arbitrator" acts as an advocate, he shall be deemed an agent, and "his acts will be regarded as those of his principal."²⁹ In the *West Towns* case when the partisan "arbitrators" of each side joined the chairman in unanimous agreement to terminate the arbitration, this was in effect an act of revocation by their respective principals. Since the submission agreement was thereby revoked prior to an award, the subsequent declaration of award was merely a nullity. It is submitted that the court was in error by failing to perceive the distinction between commercial and labor submission agreements. This misunderstanding appeared in another Illinois Appellate case decided at approximately the same time.³⁰ In the latter case the court was dealing with a matter of commercial arbitration. By way of dictum they took the same position on revocation of submission agreements as the court in the instant case did. To correct this oversight the courts must first accept and recognize the distinction between these two different types of agreements. When this is realized by the courts, the arbitration statutes will once again operate in the areas for which they were respectively designed.

²⁵ *Cowen v. McNealy*, 342 Ill. App. 179, 96 N.E. 2d 100 (1951).

²⁶ *Ibid.*

²⁷ *Wollensak v. Briggs*, 119 Ill. 453, 10 N.E. 23 (1887).

²⁸ *Langson v. Goldberg*, 298 Ill. App. 227, 18 N.E. 2d 729 (1939).

²⁹ *Niagara Fire Ins. Co. v. Bishop*, 154 Ill. 9, 20, 39 N.E. 1102, 1106 (1894).

³⁰ *Hill v. Mercury Record Corp.*, 168 N.E. 2d 461 (Ill. App. 1960).