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Transformed, Not Transcended: The Role of Extrajudicial Dispute Resolution in Antebellum Kentucky and New Jersey

by CARLI N. CONKLIN*

Extrajudicial dispute resolution, that is, the resolution of disputes outside the judicial process, was a recognized method of resolving disputes under the common law of England. Extrajudicial dispute resolution gained statutory recognition and formality through the late-eighteenth and early-nineteenth centuries not only in England, but also in America as several newly-formed states encouraged the use of extrajudicial dispute resolution through their emerging state governments. Evidence demonstrates that in some states, this use and encouragement of extrajudicial dispute resolution remained robust throughout the antebellum period.

In his work, *The Transformation of American Law: 1780-1860*, noted legal scholar Morton J. Horwitz studies the use of extrajudicial forms of dispute resolution in antebellum America. Horwitz asserts that arbitration declined after the Revolutionary War and that the legal system triumphed over arbitration to become the preferred means of dispute resolution in antebellum America.¹ He bases his theory of arbitration's demise and the legal system's triumph in antebellum America on notions of who used arbitration, who supported arbitration, and who opposed arbitration, ultimately leading to its decline. Horwitz's discussion focuses on two areas. First, he focuses on the practice of arbitration within the mercantile community, stating that merchants preferred arbitration as a more efficient and cost-effective means of settling disputes. Furthermore, and most importantly for his thesis, Horwitz asserts that merchants originally chose arbitration over the legal system because the common law had not adapted to mercantile needs. Thus, merchants favored arbitration because they believed that their disputes were better resolved by arbitrators who were

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1. For the following summary, see MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860* 145-55 (Harvard University Press 1977).

often merchants themselves and who understood and more favorably applied the mercantile law.

According to Horwitz, although merchant arbitration prevailed in colonial and early America, the emerging legal system in the post-Revolutionary War era grew increasingly hostile to arbitration in any form. Horwitz states that, over time, and in response to this hostility, merchants and lawyers struck an implicit deal in which the judiciary produced pro-commercial legal decisions in exchange for the merchants' willingness to turn away from arbitration and toward the legal system as the settlor of their disputes. Horwitz garners the bulk of his support from New York with additional support coming from Massachusetts,² Pennsylvania,³ and South Carolina.⁴ From this basis, he asserts that the relationship between the merchants and the legal profession that led the merchants to use arbitration (and, later, led the merchants to abandon arbitration) was not limited to these states but was "a general theme in colonial America."⁵

Horwitz's second area of focus is arbitration use among Quakers, especially the Pennsylvania Quakers.⁶ Horwitz asserts that, although the Quakers strongly encouraged arbitration among their members and, therefore, contributed to the initial rise of arbitration in Pennsylvania, the emerging legal elite, as embodied in the judiciary, became hostile to the use of arbitration and eventually forced it out of existence. In his discussion, Horwitz does not draw a distinction between a judicial system increasingly hostile to mercantile arbitration and how the judicial system in Pennsylvania responded to the specifically Quaker use of arbitration in that state.

From his study of the New York merchant community (with some additional information from Massachusetts, Pennsylvania, and South Carolina) and the Pennsylvania Quaker community, Horwitz concludes that the antebellum demise of arbitration was not limited to these states but was a general pattern of decline necessary for the growth of the power and prestige of the legal profession in early nineteenth century America.⁷ The purpose of this paper is to explore the applicability of that conclusion

2. For Horwitz's discussion of Massachusetts, *see id.* at 151. Horwitz states that the Massachusetts judiciary sought to undermine statutory arbitration by reversing arbitration awards on technicalities and by strictly construing the arbitration statute. These points are reflective of Horwitz's broader New York discussion.

3. For Horwitz's discussion of Pennsylvania, *see id.* at 151-54. Horwitz states that Pennsylvania, whose antilegalism largely stemmed from Quaker doctrine, nevertheless demonstrated a hostility toward extrajudicial dispute resolution that "was similar to that in other states," with the judiciary seeking to set aside arbitration awards and discourage their use and power. Horwitz ties this hostility back to attitudes about commercial law. *Id.* at 152-54.

4. For Horwitz's discussion of South Carolina, *see id.* at 154. Horwitz asserts that the South Carolina judiciary began to intervene in arbitration awards more frequently, undermining the authority of the awards and therefore fatally weakening the incentive to make use of extrajudicial dispute resolution in the first place, particularly in disputes of commercial law.

5. *Id.* at 146. For a discussion of the general pattern of this change in the merchants' and judges' previous support for extrajudicial dispute resolution in America, *see id.* at 140, 154-55.

6. For the following summary, *see id.* at 151-54.

7. *Id.* at 140, 154-56.

to two states not studied by Horwitz: Kentucky and New Jersey. The study of Kentucky, a state that was largely agricultural in the antebellum period, will provide a case study for the argument that the destruction of arbitration in antebellum America was mainly due to a merchant-lawyer alliance. A powerful merchant-lawyer alliance seems doubtful for a state such as Kentucky, which was largely pre-industrial/pre-commercial in the antebellum period. Indeed, the research shows that while merchants may have aligned with lawyers and judges on some issues, a merchant-lawyer alliance as a means to eliminate arbitration did not occur in Kentucky in this time period. Neither did the effects of a merchant-lawyer alliance manifest themselves in this time period. Kentucky's legislative and judicial branches continually upheld the viability of arbitration throughout the antebellum period. Furthermore, other factors in Kentucky contributed to arbitration's consistently strong—even preferred—usage as a means of dispute resolution throughout the antebellum period.

The study of New Jersey, a state that, like Pennsylvania, was largely Quaker in origin, provides a case study for the argument that even in largely pro-arbitration Quaker areas, the judiciary became hostile to and eventually triumphed over the use of arbitration. A close study of Quaker meeting records and New Jersey statutory and case law demonstrates that the New Jersey judiciary remained supportive of arbitration throughout the antebellum period. In contrast to the idea of a hostile judiciary, the New Jersey judiciary continually upheld and promoted the use of arbitration through dicta and decisions that followed the New Jersey arbitration statutes and were in keeping with the long-standing Quaker notions of arbitration that those statutes reflected.

Thus, the research in Kentucky and New Jersey demonstrates that, instead of declining arbitration enjoyed a continued usage in these states throughout the antebellum period. Furthermore, the research suggests that arbitration was not only seen as equal to the courts as a method of dispute resolution but may have, in some respects, served as the preferred method of dispute resolution for many in these states throughout the antebellum period, with litigation in a court of law acting as the secondary dispute resolution mechanism. The distinctions in Kentucky and New Jersey have implications not only for the role of extrajudicial dispute resolution these two states, but also for its role in antebellum America as a whole, since additional research may demonstrate countervailing factors in other states, as well.⁸

8. For an insightful critique of the working out of Horwitz's thesis in New York, see Eben Moglen, Note, *Commercial Arbitration in the Eighteenth Century: Searching for the Transformation of American Law*, 93 YALE L.J. 135 (1983). Among other points, Moglen argues that Horwitz erred in asserting that a decline in reference indicated a decline in use of extrajudicial resolution in general. Moglen claims the decline was likely the result of a 1791 act that encouraged New Yorkers to use arbitration instead of reference, thus, suggesting that extrajudicial dispute resolution, in general, continued to be strong. In addition, Moglen disagrees with Horwitz's claim that the legal profession wrested several key powers away from arbitrators and referees. Rather than having these powers eliminated by a jealous legal profession, Moglen asserts that these powers were not powers traditionally exercised by arbitrators and referees in the first place.

KENTUCKY

In order to test the applicability of Horwitz's thesis to Kentucky, we must first understand his account of New York and then consider how that account is similar to or different from the historical context of Kentucky.

A Merchant-Lawyer Alliance in New York

In his explanation of the rise and fall of extrajudicial dispute resolution from 1780 to 1860, Horwitz asserts that the conflict between merchants and a pre-commercial legal profession that led merchants to use arbitration "was a general theme in colonial America."⁹ In describing the merchant-lawyer alliance that he claims defeated the use of arbitration, however, Horwitz draws his evidence largely from studies of the eastern states of New York, Massachusetts, Pennsylvania, and South Carolina, particularly New York. In his discussion of New York, Horwitz identifies several colonial and early national trends to support his thesis, including:

(1) a "campaign against lawyers" based on anti-lawyer sentiment stemming from merchants' perception of lawyers as having pre-commercial attitudes; (2) an initial increased use of arbitration as a means to resolve disputes, presumably due to lawyers' pre-commercial attitudes; and, (3) the passage of statutes to support arbitration in this time period.¹⁰

Once Horwitz identifies these trends supporting the existence and growth of arbitration, he then claims that each of these pro-arbitration trends shifted at the turn of the century.¹¹ As evidence of this shift, he first cites an emergence of "a new willingness of the judges to reverse arbitration awards for technical deficiencies" after 1799 and a judicial trend in which "the traditional common law deference to the reports of arbitrators had begun rapidly to dissipate."¹² Second, Horwitz cites an 1801 case as an example of a trend in which the courts refused to refer any case to an arbitrator if the case might have a question of law.¹³ Finally, Horwitz claims that although statutes had been passed to support arbitration, those statutes were continually undermined by the courts.¹⁴

Horwitz applies his New York account to colonial and early America in general. According to Kentucky case law, however, the pro-arbitration attitude that Horwitz was to have declined in New York and across America by the turn of the century was still displayed by the Kentucky courts as late as 1860.

9. *Id.* at 146.

10. *Id.* at 146-49, 151.

11. *Id.* at 150.

12. *Id.* (citing *Parker v. Avery*, Kirby 353 (Conn. 1787). 2 Z. Swift, *A System of the Laws of the State of Connecticut* 7-8, 17 (1795)).

13. *Id.* (citing *De Hart v. Covenhaven*, 2 Johns. Cas. 402 (N.Y. 1801)).

14. *Id.* at 149, 151.

Evidence of a Merchant-Lawyer Alliance in Kentucky?

The first point of departure between Kentucky and Horwitz's thesis is in the nature of the economic community during the time period studied. Horwitz's study is based on the existence of a strong mercantile community that practiced arbitration and opposed the growing legal system.¹⁵ The problem in generalizing these claims beyond the more mercantile eastern states is that not all states at this time had an economic base driven by the merchant class. By claiming that merchant-lawyer relations alone explain the rise and fall of arbitration in America, Horwitz neglects to explain how this phenomenon could convincingly apply to states like Kentucky, whose economic base remained largely agricultural through the first half of the nineteenth century, and whose use of arbitration did not depend upon a merchant class. Mary Bonsteel Tachau provides this description of Kentucky in the early 1790s:

What was then the western district of Virginia was a wilderness, only recently vacated by Indians who frequently recrossed the Ohio River to attack the Anglo-Americans who had taken their hunting and farming lands. It was a forested and fertile land which promised great productivity and wealth to those who could hold and exploit it, but it was a land that could be reached only after hazardous journeys along primitive trails or along the rivers. No stagecoaches penetrated the region, and the unimproved Wilderness Road, recently carved through the mountains, was too rugged for wagons. There was no mail service; even letters from President Washington and his secretary of war were carried in the packs and saddlebags of private citizens. Communications within and away from the area were exceedingly irregular.¹⁶

Although there were explorations into Kentucky¹⁷ in the 1750s, the first real efforts at settlement did not occur until around 1775 near what is today Lexington.¹⁸ After 1780, Kentucky began to be settled at the rate of approximately 5,000 people per year, many of whom were former Virginians with rural backgrounds.¹⁹ These former Virginians were a much "less urban people than the more northern colonists" and turned to Kentucky to "seek fresh fields" for their agricultural pursuits.²⁰

By the late 1780s, Kentucky was a rich producer of "grain, cattle,

15. *Id.* at 140.

16. MARY K. BONSTEEL TACHAU, *FEDERAL COURTS IN THE EARLY REPUBLIC: KENTUCKY 1789-1816* 14 (Princeton University Press 1978).

17. To avoid confusion, I will refer to the land that became the state of Kentucky as "Kentucky" both before and after statehood.

18. N.S. SHALER, *KENTUCKY: A PIONEER COMMONWEALTH 60-67* (Houghton, Mifflin and Company, Boston and New York, and The Riverside Press, Cambridge 1884); and WILLIAM B. ALLEN, *A HISTORY OF KENTUCKY, EMBRACING GLEANINGS, REMINISCENCES, ANTIQUITIES, NATURAL CURIOSITIES, STATISTICS, AND BIOGRAPHICAL SKETCHES OF PIONEERS, SOLDIERS, JURISTS, LAWYERS, STATESMEN, DIVINES, MECHANICS, FARMERS, MERCHANTS, AND OTHER LEADING MEN, OF ALL OCCUPATIONS AND PURSUITS* 144 (Bradley & Gilbert, Publishers, Louisville, KY 1872).

19. SHALER, *supra* note 18, at 55, 80.

20. *Id.*

hogs, sheep, fruits, and fiber.”²¹ Kentucky became known for growing grain and livestock and, after 1800, its economic influence continued to increase.²² Settlements continued²³ and in the first decade of the 1800s, Kentucky farmers made use of river routes for trade, sending their produce to New Orleans, while eastern merchants came to the area to trade their merchandise for produce they then sold in northeastern cities.²⁴ By the 1850s, Kentucky’s largest source of prosperous trade was her waterways.²⁵ It was not until the mid-1800s, however, that Kentucky’s capital became a center for agriculture and commerce.²⁶ Instead, the Kentucky plains were “ruled” by “a comfortable agrarian society” comparable to “a planting society not unlike that of the lower southern cotton belt.”²⁷ The mountainous portions of the state were also agricultural, although not as prosperous as other portions of the state.²⁸ Kentucky’s economy was built on agriculture and even the cities and towns reflected an agricultural bent; in the early days of Kentucky they “were no more than gathering places for expatriate farmers and a few tradesmen and professional people. They all looked to the countryside rather than within themselves for economic strength.”²⁹

Kentucky’s growing population began to call for separation from Virginia in the early 1780s, and Congress admitted Kentucky into the Union effective June 1, 1792.³⁰ Kentucky assembled a convention to form its first State constitution in April of 1793 and from the beginning of statehood it began establishing courts of justice.³¹

One predicament that immediately pressed upon those courts was the settlement of a multitude of land-dispute claims. In encouraging settlement of the region before statehood, Kentucky had instructed each land claimant to make his own survey of the land and then record that survey in the state land office.³² This procedure allowed for speedy settlement but also resulted in conflicting land claims by those who had independently conducted their own surveys, those who were granted land rights through chartered land companies, and those who were granted land rights through military warrants.³³ Within the first ten years of settlement, some

21. THOMAS D. CLARK, *KENTUCKY: LAND OF CONTRAST* 34 (Harper & Row, Publishers, New York 1968).

22. *Id.* at 36.

23. SHALER, *supra* note 18, at 81.

24. CLARK, *supra* note 21, at 34.

25. *Id.* at 123.

26. *Id.* at 35.

27. *Id.* at 37.

28. *Id.*

29. *Id.* at 38.

30. SHALER, *supra* note 18, at 93, 107.

31. *Id.* at 107, 112.

32. *Id.* at 49, 50.

33. *Id.* at 50; TACHAU, *supra* note 16, at 167-68.

parts of the state experienced more than three times as many claims as there was land available.³⁴ By 1779, Kentucky had approximately 20,000 settlers with so many land-dispute claims that Virginia, which then governed the territory, had to appoint a land commission to review and resolve the claims.³⁵ Although the commission reviewed 1,400 claims and confirmed 1,328, this only gave resolution to claims over approximately 1/8 of the land in the region.³⁶ After the appointment of the land commission, Virginia passed a statute to resolve the Kentucky land controversies, but this proved a failure due to the multiple steps required to quiet title, which worked to create additional disputes.³⁷

As a result of these failed efforts, the conflict over how to settle land disputes continued and was an issue that dominated the docket of the Kentucky judiciary from the first breath of statehood. As the new state of Kentucky began to form its governing framework, it was aided by those settlers from Virginia who had brought with them not only agricultural interests, but also notions of a sophisticated and well-trained judicial system that adhered to the English common law and traditions.³⁸ The settlers had known such a system in Virginia and worked to implement it in Kentucky. Neither the statutory nor common law of Virginia, however, held an adequate remedy for the prevailing land disputes.³⁹ Land-dispute claims became so numerous in the first years of Kentucky statehood that in the 1790s Henry Clay's mother told her son to come to Kentucky where there was good income for lawyers who would defend land-dispute cases.⁴⁰

The impact of the land use controversy on litigation was reflected in the debates between the radicals and moderates leading up to Kentucky's first constitutional convention in 1792. The radicals in the state promoted a constitutional proposal to prohibit lawyers from holding government positions.⁴¹ There were fears that if the lawyers were allowed into the legislature, they would use their positions of power to complicate the law in order to insure their own employment and also to take hold of the property of the working man.⁴² The radicals wanted a simple, direct, and responsive form

34. CLARK, *supra* note 21, at 30.

35. TACHAU, *supra* note 16, at 169.

36. *Id.* (citing Samuel M. Wilson, *The First Land Court of Kentucky 1779-1780* 43-47 (Lexington, KY 1923).

37. *Id.* (citing William Waller Hening, *The Statutes at Large; Being a Collection of all the Laws of Virginia from the First Session of the Legislature, in the Year 1619*, x (New York, 1823), 35-65; Littell, *Statute Law of Kentucky*, I, 392-464.)

38. *Id.* at 15. (citing David H. Flaherty, *An Introduction to Early American Legal History*, in Flaherty, ed., *Essays in the History of Early American Law*, 25; Charles Warren, *The Supreme Court in United States History*, I (Boston, 1926), 37; Ellis, *Jeffersonian Crisis*, 121; Herbert A. Johnson et. al., *The Papers of John Marshall*, I (Chapel Hill, NC., 1974)). Notably, the English common law included the use of arbitration. See WILLIAM BLACKSTONE, *COMMENTARIES* * 16-17.

39. CLARK, *supra* note 21, at 32.

40. *Id.* at 31.

41. *Id.* at 124. (citing *Kentucky Gazette* (Lexington), 24 December 1791).

42. *Id.* (citing *7 Kentucky Gazette* (Lexington), 7 January 1792).

of government based on a “simple and concise code of laws’ which would then eliminate the need for lawyers.”⁴³ The moderates disagreed and favored an independent (as opposed to elected) judiciary.⁴⁴ They argued that a more complex and intricate system of law and justice was beneficial because it took decisionmaking out of the “arbitrary will of the rulers.”⁴⁵

In 1796 and 1797, land use continued to fuel the governance debate in Kentucky. Radical movements for a second constitutional convention were countered with the moderates’ use of property rights rhetoric as a way to appeal to the “overwhelming majority” of Kentucky citizens who owned land.⁴⁶ The agrarian land owners were not so easily swayed, however, and spoke out against the passage of “agrarian laws” which they believed lawyers would use to take “one half of your land to advocate your claim to the other. . . .”⁴⁷ The radicals “emphasized the necessity of freeing the state from aristocratic control, of finding some way of settling the numerous land disputes whose ‘perplexity and expense of law proceedings loudly call for some constitutional provisions. . . .’”⁴⁸ They also promoted the establishment of a circuit court system “which they believed would help make the administration of justice cheap, convenient, and locally oriented.”⁴⁹ The moderates opposed this proposal, however, and it was ultimately defeated.⁵⁰

At the crux of these disagreements in law and governance was the fact that the moderates promoted a more educated and experienced elected class, especially lawyers, while radicals promoted the common man and decried the election of lawyers and judges whom they believed to be against the interests of the country and the common man.⁵¹ In contrast to Horwitz’s thesis, which claims that the merchants’ dislike of lawyers’ pre-

43. *Id.* at 124-25. (citing *Kentucky Gazette* (Lexington), 15 October 1791; “Rob the Thrasher,” *Kentucky Gazette* (Lexington), 17, 24 December 1791).

44. *Id.* at 125. (citing *Kentucky Gazette* (Lexington) 18 February 1792 and 24 September, 1 October, 1791; “The Disinterested Citizen,” *Kentucky Gazette* (Lexington), 22, 29 October, 31 December 1791, and 25 February 1792; “Little Brutus,” *Kentucky Gazette* (Lexington), 17, 24 December 1791; “X.Y.X.,” *Kentucky Gazette* (Lexington), 18 February 1792).

45. *Id.* (citing “Felte Firebrand,” *Kentucky Gazette* (Lexington), 12 November 1791; “The Disinterested Citizen” *Kentucky Gazette* (Lexington), 22 October 1791).

46. RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* 139-142 (Oxford University Press 1971). In order to win popular support, the moderates asserted that the radicals were against private property rights, an assertion that the radicals denied. *See id.* at 142, 146.

47. *Id.* at 142-43. (citing “A Voter,” *ibid.*, 17 April 1798; William Warfield to John Breckinridge, 22 April 1798, Breckinridge Papers, LC).

48. *Id.* at 143. (citing “A Voter,” *Stewart’s Kentucky Herald* (Frankfort), 17 April 1798; “A Friend to Senates,” *Kentucky Gazette* (Lexington), 25 April 1798; “Cassius,” *ibid.*, 2 May 1798; H. Marshall, *History*, II, 246-47).

49. *Id.* at 147.

50. *Id.* at 147-48 (citing “Notes on the Debates,” 30 July-2 August 1799, Breckinridge Papers, LC; Joseph H. Parks, *Felix Grundy* (Baton Rouge, 1940), 12-13).

51. *Id.* at 125-26.

commercial mind-set formed the basis for anti-lawyer hostility,⁵² the anti-lawyer sentiment in Kentucky seemed based not on a view of lawyers as pre-commercial, but on the common man's fear of the lawyers' great ability to grasp and garner potentially abusive power, power that could infringe on the common man's land and property rights.

Not only were anti-lawyer fears not instigated by commercial interests, but neither were the claims that made their way to court. It was the seemingly infinite number of land claims that formed the basis for legal disputes in Kentucky at this time.⁵³ Richard Ellis states:

Land was what Kentucky was all about. It was in search of land that the speculator, the planter, and the farmer had dared to venture across the mountains in the first place. And in no other state of the union was there as much confusion over land titles as in Kentucky. The origins of the situation lay in the unsystematic manner by which Virginia had distributed its western lands. The Old Dominion had parceled out its Kentucky lands first as a bonus to soldiers for fighting in the French and Indian War, then as a grant to the Transylvania Company, and finally as an inducement to obtain enlistments during the War for Independence. Moreover, many had made purchase through the land office, while thousands of small farmers had simply settled on what appeared to be unclaimed land. As little was known about the geography of Kentucky, the locations of the various grants were only vaguely described. Efforts made to survey the area merely complicated the problem. Because the surveyors were constantly harassed by hostile Indians, their work tended to be inaccurate. In addition, over a period of several years, the same terrain of land was often marked off several times, so that what might be designated as an individual lot by one surveyor would be included as different parts of several continuous lots by another. As a result of these overlappings, the state became 'shingled over' with land claims to which two, three, and sometimes even four and five persons held conflicting titles.⁵⁴

In 1784, "most Kentuckians were non-landowners living in the midst of enormous tracts held by absentees, 'tenants of the log cabin' they were called. . . ."⁵⁵ Absentee landowners would bring ejectment suits against these occupying settlers.⁵⁶ Kentucky was sympathetic to these settlers who might not have even known of the absentee landowners and who, believing themselves to be the rightful owners, had already made improvements on the land.⁵⁷ As Kentucky entered statehood, it became even more important to resolve these land disputes. An overwhelming

52. HORWITZ, *supra* note 1 at 146-48. Horwitz terms this type of antilegalism as "compatible" with mercantile antilegalism.

53. ELLIS, *supra* note 46, at 130. Disputes over competing land claims are replete throughout the early published state court decisions and land disputes dominated the federal court docket as well, comprising almost half of all private suits brought to federal courts in Kentucky from 1789-1816. TACHAU, *supra* note 16, at 167.

54. *Id.* at 134. (citing W.R. Jillson, *The Kentucky Land Grants* (Louisville, 1925); Connelly and Coulter, *History of Kentucky*, I, 212-220; Francois Andre Michaux, "Travels to the West of the Alleghany Mountains," Reuben Gold Thwaites (ed.), *Early Western Travels, 1748-1846* (32 vols., Cleveland, 1934), III, 227-28.)

55. PAUL W. GATES, *LANDLORDS AND TENANTS ON THE PRAIRIE FRONTIER: STUDIES IN AMERICAN LAND POLICY* 21 (Cornell University Press 1973), stating in footnote 15 "Senator Clement C. Clay of Alabama used this term, not critically, in 1841, in a discussion of pre-emption (Cong. Globe, 23 Cong., 2 Sess., Appendix, 18 [Jan. 4, 1841])."

56. *Id.* at 21.

57. *Id.*

majority of people in Kentucky either owned or thought they owned land, and the endless disputes over land titles inhibited immigration and economic development since people did not feel secure in purchasing land or in selling or improving the land they thought they owned.⁵⁸ The situation drastically worsened in 1794 when the Kentucky Court of Appeals, which had been given original jurisdiction in all land-dispute claims, decided *Kenton v. McConnell*, a case that “threatened to overturn thousands of land titles” by stating that the previous findings of the Virginia-appointed land commission could be reversed.⁵⁹ In response to this upheaval came cries that the Kenton decision was the fruit of land speculators and lawyers.⁶⁰ It seemed the radicals’ fears of lawyers as a class that would upset their property rights had been realized.

In response to the fallout from Kenton, the Federalists and dissident moderates joined with the radicals and led a reorganization of the judiciary.⁶¹ The legislature passed acts in 1795 that limited the judiciary, revoked the Court of Appeals’ original jurisdiction in land-dispute claims, and prohibited justices of the peace and sheriffs from being elected to the General Assembly.⁶² Furthermore, in the year following the *Kenton* decision, the radicals achieved the far-reaching reform they desired with the 1795 Act Concerning Arbitrations, an Act which provided statutory support for extrajudicial means of dispute resolution.⁶³ Kentucky’s first broad-ranging arbitration act followed on the heels of widespread discontent with the court system’s handling of land-dispute claims as epitomized in the Court of Appeals’ *Kenton v. McConnell* decision. The case that threw the state into upheaval over the legitimacy of land titles also instigated legislative acts that paved the way for arbitration to hold a strong place in Kentucky dispute resolution for years to come.⁶⁴

58. ELLIS, *supra* note 46, at 130, 142. See also GATES, *supra* note 55, at 14-15, 19.

59. *Id.* at 131 (citing Mss Journal of the Kentucky House of Delegates, June 1792, 7; also reprinted in Kentucky Gazette (Lexington), 23 June 1792); 135 (citing *I Hughes Reports*, 134-169); and 134. (citing W.R. Jillson, *The Kentucky Land Grants* (Louisville, 1925); Connelly and Coulter, *History of Kentucky*, I, 212-220.)

60. *Id.* at 135.

61. *Id.* at 136.

62. *Id.* at 136. (citing Humphrey Marshall, *History of Kentucky*, Volume II, 156-57, 169 (Frankfort, 1824)).

63. *Id.* at 136-37. (citing Kentucky Sessional Laws of 1795 (Frankfort, 1796), Chapter XV, Evans #30656.)

64. Indeed, my research shows that land-dispute claims formed the largest single subject of known dispute in arbitration cases brought to court in Kentucky between 1780-1860.

Decade	Land Disputes	Merchant Disputes	Other Disputes	Unknown Disputes	Total Disputes by Decade
1780-1790	0	0	0	0	0
1791-1800	2	0	0	0	2
1801-1810	8	1	9	15	33
1811-1820	9	1	2	4	16
1821-1830	8	3	5	10	26
1831-1840	5	1	8	4	18
1841-1850	1	1	3	4	9
1851-1860	0	1	4	5	10
Total Disputes by Type	33	8	31	42	114

The Act Concerning Arbitrations was passed on December 19, 1795.⁶⁵ The preface to the Act stated that it was intended to address the problem of the “enormous expences [sic]” and “tedious length of time” that lawsuits entail, which cause them to be an “almost total denial of justice.”⁶⁶ The Act provided that it would be lawful for parties in a dispute to mutually submit the dispute to arbitrators of their own choosing.⁶⁷ The parties to the dispute would then refer the arbitrators to a court of the parties’ own choosing.⁶⁸ The dispute would be entered in the court record and the arbitrators would be given the same power as the courts enjoyed to subpoena witnesses and compel their attendance and compliance in providing evidence.⁶⁹

The 1795 Act also required arbitrators to take an oath of impartiality in deciding the dispute.⁷⁰ The arbitrators were given jurisdiction to “hear and determine all matters of dispute to them refered [sic].”⁷¹ Once the case had been decided, the arbitrators were to give a copy of the award to each party and to the court that had set out the order of arbitration.⁷² The copy given to the court would “be entered of record, and become a final end and [decision] of all and every controversy or suit to them so submitted, and be made a decree of such court. . . .”⁷³ An arbitration decree could be invalidated only if there was evidence that it was “procured by corruption or other undue means” or that there “was evident partiality in the arbitrators or umpires.”⁷⁴ Where such corruption or partiality was evident, the award would be set aside and the injured party would be allowed to appeal only to the Court of Appeals and only if he did so within three months and provided notice to the other party.⁷⁵ If the appeal was not brought within three months, then the award would be executed.⁷⁶ The statute also supported arbitration by providing monetary compensation for the court clerks who filed the arbitration orders, the arbitrators who heard the dispute and made the award, and the attending witnesses, just as in court.⁷⁷

Two years after passing the 1795 Act Concerning Arbitrations, the Kentucky legislature again broadened the power of arbitration with “An Act Concerning Guardians, Infants, Masters and Apprentices.”⁷⁸ The bulk

65. ACTS OF 1795, Ch. 9. To ease the reading of these statutes, I have replaced the ‘f’ marking given for the ‘s’ sound with ‘s’ when necessary to comport with contemporary spelling.

66. *Id.* (Preamble).

67. *Id.* at § 1.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at § 2.

74. *Id.*

75. *Id.*

76. *Id.* at § 3.

77. *Id.* at § 5.

78. ACTS OF 1796-1797, Ch. 15.

of this Act dealt generally with the duties of guardians toward their wards, but one section in particular gave guardians the ability to use arbitration to settle the disputes of their wards.⁷⁹ While the 1795 Act implicitly seemed to be a reaction to concern over land-dispute claims, the arbitration portion of the 1797 Act was explicitly so. Specifically, it granted guardians the right to use arbitration in their wards' disputes when those disputes centered on land claims.⁸⁰

In February of 1798, the legislature passed yet another statute on arbitration, entitled, "An Act Concerning Awards."⁸¹ The Act repealed previous acts concerning arbitration and awards⁸² and set forth the following: (1) any persons in controversy could appoint any person(s) to settle their claim; (2) if that was done before a suit was pending, then the parties were to submit their controversy to a court, which would then issue an order to the arbitrators; (3) the order was to state the matter in dispute that was decided; (4) if an arbitrator failed to discharge the reference order, then either party could provide "satisfactory proof thereof" to either discharge the reference order or appoint another arbitrator; (5) the arbitrators had the power to call witnesses and issue fines or penalties as in a court of law if the witness failed to appear and give testimony; (6) the arbitrators were instructed to take an oath of impartiality; (7) the arbitrators had to provide a copy of the award to each party and to the court that issued the order at the next session of that court meeting; (8) there had to be at least 15 days from the issuance of the award until its delivery at the court; (9) the court was to enter the award and make a judgment or decree; (10) the award was not to "be invalidated, set aside or appealed from, unless it shall be made appear to the court, that such award was obtained by corruption, evident partiality, or other undue means"; (11) if either party alleged "corruption, evident, partiality, or other undue means" it could appeal to the Court of Appeals; (12) the appellant had to provide notice to the appellee within ten days after obtaining the appeal; (13) the appellant had to provide a copy of the notice and the lower court record to the Court of Appeals; and (14) the appellant would lose his right to appeal if he did not comply with all the requirements.⁸³

After stating the procedure through which parties could arbitrate, the legislature went on to strongly uphold the validity of such awards, stating:

No award made by virtue of this act, shall be liable to be examined into, superseded or revised by writ of error, or be set aside by the court to which it may be returned for want of form only, nor for other irregularity, if by such award, it manifestly appears, that the suit, matter, or controversy submitted is thereby finally and certainly decided. Provided nevertheless, that nothing herein

79. *Id.* at § 2.

80. *Id.*

81. ACTS OF 1ST SESSION, 1798, Ch. 25.

82. It did not, however, repeal the Act of 1797, which gave guardians the authority to submit their wards' land disputes to arbitration. See *Galloway's Heirs v. Webb*, 3 Ky. 326, 332 (Ct. App. 1808).

83. An Act Concerning Awards, *supra* note 81, at §§ 1, 2, 6.

contained shall be construed to take from courts of equity their power over awards, arbitrations or umpirages.⁸⁴

Thus the 1798 Act upheld the validity and strength of arbitration by providing for substance over form, clarifying appeal procedures, and retaining arbitrators' previous jurisdiction. It was the language of this Act, first asserted in response to land-dispute claims in 1795, expanded to include guardians in 1797, and refined here in 1798, that formed the basis for the legislature's enactments on arbitration for the next fifty years.

On July 1, 1852, the General Assembly enacted the Revised Statutes of Kentucky.⁸⁵ Chapter 3 of the Revised Statutes outlined the procedures for arbitrations and awards.⁸⁶ In 1854, the Code of Practice in Civil and Criminal Cases for the State of Kentucky (hereinafter Code of Practice) codified the Revised Statutes' provisions for arbitration and awards in title X, chapter 8, section 499, subsections 1-9.⁸⁷ The only change made to the provisions as contained in the Revised Statutes was to strike the words "of chancery" from the Revised Statutes, chapter 3, section 8.⁸⁸

84. *Id.* at § 3.

85. RICHARD H. STANTON, *THE REVISED STATUTES OF KENTUCKY, APPROVED AND ADOPTED BY THE GENERAL ASSEMBLY, 1851 AND 1852, AND IN FORCE FROM JULY 1, 1852 WITH ALL THE AMENDMENTS SUBSEQUENTLY ENACTED, AND NOTES OF THE DECISIONS OF THE COURTS OF APPEALS OF KENTUCKY, VOLUME I*, (Robert Clarke & Co., Cincinnati, 1860) (hereinafter *REVISED STATUTES*). The version of the Revised Statutes that is cited here appears to be the original Revised Statutes from 1852 with amendments and notes of court cases added at the end of each section. *Id.* at 129, § 499.

86. *Id.* at VIII, 181-184.

87. M.C. JOHNSON, ET AL., *CODE OF PRACTICE IN CIVIL AND CRIMINAL CASES, FOR THE STATE OF KENTUCKY 129-131* (A.G. Hodges, Public Printer, Frankfort, 1854) (hereinafter *CODE OF PRACTICE*). The preface to this volume provides a history for the Kentucky Code. This same language concerning arbitration was adopted under section 499 in subsequent versions of the Code of Practice. The headnote summary of this text describes the procedures for arbitration as follows: "§ 499. Proceedings to be according to chapter 3 of Revised Statutes. 1. Manner of submitting controversy by rule of court. 2. The arbitrators to be sworn. Their oath. May examine parties on oath. 3. May issue subpoenas for witnesses, and report to court the failure [sic] of witnesses to attend or testify. 4. Personal representatives, committees, and guardians may make a submission. 5. If arbitrator refuses to act, reference may be set aside. 6. Trial before arbitrators, and their award. 7. How the award to be made the judgment of the court. 8. No award to be set aside for defect of form. Courts of equity to have jurisdiction over awards. 9. Matters in justice's jurisdiction may be submitted by rule or order injustice's court, on which same proceedings may be had. Subject to appeal."

88. *Id.* at 129, § 499. The omission of "of chancery" may have been to distinguish the already existing dual law and equity functions of the Court of Appeals from the equity function of the newly created Louisville Chancery Court. The Court of Appeals was granted jurisdiction in both law and equity under Article V. Section 1 of the First Constitution of Kentucky (June 1, 1792). This power was re-asserted through Article IV, Section 1 of the Second Constitution of Kentucky (August 17, 1799) and Article IV, Section 1 of the Third Constitution of Kentucky (June 11, 1850). A new court called the Louisville Chancery Court was established in 1835 and then included in Article IV, Section 40 of the Third Constitution of Kentucky (June 11, 1850). It is possible that it was deemed necessary to remove "of chancery" from the Revised Statutes as a way to ensure that the language would not be misconstrued to mean that only the Louisville Chancery Court would be able to exercise this power of equity. Whatever the reasoning, the language changed from "No award shall be set aside for the want of form; but courts of chancery shall have power over awards on equitable

The form of arbitration and award provided for under the Revised Statutes in 1852, and included in the 1854 Code of Practice, was very similar to that which had been passed in 1795 and 1798 following the upheaval over land-dispute claims. Indeed, land-dispute claims continued to provide a significant impetus for arbitration throughout much of the early-nineteenth century, comprising the largest single subject of dispute in arbitration cases brought to court in Kentucky from 1780-1860.⁸⁹ The 1797 and 1798 Acts, the Revised Statutes, and the form of the Revised Statutes codified by the Code of Practice greatly encouraged the use of arbitration to settle disputes through: (1) provisions for enforcement by the court (section 1); (2) assumption that arbitrators would be able to decide according to law (section 2); (3) award of power to arbitrators to subpoena witnesses and compel cooperation (section 3); (4) provisions that upheld and expanded the Act of 1797 concerning guardians (section 4); (5) statement that no award should be set aside on form alone (section 8); and (6) a provision for arbitration settlement by Justices of the Peace (section 9).⁹⁰ The fact that the Revised Statutes and later the Code of Practice sought to uphold the longstanding system of arbitration in Kentucky is further evidenced by the case notes following the statutory provisions in the Code of Practice, many of which explicitly affirmed the law's favorable attitude toward arbitration as a means of dispute resolution.⁹¹

Perhaps one reason for the strength of these provisions is the fact that the bitterness over land-title disputes and the role of the lawyer in their resolution remained strong in Kentucky throughout the first half of the 19th century.⁹² In 1849, there was a call for, and the holding of, a constitutional convention. In the debates surrounding that event, this anti-lawyer sentiment resurfaced, with men stating that the bar had "'despoiled' the property of the early settlers of the State on behalf of 'land-jobbers' while themselves growing 'fat and sleek upon the litigation and miseries of the farmer. . .'"⁹³ Even during the convention itself, a proposal was made to quiet all titles of claimants who had occupied their land for seven years.⁹⁴ By the mid-1880s, Kentucky still had hundreds of

principles as heretofore" in the Revised Statutes to "No award shall be set aside for the want of form, but courts shall have power over awards on equitable principles as heretofore" in the Code of Practice. See REVISED STATUTES, *supra* note 85, at Ch. 8, § 8 and CODE OF PRACTICE, *supra* note 87, at § 499.

89. Land claims formed the basis of dispute in 33 of 114 reviewed cases. Merchant disputes formed the basis of 8 cases, and an additional 31 cases addressed a variety of issues including water rights, slave owners' property rights, and disputes over the formation of turnpikes and railroads. Each of the remaining 42 cases did not provide enough information in the opinion to determine the basis for dispute. See Table, *supra* note 64.

90. Sections cited are from the CODE OF PRACTICE. *Supra* note 87 at 205-06, § 499, Ch. 8, Ti. 10.

91. *Id.* See case law notes included in the appendix to this source.

92. JAMES W. GORDON, *LAWYERS IN POLITICS; MID-NINETEENTH CENTURY KENTUCKY AS A CASE STUDY* 152 (Garland Publishing, Inc., New York 1990).

93. *Id.* at 152. (citing *Louisville Journal*, 26 October 1849).

94. *Id.* Gordon states here that the proposal failed and was not brought up again.

thousands of acres of land whose ownership had not been recorded.⁹⁵ During this same time period, the Court of Appeals heard many arbitration appeals based on land-dispute claims.⁹⁶ Likely it was the legislative language, instigated by land-dispute upheaval and applied by the court in its arbitration decisions, that led the Kentucky Court of Appeals to be an extremely pro-arbitration court throughout the antebellum era.

Horwitz's Case Law Conclusions As They Apply to Kentucky

The preceding discussion demonstrates a countervailing factor to Horwitz's argument that arbitration across antebellum America was promoted, maintained, and then dissolved by the combined economic and political interests of the merchants acting in concert with the judiciary. That countervailing factor is social at its root. Essentially, Horwitz's history of arbitration's decline and the emerging legal system's triumph is a

95. SHALER, *supra* note 18, at 51. This continued dispute over Kentucky land claims throughout the nineteenth century is also chronicled in the previously mentioned "Tenants of the Log Cabin," GATES, *supra* note 55, at 13-47. A claimants' law was passed on Feb. 21, 1797 that gave the occupying settlers, if ejected, the value of their improvements and charged them for any damages to the land. More occupancy laws followed and by 1820 Kentucky had created statutory enactments granting "the right of occupants with a color or title to their improvements and the right of settlers on privately owned land, unchallenged for seven years and paying taxes thereon, to a firm and clear title to their land no matter what adverse titles might be outstanding." *Id.* at 27. During the Panic of 1819, Kentucky split over debtor relief legislation with the Relief Party consisting of "debtors, several eminent lawyers, and a large majority of the population" and the Anti-Relief Party consisting of "the mercantile class, the lawyers and judges, and the larger farmers." *Id.* at 28-29. In response to the Court of Appeals striking down a replevin law, the legislature abolished the court, and replaced it with judges more favorable toward relief legislation. Then, in the case of *Green v. Biddle*, 8 Wheaton 11 (1823), the United States Supreme Court found that the Kentucky statutes on occupancy violated Article Seven of the Virginia-Kentucky compact. Kentucky land claims were once more thrown into confusion. Governor Charles Scott and conservative leaders in the legislature had questioned the constitutionality of the occupancy laws as had many of the large property owners but the laws continually had been upheld by the Kentucky Court of Appeals. The United States Supreme Court decision instigated great conflict. The Governor and the Legislature opposed the Court's decision and Kentucky secured an (ultimately unsuccessful) rehearing of the case. It was believed that, "[b]y thus applying the harsh doctrines of common law to the occupancy statutes of Kentucky, the [United States Supreme] Court threatened to destroy all equity in improvements settlers had made on land having prior claimants." *Id.* at 37. Kentucky did not accept the United States Supreme Court's decision and in 1824 the Kentucky Court of Appeals upheld the occupancy law of 1812 and said it was not inconsistent with the Virginia compact. Kentucky said that there was no question that the Act of 1812 was constitutional and, subsequently, an 1824 act was passed to undo Green and to uphold the rights of occupying settlers at the expense of absentee landowners. Absentee landowners liked Green and tried to take their cases to federal courts for friendlier rulings but even there they did not receive much support. For the preceding discussion, see GATES, *supra* note 55, at 13-41.

96. Of 114 arbitration cases reviewed from 1780-1860, 33 (approximately 29%) revolved around land-dispute claims. The actual percentage may be even higher given the fact that disputes of 42 cases were not discernible. Of the 72 arbitration cases whose disputes were discernible, 33 (approximately 46%) revolved around land-dispute claims. See Table, *supra* note 64.

story of revolution—a revolution in the use of arbitration that changed the face of the American legal system. Horwitz believes this revolution came about through the combined political interest of an emerging lawyer class and the economic interests of an existing merchant class. But revolutions occur for many reasons—political and economic, certainly, but social and ideological as well. While Horwitz asserts a strong political and economic foundation for the revolutionary decline of arbitration, it misses the mark in an area, such as Kentucky, where unique social problems influenced political and economic concerns in a way that prevented a merchant-lawyer alliance and subsequent opposition to arbitration from forming in the first place, at least in the antebellum period.

As demonstrated, arbitration in Kentucky was not primarily promoted or sustained by the economic interests of the merchant classes, and it was not demolished by the political motivations of an emerging lawyer class. Instead, the continued favor and use of arbitration in Kentucky was social at its root—the result of a state beleaguered by conflicting land-title claims. One might suppose, at this point, that Horwitz’s history of arbitration’s demise could play out through an alliance of the judiciary with land-title disputants rather than with merchants. In order for such an alliance to occur, however, Horwitz’s portrait of the judicial branch as actively hostile to the use of arbitration would also need to be accurate in Kentucky. Yet, no such hostility emerges. To demonstrate this distinction, the following discussion takes on each of the four claims Horwitz makes to support his account of a judicial branch actively hostile to arbitration in antebellum America and applies them to the arbitration case law in Kentucky at the time.

Decline in Common Law Deference to Arbitration Awards

One of Horwitz’s first and most important claims is that at the turn of the century courts began to abandon their common law deference to arbitration awards.⁹⁷ Under the common law of England, courts were prohibited from intervening in arbitration awards, which were “conclusive, unless some corruption, or other misbehavior of arbitrators, is proved. . . .”⁹⁸ Horwitz claims that by the mid-1800s such deference was no longer the norm and that “an increasingly self-conscious legal profession had succeeded in suffocating alternative forms of dispute settlement.”⁹⁹ One example Horwitz provides is Pennsylvania, whose judiciary declared that it would begin to set aside judgments upon “a clear, plain, evident mistake, either in law or fact, which affects the justice and honesty of the case,” and stated that it no longer considered arbitration to be “a kind of judgment, given by private courts’ . . . ‘equally binding as a contract of the parties, or a judgment of a court of competent jurisdiction.’”¹⁰⁰

97. HORWITZ, *supra* note 1, at 150.

98. *Id.* at 154 (citing a note to *Alken v. Bolan*, 3 S.C.L. (1 Brev.) 239, 240 (1803)).

99. *Id.* at 155.

100. *Id.* at 152 (citing *Gross v. Zorger*, 3 Yeates 521, 525, 526 (Pa. 1803) and *Dixon v. Morehead*, Addison 216, 224 (Pa. 1794)).

The case law of Kentucky does not support Horwitz's claim that by the early nineteenth century the courts no longer deferred to arbitration awards.¹⁰¹ On the contrary, Kentucky case law demonstrates that the court's deferential attitude toward arbitration awards prevailed through the 1850s. From 1790-1810, the Kentucky Court of Appeals seemed to treat arbitration as another, equal arm of the law. It overturned awards when statutory formats had not been followed, but it did so in keeping with the spirit and not the letter of the law. It never suggested that courts were allowed to look into underlying facts or overturn an award unless there was fraud or corruption on the face of the award.

The case of *Baker's Heirs v. Crockett*¹⁰² (1808) provides an example of Kentucky's early favor toward both statutory and common law arbitration. *Baker's Heirs* was a land-dispute claim in which the disputing parties had agreed to send their dispute to arbitration. After the arbitration award had been returned, a survey showed surplus land not contemplated by the arbitrators. The court upheld the award under the existing arbitration statute and, in doing so, affirmed the common law process of arbitration. It stated:

By this view of the cases, as at common law, we may be greatly assisted in respect of the proper effect and operation of the statute of this state, which declares that an award under that act shall not be invalidated, or set aside, unless it shall appear to the court, "That such award was obtained by corruption, evident partiality, or other undue means." . . . We are, therefore, of opinion that either as at common law, or in equity; with or without the statute; this award can not be set aside for *mistake* of law, apparent in the body or face of the award.¹⁰³

This early deference to the decisions of arbitrators continued throughout the next decade and from 1811-1820 courts continued to uphold arbitration under both common law and statutory law. In the 1811

101. To test the attitudes of the emerging legal system toward extrajudicial dispute resolution in Kentucky and New Jersey, I have relied heavily on cases dealing with extrajudicial dispute resolution. I attempted to focus on cases stemming from these states' high courts of law. For New Jersey, that included cases from the New Jersey Supreme Court. Since Kentucky's state reporter system does not include cases from its high court of law in this time period, I relied solely on cases reported in the Court of Appeals, Kentucky's court of last resort for both law and equity. Since it was not always clear whether a given case was on appeal from law or equity, I have attempted to include all relevant cases that made their way to this court in this time period, whether law or equity. A Kentucky statute which broadly upheld the validity of arbitration and arbitration awards contained a provision that allowed courts of equity to retain their "power over awards, arbitrations or unipirages." (An Act Concerning Awards, *supra* note 81, at § 6). New Jersey courts of equity also may have retained a similar authority over arbitration. One would need to delve into New Jersey equity case law to determine what impact such an authority may have had on the use of arbitration. Unfortunately, equity case law from New Jersey's highest equity court is only available in the New Jersey state reporter system from 1830 forward and, for equity opinions in New Jersey's court of last resort, from 1847 forward.

102. 3 Ky. 396 (Ct. App. 1808).

103. *Id.* at 410-11. An award would not be enforced, however, if a party who submitted a portion of land to arbitration had no authority over the land he submitted. *Payne v. Moore*, 5 Ky. 163 (Ct. App. 1810). These cases seem to be in keeping with Kentucky's need to settle land disputes fully and finally.

case of *Ewing's Administrator v. Beauchamp*,¹⁰⁴ the court stated that it was not up to courts to decide "whether in our opinion the arbitrators determined correctly on the points before them."¹⁰⁵ Instead, courts were only permitted to ask whether the arbitration demonstrated "either corruption, evident partiality, or other undue means" and if the arbitrators' determination "has been so palpably and grossly wrong, as to warrant this court in pronouncing them to have acted corruptly, evidently partial, or under other undue means within the meaning of a sound exposition of the law. . . ." ¹⁰⁶ The court found that the arbitrators had not so acted and upheld the award.¹⁰⁷

In a later case, *Ewing v. Beauchamp*¹⁰⁸ (1813), the court seemed not only to maintain common law deference to awards but also to expand it. The lower court had quashed the arbitration award for errors on the face of the award. The Court of Appeals reversed and upheld the award, stating that although some had interpreted the common law from England as allowing awards to be set aside if there was "a plain mistake in the body of the award," *Baker's Heirs* had held that whether it was at common law or pursuant to statute, an award could not be set aside for such a mistake.¹⁰⁹ Furthermore, the court believed that the arbitration award should be as binding on the parties as a court judgment. For instance, in *Irvine's Heirs v. Crockett*¹¹⁰ (1816), the court upheld the arbitration award even though the parties themselves had mutually agreed to set aside the award. The court stated, "[T]he power is not given to vacate and set aside the award and judgment of the court at the pleasure of the guardian and adversary claimant. The judgment is made as binding as if it were founded on the opinion of the court itself upon the merits of the claims."¹¹¹

The cases where individuals wished to have their awards set aside highlight the court's unwillingness to enter into areas that it deemed to be under the arbitrators' jurisdiction. In several cases, the court outlined the scope of that jurisdiction, preserving the arbitrators' independent authority over the award before, during, and after the submission of the award. For instance, in *Gilkinson v. Flower*¹¹² (1809), the court held that it was impermissible for a court to hear a matter in controversy while the arbitration on that matter was still pending. The court's decision in *Singleton v.*

104. 5 Ky. 456 (Ct. App. 1811).

105. *Id.* at 457. See also *Williams v. Davis*, 25 Ky. 533 (Ct. App. 1829) (award upheld in spite of mistake of judgment by arbitrators).

106. 5 Ky. 456 at 458.

107. *Id.* at 458.

108. 6 Ky. 41 (Ct. of App. 1813).

109. *Id.* at 45. See also *Clarke v. M'Kinney*, 12 Ky. 195 (Ct. App. 1822) (award upheld in spite of objections of fact).

110. *Irvine's Heirs v. Crockett*, 7 Ky. 437, 438 (Ct. App. 1816).

111. *Id.* at 438. See also *Lillard v. Casey*, 5 Ky. 459 (Ct. App. 1811) (court refused to set aside award at request of one party after award was made a decree of the court).

112. 4 Ky. 524 (Ct. App. 1809).

*Mason*¹¹³ (1810) highlighted the court's hesitancy to hear appeals from awards.¹¹⁴ In other rulings, the court held several times that the authority of the arbitrators over the matter in controversy pertained only to the parties who had agreed to the arbitration,¹¹⁵ and ceased with the submission of the award.¹¹⁶ This rule made sense, given the court's emphasis on party agreement to arbitration and the fact that the controversy itself ceased to exist once the award had been submitted. Thus, whether under common law or statute, the arbitration award was to be as conclusive of the matters in controversy as a court decision. In *Evans v. M'Kinsey*,¹¹⁷ the court stated, ". . . it is well settled at common law, that after a submission to arbitrators, and an award in pursuance to the submission, no action can be maintained on the original subject of the dispute. . . ." ¹¹⁸

In the 1820 case of *Shackelford v. Purket*,¹¹⁹ the court further evidenced deference for arbitration by holding in a land-title case that,

113. 5 Ky. 165 (Ct. App. 1810). Similarly, the court refused to hear an action by one party to compel the other party's performance of the award when the first party had not performed on the award as required. *Fleming v. Chinowith*, 2 Ky. 17 (Ct. App. 1801).

114. In *Singleton*, one party objected to the award after it was delivered to the court, claiming that the lower court did not grant him adequate time to gather proof. The Court of Appeals held that the objector should have brought an affidavit stating that his objections "were probably true" in order to cause delay in the finality of the award. Since the affidavit was not brought, the award was upheld.

115. These cases seem to apply to arbitration awards the general court rule that a decision cannot bind individuals who were not parties to the suit. See *Hay v. Cole*, 50 Ky. 70 (Ct. App. 1850) (award struck down because issued against a party not a plaintiff in the original suit, which had been submitted to arbitration); *Galloway's Heirs v. Hill*, 7 Ky. 475 (Ct. App. 1816) (arbitration between Galloway's heirs and Hill struck down because the original suit was between Hill and Galloway, not Hill and Galloway's heirs); *Smith v. White*, 40 Ky. 16 (Ct. App. 1840) (a wife who was not a party to the original suit could not be bound by the award); *Lemon v. Cherry*, 4 Ky. 253 (1808) (a principal will not be held to an award when he did not give his agent authority to submit the dispute to arbitration); *Waggener v. Bell*, 20 Ky. 7 (Ct. App. 1826) (action of assumpsit not permitted to discharge a claim against an individual not party to the arbitration and award). But see *Keith v. Gore*, 24 Ky. 8 (Ct. App. 1829) (in order to quiet title, a party in a land-dispute arbitration was assumed to represent intermediate buyers prior to himself). Perhaps to provide certainty of intent to submit, the court did require in one case the submission be by deed, and not by oral agreement, in speciality cases. *Logsdon v. Roberts' Exec.*, 19 Ky. 255 (Ct. App. 1826).

116. See *Martin v. Oneal*, 12 Ky. 54 (Ct. App. 1822) (award can not be valid subsequent to the original award since the arbitrators' authority ceased with the original award); *Lansdale v. Kendall*, 34 Ky. 613 (Ct. App. 1836) (arbitrators can not issue awards subsequent to the original award or change the decision in their original award); *Brown v. Warnock*, 35 Ky. 492 (Ct. App. 1837) (alterations to a submitted award will render the award invalid if the alteration is of a material part and was conducted without consent of both parties); *Cleveland v. Dixon*, 27 Ky. 226 (Ct. App. 1830) (if one or more arbitrators has had a change of opinion, the arbitrators must acquire the parties' consent before changing the award).

On a different jurisdictional issue, the court held that an order of reference could be set aside when the referees refused to act and that the parties' consent must be acquired before new referees could be appointed in their place. *Adams v. Essex*, 4 Ky. 149 (Ct. App. 1808).

117. 15 Ky. 262 (Ct. App. 1821).

118. *Id.*

119. 9 Ky. 435 (Ct. App. 1820).

although the arbitration was performed, “in pursuance of no statutory provision of this country, but was entered into by writing under the hands and seals of the parties, without causing it to be made and order of the court. . . .” it would nevertheless be upheld as a common law arbitration.¹²⁰ As a result, the award was put into “operation and effect.. .according to the rules and principles of the common law.”¹²¹ The court summarized by saying, “[t]hat, at common law, the award of arbitrators, regularly made, and in relation to a matter which might be submitted, is conclusive between the same parties in a contest involving the same matter, is a proposition too well settled to need illustration by the citation of authorities.”¹²²

Throughout the first half of the nineteenth century, the Kentucky Court of Appeals continued to defer to the decisions of arbitrators by expressing support for common law arbitration,¹²³ upholding awards in spite of mistakes of law or fact,¹²⁴ and striking down awards only when there was evidence of fraud¹²⁵ (especially in cases where evidence was

120. *Id.* at 438.

121. *Id.*

122. *Id.* For another example of court deference, see *Brown v. East*, 5 Ky. 405 (Ct. App. 1827) (court upheld a previous arbitration and award that had resolved part of a current controversy, regardless of the fact that the records had been lost.)

123. *Frost v. Smith's Heirs*, 30 Ky. 126, 127-128 (Ct. App. 1832).

124. As stated previously, in *Baker's Heirs v. Crockett*, 6 Ky. 41, 45 (Ct. App. 1808), the court held that an award at common law or statute could not be set aside for a plain mistake in the body of the award. See also *Lillard v. Casey*, 5 Ky. 459 (Ct. App. 1811) (a party to an award can not resort to court because of an arbitrator mistake on legal issues or the admissibility of evidence). For more on evidence, see *Offut v. Proctor*, 7 Ky. 252 (Ct. App. 1815) (the fact that the arbitrators had heard evidence on matters not included in the submission did not make the award void, even if the arbitrators exercised misjudgment in hearing the evidence, since arbitrators had the power to decide what evidence was competent or relevant). The ability of arbitrators to determine what evidence they should hear was affirmed in *Harding v. Wallace*, 47 Ky. 536 (Ct. App. 1848). Although, in 1829, the court in *Callant v. Downey*, 25 Ky. 346, 348 (Ct. App. 1829) struck down an arbitration award for an evident mistake on the face of the award, the court seemed to clarify its hesitancy to strike down arbitration awards in the 1830 decision of *Cleaveland v. Dixon*, 27 Ky. 226 (Ct. App. 1830). In *Cleaveland*, the court reaffirmed that an award would not be set aside for a mistake or a misjudgment unless the mistake or misjudgment was clear on the face of the award and operated to transform the award into something other than what the arbitrators had intended. 27 Ky. at 228. The protection here seems to be against the type of mistake that would transform the award itself into something the arbitrators themselves had not intended it to be. The court used *Cleaveland* to delineate its position on mistakes in arbitration awards, citing the previously mentioned cases of *Baker's Heirs*, *Ewing v. Beauchamp*, and *Offut v. Proctor* in its statement that: “Arbitrators constitute a cheap domestic tribunal, chosen by the parties themselves; and no appeal lies from their judgments. If they misjudge the law, or misconceive the facts, without any improper interference by either party, or any improper conduct in themselves, their award can not be set aside merely for such misjudgment, or mistake also, unless the award itself show the mistake; nor will a mistake, apparent on the face of the award, be sufficient for setting it aside, unless it is of such a character as to show, that the deduction of the arbitrators, was a mistaken inference from the facts, or that the facts themselves did not authorize the conclusion drawn from them, and, that therefore, the award is not what the arbitrators intended that it should be.” 27 Ky. at 228 (Ct. App. 1830).

125. In *McCawley's Adm'r v. Brown's Adm'r*, 51 Ky. 132 (Ct. App. 1851), the arbitration was struck down because of multiple issues where the arbitration had not been

not heard by all arbitrators).¹²⁶ The court stated explicitly that it was so holding in order to avoid a scenario in which the arbitrations would “be regarded more than useless; and settlements by parties themselves would be idle and unavailing.”¹²⁷

In the late 1830s, the court not only continued its long-standing deference, but affirmed it explicitly, stating in *Shockey’s Administrator v. Glasford*¹²⁸ (1837):

the mode of settling controversies by arbitration has, in modern times, become peculiarly the favorite of the law, and the ancient niceties and technicalities applied to it, have given away to a more rational and liberal construction, with a view to encourage and sustain this mode of putting an end to litigation.

This was a trend that continued throughout the 1850s¹²⁹ with the court in *Overly’s Executor v. Overly’s Devisees*¹³⁰ (1858) stating, “the statute of 1798, concerning awards, did not alter the common law of arbitration and award.” The court went on to say:

There is nothing contained in the provisions of the Revised Statutes or of the Code of Practice on this subject, which repeals the common law, or prohibits a submission under an agreement of the parties. The manner in which controversies may be submitted to arbitration, under an order or rule of court, so that the award may be made the judgment of the court, is therein prescribed; but the common law on the subject is not altered, nor are parties prohibited from submitting their controversies to arbitration without the intervention of a court.¹³¹

Strict Construction of Arbitration Statutes and Reversal on Technicalities

A second claim Horwitz makes is that courts showed their lack of deference to arbitration awards by strictly construing arbitration statutes

conducted properly, and most notably, where the arbitrator did not have the proper authority to act over an estate. *See also Maysville. W., Pl. & L., Turnpike Road Co. v. Waters*, 36 Ky. 62 (Ct. App. 1837) (affirmed the overturning of an award in light of several issues, including a claim that the award was made *ex parte*, a claim that one party was not given notice, alleged bias of the arbitrator, mistakes of law and fact, and the fact that there had been no request by the parties to submit the dispute to arbitration).

126. *See Callant v. Downey*, 25 Ky. 346, 348 (Ct. App. 1829) (award will not be upheld where there is fraud); *Hickey v. Grooms*, 27 Ky. 124, 125-26 (Ct. App. 1830) (the fact that evidence was heard by only one arbitrator resulted in “undue means” of settlement that was fatal to the award); and *Henderson v. Buckley*, 53 Ky. 236 (Ct. App. 1853) (court held that the arbitrators must all hear the evidence and act on the award together); *Blanton v. Gale*, 45 Ky. 260, 264 (Ct. App. 1845) (award fails because arbitration submitted to two arbitrators but at least some evidence heard only by one); *Morrison’s Ex’rs v. Barnett’s Comm’rs*, 5 Ky. 270 (1811) (commissioners appointed by special statute to convey a piece of land must act jointly to submit any controversies to arbitration).

127. *Callant*, 25 Ky. at 348.

128. 36 Ky. 9, 10 (Ct. App. 1837).

129. *Carson v. Carson*, 58 Ky. 434, 434 (Ct. App. 1858) (discussing arbitration under the Civil Code of Practice, § 499, Subdivision 1); *Carson v. Carson*, 59 Ky. 96, 97 (Ct. App. 1859) (upholding common law arbitration).

130. 58 Ky. 117, 119 (Ct. App. 1858).

131. *Id.* at 117, 119-129.

so as to strike down awards on mere technicalities. He cites Massachusetts as an example.¹³² While Horwitz states that this was one of the ways in which courts worked to eliminate the use of arbitration, Kentucky case law shows that the Kentucky statutes were actually applied by the courts as the legislature had intended: to uphold arbitration.

As discussed previously, Kentucky courts regularly distinguished between common law and statutory arbitration and were careful to adhere to the intent of the legislature in applying the statutes. Such careful application was more likely to uphold an arbitration award than to strike it down. Furthermore, the Kentucky courts not only refused to use the arbitration statutes to construe arbitration out of existence, they also refused to deny the validity and legitimacy of arbitration awards achieved outside of the statute through the common law. Thus, far from decreasing their deference to arbitration awards, Kentucky courts increased their deference by allowing arbitration under both the statute and the common law. And far from searching for technicalities to dismiss arbitration awards, the Kentucky courts often looked to the legislative intent to uphold even those awards that did not fully comply with the technical details of the statute.

Kentucky courts refused to expand the technical requirements of the statute in order to increase their ability to strike down arbitration awards in several areas, including the selection of judges as arbitrators,¹³³ failure to provide notice to parties of the time and place of the arbitration or of the entrance of the award as a judgment of the court,¹³⁴ awards that were

132. HORWITZ, *supra* note 1, at 151.

133. In *Galloway's Heirs v. Webb*, 3 Ky. 326 (Ct. App. 1808) the legislative act permitted parties to choose their arbitrators so the fact that the parties had chosen to have the judges act as arbitrators was not fatal to the award.

134. Awards were invalidated on grounds of failure to provide notice when a party did not have notice of the time and place of the arbitrators' meeting or if the party was not present at the making of the award. *Craig v. Hawkins*, 3 Ky. 46 (Ct. App. 1806). However, *Hopkins v. Soudoukie*, 4 Ky. 148 (Ct. App. 1808) held that if a party was present at the judgment of the award, and did not voice an objection to lack of notice at that time, that party lost the right to that objection as a result of his silent presence. *Cleaveland v. Dixon*, 27 Ky. 226 (Ct. App. 1830) reiterated this rule and *Harding v. Wallace*, 47 Ky. 536 (Ct. App. 1848) held that a party similarly lost that right if the party's attorney was present on the party's behalf. Thus, in the notice cases, the court seemed to be acting not out of a desire to adhere to formal notice requirements, but out of a desire to protect parties against the possibility of fraud conducted in their absence. *Wrigglesworth v. Morton*, 5 Ky. 157, 161-63 (Ct. App. 1810), in which the court upheld an arbitration award even when parties were not present for the writing out of the award, supports this interpretation. In *Wrigglesworth*, the court said that if both parties were present for all of the law and evidence portions of the arbitration, as long as each party acquired a copy of the award at least fifteen days before judgment on the award as required by statute, then the fact that the parties were not present for the actual writing out of the award would not be fatal. The implication is that the parties were present to view any wrongful conduct and had notice, under the fifteen days requirement, of the time that the award would be entered as a judgment of the court and could therefore be present to view the final award at that time. Following the language of the Code of Practice, the court came to view this time requirement even less strictly in later years. *Carson v. Carson*, 58 Ky. 434, 436 (Ct. App. 1858). Continuing its desire to adhere to purpose over technicalities of notice, the court stated that the fact that a party had an award was *prima facie* evidence

broader than the original items submitted for arbitration,¹³⁵ arbitrators'

that it had been delivered to him by the arbitrators as their award *Lansdale, Kendall*, 34 Ky. 613 (Ct. App. 1836). The court took their notice holdings even further by stating that, even if the copy of the award was not delivered to a party at all, that would only be cause for non-judgment if the party who did not receive the copy was at no fault or neglect in the fact that he did not receive a copy. Thus, a party was not allowed to cry fraud as the result of his own misconduct. Neither was a party allowed to avoid payment of the award on grounds that the award had stated no time payment for the payment; the court in *Slack v. Price*, 4 Ky. 272 stated that if not time frame for payment was stated in the award, then payment was due as soon as the award was made. Although *Saunders v. Throckmorton*, 2 Ky. 324 (Ct. App. 1804), held that an award would be void if it did not appear on its face that the arbitrators had agreed to meet at a certain time and place, the later case of *Keans v. Rankin*, 5 Ky. 88 (Ct. App. 1810) seemed to dispense with that rule, with the court holding that the law did not require that the face of the award show that the parties had notice of the place and time that the award would be made. This later rule was upheld in *Shockey's Administrator v. Glasford*, 36 Ky. 9, 13 (Ct. App. 1837), in which the court reiterated that the technical requirement for notice was dispensed with if both parties agreed to meet at a certain time and place for the arbitration and actually did meet and go through with the arbitration. For holdings regarding the fifteen days requirement, see *Shult v. Travis*, 2 Ky. 140 (Ct. App. 1802) (held that delivery of the award was not required by the law); *Phillips v. Travis*, 2 Ky. 174 (Ct. App. 1802) (upheld the fifteen days rule as required by statute and thus struck down an award submitted after only nine days, stating that the full fifteen days was required to insure that a party would have the ability to make objections to the award prior to judgment); *Keans v. Rankin*, 5 Ky. 88 (Ct. App. 1810) (award upheld even though judgment was made before fifteen days had passed because the parties had agreed to return award for judgment within the current term); *Middleton v. Hume*, 26 Ky. 221 (Ct. App. 1830) (judgment can be entered before the fifteen days have passed only if both parties are in court, agree to have the judgment entered, and have waived their objections); *Harding v. Wallace*, 47 Ky. 536 (Ct. App. 1848) (even if copies of the award are not delivered at all, that is only a ground for continuance, not a ground for invalidation of the award); *Adams v. Hammon*, 49 Ky. 5 (Ct. App. 1849) (judgment cannot be entered in the same term in which the award was sent to arbitration unless the parties are given copies 15 days prior to judgment). However, in cases where the court did set aside an order of reference, it made clear that objections to setting aside the order had to be made at that time the order was set aside or that such objections would be effectively waived (*Trigg v. Shield*, 3 Ky. 176 (1807); *Casky v. January*, 3 Ky. 549 (1808)).

135. The general rule here seems to be to uphold the award insofar as it pertains to matters that were stated in the declaration of controversies. For instance, *Curd v. Wallace*, 37 Ky. 190, 194 (Ct. App. 1838) cites the proposition that only those matters submitted would be upheld but that an arbitration award that encompassed more than what was submitted would not make the award fatal in its entirety but would only make the award void as to those items not submitted. See also *Grimes v. Grimes*, 31 Ky. 234, 234 (Ct. App. 1833) (statute requires that the parties state what disputes they are referring to the arbitrators); *Smith v. Cutrights*, 2 Ky. 145 (Ct. App. 1802) (the subject in controversy was "so imperfectly and defectively stated in the submission" and "the arbitrators have awarded upon matters which by no legal intentment, can be within the submission" that the award was set aside); *Blunt v. Sprowl*, 2 Ky. 227 (Ct. App. 1803) (awards must contain a declaration of the nature of the controversy); *Turpin v. Banton*, 2 Ky. 312 (Ct. App. 1808) (an award not declaring the matters in controversy was void for uncertainty); *Fitzgerald v. Fitzgerald*, 3 Ky. 227 (Ct. App. 1808) (award must contain a declaration of controversies); *Emerson v. Hutcheson*, 5 Ky. 455 (Ct. App. 1811) (award must contain a declaration of controversies). The court also struck down awards that determined matters not outlined in the declaration of controversies. See *Carmack v. Grant*, 15 Ky. 32 (Ct. App. 1824) (award invalid because it considered rent payments subsequent to the judgment on the award which were not in the declaration of controversies); *Brown v. Warnock*, 35 Ky. 492 (Ct. App. 1837) (entire award was struck down because to omit the item that was not declared would be to destroy the mutuality of the award); and *Sthreshly v. Broadwell*, 24 Ky. 340 (1829) (award struck down because the

use of umpires,¹³⁶ awards entered by fewer arbitrators than those to which the controversy had originally been submitted,¹³⁷ voidness for uncertainty,¹³⁸ and the submission of a dispute to arbitration as a bar to further

articles referred only to the ownership of a female slave, who then died before submission, and the subsequent award dealt only with ownership of the female slave's child). It is important to note, however, that the court did not strike down awards simply because the arbitrators had considered, but not determined, matters that fell outside the declaration of controversies. *Cleaveland v. Dixon*, 27 Ky. 226 (Ct. App. 1830). In addition, in *Engleman's Executors v. Engleman*, 31 Ky. 437, 439 (Ct. App. 1833), the court stated that it should be assumed that all parts of a claim had been submitted to the arbitrators. Furthermore, in the later case of *Newton v. West*, 60 Ky. 24, 25 (Ct. App. 1860), the court took a more liberal view of submission statements. Newton and West had dismissed their court suit and referred the matter to arbitrators. West challenged the award, stating that it was broader in scope than those matters the parties had submitted to the arbitrators. The court upheld the award, stating that since the parties' law suit would have encompassed all matters, and the arbitration was submitted to in place of the law suit, then the arbitration could encompass all matters as well.

136. The court in *Daniel v. Daniel's Administrator*, 36 Ky. 98, 98-100 (Ct. App. 1838) struck down an award because the two arbitrators chose an umpire to settle the case but had no authority to do so since the arbitration had been referred not to the umpire, but to the two arbitrators. However, in *Tyler v. Webb*, 49 Ky. 123 (Ct. App. 1849), the same court later stated that when two parties had submitted their disputes to two referees and an umpire, it was permissible that the award be decided by all, even though the job of the umpire was only to step in if the referees disagreed, because "it would seem to be, in such cases, perfectly consistent with the intention and understanding of the parties, that the arbitrators with the assistance and approbation of the umpire should make the award, and that being made jointly by them all, it was done in exact conformity with the views and intention of the parties to the submission. . . ." The distinction here may hinge on what the court considers to be the intention of the parties in choosing who will arbitrate their dispute. See also *Keans v. Rankin*, 5 Ky. 88 (Ct. App. 1810). Additionally, in *Newton v. West*, 60 Ky. 24, 26 (Ct. App. 1860), the court held that there could be no objection to the fact that the arbitrators chose an umpire before they needed him because it was more convenient to have the umpire there to hear all of the evidence from the start and the umpire properly acted within his sphere of duties as an umpire.

137. The court upheld the notion that the award should be determined and made by all of the arbitrators to whom the parties had submitted their disputes, but it did not go out of its way to invalidate such awards. For instance, the court in *Patten v. Collins*, 2 Ky. 153 (Ct. App. 1802) invalidated an award made by three arbitrators when the submission had been to four arbitrators with no acknowledgment in the submission that the parties had agreed that he award could be made by less than four. However, in *Massie v. Spencer*, 11 Ky. 320 (Ct. App. 1822), the dispute was submitted to three arbitrators. The arbitrators returned the award. Later, one arbitrator stated that he had not agreed with the award, that the award had only been made by the other two, and that he had thought that an award of the majority was permissible under law. The court upheld the award, stating, "after an award is delivered as an award of all [three], its legal effect ought never to be overturned by the introduction of parol evidence, to show that the award was made through a misconception of law in the arbitrators." *Id.* at 322.

138. The court seemed to distinguish between awards that clearly left the parties in a state of uncertainty as to performance and therefore should not be upheld and awards on which performance could occur. For instance, in *Orear v. Singleton*, 2 Ky. 65 (Ct. App. 1801), the court held an award void for uncertainty because it required: (1) one party to relinquish a portion of a tract of land but did not say how that portion was to be determined, and (2) that same party to make a payment but did not say at what time interest would begin to be calculated. See also *Cox v. Smyth*, 3 Ky. 420 (Ct. App. 1808) where an award in a land dispute was not enforced because the absence of a survey left the land designations uncertain. In contrast, the court repeatedly held that awards that granted costs to one party were certain

action.¹³⁹ The statutory requirement that arbitrators be sworn in before making an award provides an interesting example of an area in which the court adhered to a more technical requirement, questioned the strictness of that requirement, and then looked for ways in which it could presume compliance with that requirement, despite the absence of explicit language that the requirement had been met.¹⁴⁰

since the court determined the costs. *Short v. Kincaid*, 4 Ky. 420 (Ct. App. 1809); *Cartwright v. Trumbo*, 8 Ky. 359 (Ct. App. 1818); *Harding v. Wallace*, 47 Ky. 536 (Ct. App. 1848). But see *Brown v. Warnock*, 35 Ky. 492 (Ct. App. 1837), which held that an award for costs is certain but will be void if the costs were not ascertained. This case seems to be an outlier since, in the later case of *Cloud v. Hughes*, 42 Ky. 375 (Ct. App. 1843), the court went out of its way to say that an award that gave costs was final even if it did not settle who should pay the costs since costs in arbitration awards follow the same pattern as costs in jury verdicts. Emphasizing its commitment to upholding awards, the court stated, "An award which is specially favored by the law, in modern times, ought not to be set aside on such slight grounds."

139. See *Gore v. Chadwick*, 36 Ky. 477 (Ct. App. 1838) (holding a general bar to suits but stating that the suit was not barred in this instance because the agreement to submit to arbitration came after action had already commenced), *Engleman's Executors v. Engleman*, 31 Ky. 437, 438 (Ct. App. 1833) (stating that even a parol submission and award were a bar to the instant suit). The court did, however, go on to suggest that items that were in dispute between the parties but not part of the arbitration submission could be brought to court to be resolved. See *Davidson v. Davidson*, 49 Ky. 115, 116 (Ct. App. 1849). But see *Danville, Lancaster, and Nicholasville Turnpike Road Company v. Stewart*, 59 Ky. 119, 120-21 (Ct. App. 1859) (holding that a party could not object after trial that a reference had been set aside before the trial when he did not object at the time that it was set aside); *Peters' Administrator v. Craig*, 36 Ky. 307, 308 (Ct. App. 1838) (stating that a submission was not binding where there was no evidence that the parties had agreed to be bound by the submission and a suit was brought the day after the arbitration, before the award could have been made and completed. The court stated that this was a permissible revocation of the award because it occurred before the award was conclusively made); *Dorsey's Representatives v. Dorsey*, 30 Ky. 156, 157 (Ct. App. 1832) (court heard a dispute between a divorcing couple, ordered arbitration for the disputes remaining between the parties but then, at the next term of court, set aside the arbitration and continued handling the matter in court).

140. The requirement that arbitrators be sworn in changed dramatically over time. The statute required that arbitrators take an oath, which the courts initially read to require evidence on the face of the award attesting to the fact that the arbitrators had actually been sworn in. *Jackson v. Steele*, 2 Ky. 21 (Ct. App. 1801) (award invalidated because it did not show that the arbitrators had been sworn in before making the award); *Blunt v. Sprowl*, 2 Ky. 227 (Ct. App. 1803) (fact that arbitrators were sworn in has to appear on the face of the award); *French v. Moseley*, 11 Ky. 247, 249-50 (Ct. App. 1822) (arbitrators' first award did not demonstrate that the arbitrators had been sworn in but an amended second award attesting to the swearing in actually went to court and was thus upheld). However, in the 1810 case of *Lile v. Barnett*, 5 Ky. 166 (Ct. App. 1810), the court stated a desire to remove this requirement: "If this question [of swearing in] were a new one, there would be great propriety in contending for the principle, that the arbitrators ought to be presumed to have done that which was only necessary to their right acting, but did not form a part of the award itself, unless the contrary was shown. But we conceive the question too long settled by the decisions of this Court, to be now stirred by us—*Bice v. Smock*, decided October term, 1798—*Shult v. Travis*, Pr. Dec., 163—*Blunt et ux. v. Sprowl et ux.*, Pr. Dec., 267." Unable to presume swearing in in general, the court moved to presume several aspects of the swearing in. For instance, in several cases, the court held that if the award showed that the arbitrators were sworn in, then it would be presumed that it was done in the proper way. See *Keans v. Rankin*, 5 Ky. 88 (Ct. App. 1810); *Aills v. Voirs*, 8 Ky. 190 (Ct. App. 1818); *Shryock v.*

The Court of Appeals seemed less inclined to uphold awards where important items were not included in the record,¹⁴¹ the case was extremely complex,¹⁴² or the matter was “wholly uncertain, undetermined, and open for future controversy.”¹⁴³ Nevertheless, in the late 1820s, the court explicitly discouraged the use of technicalities to overturn awards, stating:

It is not fitting that courts should be punctiliously exact, or fastidiously technical in the interpretation of awards by arbitrators. Arbitrations are comparatively cheap and speedy. They are favored by the law; and, in modern times, awards have received more indulgence and liberality than were extended to them anciently. They will be construed according to the dictates of common sense. Their words will generally be interpreted according to the popular understanding of them. In construing them, the only object of the judge, is to ascertain what the arbitrators intended.¹⁴⁴

This same proposition was echoed 30 years later when the court in *Snyder v. Rouse*¹⁴⁵ (1859) summarized the court’s stance on technical defeats of arbitration awards, stating:

Mere formal objections to awards should be disregarded. The settlement of controversies by arbitration is favored by law, and should be encouraged by sustaining awards, notwithstanding they may be liable to technical and formal objections, which do not affect the substantial rights of the parties.¹⁴⁶

Thus, the 1780-1860 case law of Kentucky does not reveal a judiciary actively hostile to arbitration and seeking to overturn awards on purely technical terms.

Morton, 9 Ky. 561 (Ct. App. 1820). In addition, the court held that, in a case where evidence was heard by arbitrators but no award was issued, the court would presume that the arbitrators had been sworn in and that the evidence could be properly submitted before the court. See *Kelly’s Executor v. Connell’s Administratrix*, 33 Ky. 432 (Ct. App. 1835). Finally, in *Snyder v. Rouse*, 58 Ky. 625 (Ct. App. 1859), the court upheld arbitration in a case where the arbitrators were not sworn.

141. In *Milner v. Turner’s Heirs*, 20 Ky. 240 (Ct. App. 1827) the court held that arbitrators should include all that they looked at in determining the award. Because the submission to arbitration was not included in the record, and a record of certain items was lacking, the arbitration was not upheld.

142. In *M’Clanahan’s Devises v. Kennedy*, 24 Ky. 332, 336 (Ct. App. 1829), the court sent a land inheritance dispute to court against decedent’s instructions for arbitration due to the great numbers of parties involved and the expected complexity of resolving the case. *Brooks v. Clay*, 5 Ky. 499 (1811) may also be such a case. In *Brooks*, the parties attempted an arbitration five years into what would become a fifteen-year dispute over land. The court set aside the order of reference during the thirteenth year of the dispute, but provided no reasons in the Court of Appeals record and listed no objections by either party.

143. Citing *McCullough v. Myers’s Ex’rs.*, 3 Ky. 206, 209 (Ct. App. 1808), in which an award was set aside because it was “not sealed, as expressly required by the submission, and because it leaves the matter wholly uncertain, undetermined, and open for future controversy.” The court showed a pro-arbitration bent, however, when it said that if the parties had agreed to the award, it would have been upheld even without the seal. See also *Coghill v. Hord*, 31 Ky. 350 (Ct. App. 1833), in which the court found that an award was uncertain because it was based on the value of the property in question but did not provide for a means to determine the value of that property.

144. *Gentry v. Barnet*, 25 Ky. 312, 315 (Ct. App. 1829).

145. 58 Ky. 625 (Ct. App. 1859).

146. *Id.* at 626-27.

Refusal to Refer on Questions of Law

A third trend Horwitz points to in his discussion of arbitration's decline at the turn of the century was the courts' new refusal to refer cases involving questions of law to arbitration. Horwitz cites *De Hart v. Covenhaven*,¹⁴⁷ (1801) in which the New York court asserted that it would no longer refer any case to an arbitrator if the case might have a question of law. Horwitz states that "[w]ith this decision, the judges had finally established their position as the sole and authoritative expositors of New York law."¹⁴⁸ He continues, "Thereafter, up through the time of the Civil War, arbitration in New York was confined to fact finding, and referees were required to follow judicially established rules. In short, during the first few decades of the nineteenth century, both juries and arbitrators were deprived of their prerevolutionary shares of lawmaking power."¹⁴⁹

Unlike the courts in Horwitz's history of New York, the Kentucky courts continued to refer decisions to arbitrators on issues of both fact and law, and arbitrators were seen as legitimately able to decide either. Arbitrators were given authority to determine cases among parties along the same lines that those cases could have been decided under the law.¹⁵⁰ Furthermore, it did not invalidate the award if the arbitrators had made a mistake in the interpretation of that law. For instance, in 1810, the court in *Wigglesworth v. Morton* cited previous case law when stating that an arbitration award "cannot be set aside for *mistake* of law, apparent in the body or face of the award."¹⁵¹ This deference to the arbitrators on questions of law continued even when the parties contended that the law was

147. *De Hart v. Covenhoven*, 2 Johns. Cas. 402 (N.Y. 1801). In *De Hart*, the counsel for the plaintiff moved to have the case submitted to reference. The counsel for the defendant provided an affidavit that stated that the case involved questions of law. The per curiam opinion of the court stated: "As the trial will involve the decision of law questions, the motion must be denied." *De Hart*, 2 Johns. Cas. At 402.

148. HORWITZ, *supra* note 1, at 150 (citing *Adams v. Bayles*, 2 Johns. 374 (N.Y. 1807); *Low v. Hallett*, 3 Cai. R. 82 (N.Y. 1805)).

149. *Id.* at 150 (citing C. Edwards, *The Law and Practice of Referees* 17-18 (1860)).

150. One area in which this was demonstrated was in the ability or inability of arbitrators to convey land. In *Dicken v. Griffith*, 23 Ky. 605, 607 (Ct. App. 1828), the court held that if the action submitted was one of ejectionment, then conveyance of land could not be a part of the award since "the ejectionment itself could not enforce such a measure, nor was such a matter in controversy." The court held that the arbitrators could rightfully convey lands in other areas in keeping with the law. In the later case of *Brown v. Burkenmeyer*, 39 Ky. 159, 160-63 (Ct. App. 1839), the court affirmed the "conveyance of the lease hold, as awarded by the arbitrators," stating that whether under an agreement or an award, "[t]he same moral obligation to convey, if the award was fairly made," exists. In *Stark's Heirs v. Cannady*, 13 Ky. 399 (Ct. App. 1823), the court also held that verbal submissions to settle land disputes were permissible if the verbal agreement regarding the land would be permissible under the statute of frauds. This principle of granting arbitrators the same powers as permitted under the law was further demonstrated by the court in *Evans v. M'Kinsey*, 15 Ky. 262 (Ct. App. 1821), in which the court held that, "In all cases where writing is not required to transfer the title of the thing in contest, a parol submission and award is as valid as a written one."

151. 5 Ky. 157, 161 (Ct. App. 1810).

handled wrongly. For instance, in *Ewing v. Beauchamp*¹⁵² (1813), the court reviewed the history of deference on questions of law and chose to uphold deference, stating:

Whether the arbitrators misjudged the law in their decision between the parties, we deem not necessary to be examined: for it is conceived from the act of 1798, concerning awards, no award should ever be set aside or invalidated on the ground of the misjudgment of the arbitrators. . . . It is evident that the misjudgment of the arbitrators in a point directly in issue between the parties, and submitted to them for their decision, is not embraced by the act as a cause for which the award can be invalidated. To permit such a construction would in effect defeat the salutary provisions of the law. For if because the court may think the law different from what the arbitrators have decided, they will quash an award, in every case where an issue of law is submitted the award cannot finally and certainly decide the controversy, but only place the cause in a different attitude for the decision of the court on the point of law. The parties thereby would be effectually precluded from having the benefit of a final decision of their cause, by judges of their own choosing, although the award may be made fairly, without corruption or partiality or other undue means.

Perhaps the best evidence for the proposition that the judiciary upheld the right of arbitrators to determine issues of law is *Rudd v. Jones*¹⁵³ (1836). In *Rudd*, two merchants entered into a dispute over payment of goods. Jones sued in court for payment and a verdict was returned. Neither party liked the verdict so they agreed to “set aside by consent.”¹⁵⁴ They then referred their controversy to arbitration. When the arbitrators found for Jones, Rudd filed to enjoin the judgment on the basis of “alleged partiality and fraud.”¹⁵⁵ The court upheld the arbitration award, finding “no proof of misconduct or partiality” and stating that “[t]he award does not exhibit, on its face, any evidence of miscalculation or mistake.”¹⁵⁶ The court said:

The parties having made the arbitrators judges between them, mere erroneousness in their judgment will not be sufficient for reversing or vacating the award. As to judgment respecting the law of the case submitted, they were the ultimate tribunal. . . .the arbitrators had the right to decide the question of law for themselves; and even though they may have decided erroneously, their judgment is final.¹⁵⁷

Thus, as case law demonstrates, throughout the first half of the nineteenth century, the Kentucky courts upheld the right of arbitrators to determine questions of law, consciously recognizing that, by doing so, they were upholding the jurisdiction of arbitrators and the legitimacy and finality of arbitration awards.

152. 6 Ky. 41, 45 (Ct. of App. 1813).

153. 34 Ky. 229, 230-31 (Ct. App. 1836).

154. *Id.* at 229.

155. *Id.* at 229-230.

156. *Id.* at 231.

157. *Id.* at 229, 231.

Merchants' Lack of Deference Signaling Court Victory Over Arbitration

Horwitz asserts that the merchants' increasing appeals of arbitration awards were evidence of the New York courts' success "in reversing the colonial pattern of merchants' deference to these awards."¹⁵⁸ This trend does not apply to Kentucky. Contrary to Horwitz's suggestion that the courts were trying to break down internal deference to the awards, the Kentucky courts continued to uphold arbitration awards on appeal, even in cases involving merchants. In upholding these arbitration awards, the Kentucky courts seemed to suggest a desire to strengthen deference to awards.

For instance, in *Southard v. Steele*¹⁵⁹ (1826), the court declined an opportunity to strike down a merchant award when it used persuasive precedent on an original question to hold that a merchant could bind his co-partner in a submission and award. This arbitration was upheld in spite of the fact that *A Petition for a Rehearing on the Merits*, filed by F.W.S. Grayson, Esq., and included in the opinion, decried this decision, incorporating much of the anti-arbitration language and sentiment Horwitz speaks of in his work.¹⁶⁰ Three years later, in *Gentry v. Barnett*¹⁶¹ (1829), two merchants agreed to submit all of their disputes except one to arbitration. When one party sued for performance of the award, the case went to court, and the Court of Appeals upheld the award.

*Rudd v. Jones*¹⁶² (1836) provides an excellent example. As stated previously, Rudd involved a dispute between two merchants who first received a verdict from court and then mutually agreed to submit to arbitration. When the arbitration award was returned for Jones, Rudd sued. The court upheld the arbitration award as binding on the parties, stating that they could not strike down the award "without shaking the stability of judicial awards, and subverting the long and well established doctrines of the law respecting their validity and effect."¹⁶³ Even as late as 1860, the court continued this trend by upholding the few arbitration agreements engaged in between merchants that made their way to court.¹⁶⁴

158. HORWITZ, *supra* note 1, at 150.

159. 19 Ky. 435, 438 (Ct. App. 1826).

160. *Southard*, 19 Ky. at 435, 438, 441-46.

161. 25 Ky. 312 (Ct. App. 1829).

162. 34 Ky. 229, 230 (Ct. App. 1836).

163. *Id.* at 229, 232.

164. See *Newton v. West*, 60 Ky. 24, 25 (Ct. App. 1860). As stated previously, disputants Newton and West agreed to dismiss their court suit and use arbitration instead. After the arbitration award was granted, West challenged it, saying that it was too broad in scope. The Court of Appeals upheld the award, stating that because the lawsuit would have encompassed all matters, and the arbitration was submitted to in place of the lawsuit, then the arbitration could encompass all matters. Merchant disputes accounted for only 8 of 114 of Kentucky's total disputes and 8 of 72 of Kentucky's known disputes in arbitration from 1780-1860. See Table, *supra* note 64.

Conclusion to the Kentucky Account

Horwitz begins his account of the revolutionary triumph of law over arbitration from 1780-1860 based on a general theme of lawyer-merchant conflict, the increase and then decrease of the use of arbitration by the merchant class, the merchants' alliance with the legal community to overthrow arbitration, and the judiciary's use of statutory law to defeat arbitration awards. Horwitz claims that the judiciary, in defeating those awards, abandoned its common law deference to arbitration, began reversing on technicalities, refused to refer matters of law, and triumphed through the merchants' growing use of appeals. Each of these claims assumes a politically jealous judiciary that was hostile to the use of arbitration.

Yet, these claims do not apply to Kentucky, where existing social factors caused arbitration to gain, not lose, favor throughout the antebellum period. Kentucky was an agricultural state that remained embroiled in land-dispute claims throughout most of the nineteenth century. It was this conflict over land claims, and not a mercantile animosity toward pre-commercial lawyers, that seemed to fuel the need for and use of arbitration in antebellum Kentucky. Furthermore, Kentucky hosted a judiciary that, throughout the mid-nineteenth century, was extremely reluctant to overturn both common law and statutory arbitration awards. The Kentucky judiciary exhibited this attitude by focusing on intent rather than technicalities, continuing to refer matters of law, and generally supporting the use of arbitration as a valid and long-favored form of extrajudicial dispute resolution. The Court of Appeals' decision in *Overly's Executor v. Overly's Devises*¹⁶⁵ (1858) provides a good summary of where the Kentucky judiciary stood with respect to arbitration at the close of the antebellum period:

In modern times the submission of controversies to arbitration has been much more encouraged than it was anciently. It has been the policy of the law to favor the settlement of disputes in this manner. It is attended with much less expense than the ordinary litigation in courts of justice, and is just as likely to result in a correct determination of the matters in controversy between the parties. Acts have been passed by the legislature for its encouragement, by permitting the parties to proceed under an order of court, so that the award, when made, could be entered as the judgment of the court, instead of compelling the parties, as at common law, to resort to an action for a failure to perform it. . . . A mere error of arbitrators, either as to law or fact, is no ground for setting aside their award.¹⁶⁶

165. 58 Ky. 117, 120-22 (Ct. App. 1858).

166. *Id.* (citing *Rudd v. Jones*, 34 Ky. 229 (Ct. App. 1836)). *Overly's* case also expanded the common law use of arbitration by executors. At common law, an executor could submit a dispute regarding the estate of his ward but would be personally liable for the result. Therefore, he was "compelled in self-defense" to choose court instead. The *Overly* court stated that under the Code of Practice, a good faith submission by a decedent's personal representative would be binding and that the representative would not be personally responsible for any loss "unless the same be caused by his fault or neglect." 58 Ky. 117, 120-21. The court went on to say that there "does not seem to be any good reason" why this should not be extended to out-of-court submission as well. *Id.* at 121. The court said that

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The Kentucky account highlights the fact that Horwitz's thesis of a merchant-lawyer alliance that effectively discouraged the use of extrajudicial dispute resolution and a judiciary hostile to extrajudicial dispute resolution does not ring true for Kentucky, where the existing social factor of extensive land disputes worked to promote arbitration throughout the antebellum era.

It would be incomplete, however, to end the inquiry there. While Horwitz's account focuses mainly on an alliance of the lawyer and merchant classes, he also looks at another significant class of persons whom he believes contributed to the initial rise and ultimate decline in the use of arbitration: the Pennsylvania Quakers. In order to explore how Horwitz's account pertains to the role of the Quakers in the rise and fall of arbitration in antebellum America, I have chosen to look at the use of arbitration in New Jersey, a state that, like Pennsylvania, was heavily impacted by the Quaker influence.

In order to consider the applicability of Horwitz's thesis to Quaker New Jersey, we will first look at the historical context of Pennsylvania and New Jersey.

Horwitz's Account of Extrajudicial Dispute Resolution and Quaker Influence in Pennsylvania

Horwitz's Pennsylvania account differs from his general account of antebellum arbitration in that he includes the role of Quaker antilegalism as a catalyst for early use of arbitration in that state.¹⁶⁷ Thus, in describing what he sees as the rise and fall of arbitration in antebellum Pennsylvania, Horwitz looks particularly at the influence of Pennsylvania's large Quaker population.¹⁶⁸

Horwitz asserts that Quakers were very supportive of the use of arbitration. Quaker doctrine required Christians to avoid settling disputes through the law and, instead, to settle their differences by submitting the dispute to fellow Quaker arbitrators.¹⁶⁹ Horwitz sums up the Quaker atti-

although the form of common law arbitration and statutory arbitration under a rule of the court may differ, there is not such a "substantial difference" between them that "the ends of justice will be better promoted by one mode of proceeding than by the other." *Id.* at 121. Note, however, that the *Overly's* court then begrudgingly remanded the award on the basis that the statute requires an affidavit and, though the court would have been willing to waive the requirement if the intent of the requirement had been met through information cited in the record, no information was found and, therefore, in spite of the fact that "it is obvious that the failure to require the claimant to verify his demand by affidavit was a mere oversight on the part of the executor. . . . [the] judgment is affirmed." 58 Ky. at 122.

167. HORWITZ, *supra* note 1, at 151.

168. *Id.* at 151-54.

169. *Id.* at 151 (citing 2 T. CLARKSON, A PORTRAITURE OF QUAKERISM 56 (Phila. 1808)). This was a weighty doctrine, with its roots in St. Paul's charge to the church in Corinth:

tude toward arbitration and lawsuits by citing Quaker historian Thomas Clarkson as saying that, to the Quaker way of thinking,

[L]aw-suits are at best tedious. They often destroy brotherly love in the individuals, while they continue. They excite also, during this time, not infrequently, a vindictive spirit, and lead to family-feuds and quarrels. They agitate the mind also, hurt the temper, and disqualify a man for the proper exercise of his devotion.¹⁷⁰

The Quakers' pro-arbitration attitude began in pre-colonial times. In England, Quakers had developed a set of rules for settling disputes through the use of arbitration with an accompanying discipline for those who first submitted their differences to the legal system instead.¹⁷¹ This extended to the colonies and, in the 1600s, Pennsylvania Quakers created a system by which three or four Quakers would serve as "common peacemakers" and sit on arbitration boards to resolve citizen disputes.¹⁷² Even as late as 1790, referees accounted for the administration of justice in a great number of Pennsylvania disputes.¹⁷³

After describing the Quakers' initial support and promotion of arbitration in Pennsylvania, Horwitz states that, even in the large Quaker state of Pennsylvania, "there is strong evidence, similar to that in other states, of increased judicial resistance to extrajudicial resolution of disputes."¹⁷⁴ Thus, Pennsylvania was caught between two forces: the Quakers who supported and promoted arbitration and a judiciary that increasingly resisted it. As the judiciary grew increasingly hostile, the legislature sought to limit the powers of arbitration by passing more restrictive arbitration statutes that the judiciary then took care to interpret strictly.¹⁷⁵ Thus, Horwitz asserts it was the Quakers who led to the original rise in the use of arbitration but the hostile Pennsylvania judiciary, acting at times in concert with the legislature, which fatally undermined the use of arbitration in Pennsylvania.¹⁷⁶ It is my conclusion that, although New Jersey also has a Quaker foundation, Horwitz's history of Pennsylvania does not play out in New Jersey.

"Dare any of you having a matter against another, go to law before the unjust, and not before the saints?...If then ye have judgments of things pertaining to this life, set them to judge who are least esteemed in the church. I speak to your shame. Is it so, that there is not a wise man among you? [N]o, not one that shall be able to judge between his brethren? But brother goeth to law with brother, and that before the unbelievers. Now therefore there is utterly a fault among you, because ye go to law one with another. Why do ye not rather take wrong? [W]hy do ye not rather suffer yourselves to be defrauded?" 1 *Corinthians* 6:1-7 (King James).

170. HORWITZ, *supra* note 1, at 151, n. 68 (citing 2 T. CLARKSON, A PORTRAITURE OF QUAKERISM 57 (Phila. 1808)).

171. *Id.* at 151 (citing 2 T. CLARKSON, A PORTRAITURE OF QUAKERISM 56 (Phila. 1808)).

172. *Id.* at 151 (citing 1 A. CHROUST, THE RISE OF THE LEGAL PROFESSION IN AMERICA 210-211 (1965); ODIORNE, "Arbitration and Mediation among the Early Quakers," 9 *ARB. JO.* 161 (1954)).

173. *Id.* at 151 (citing 1 Dall. iv. (Preface to reports)).

174. *Id.* at 152.

175. *Id.* at 153-54.

176. *Id.* at 152-53.

New Jersey's Quaker History

Like Pennsylvania, New Jersey was heavily influenced by the Quakers. New Jersey began as a single proprietary colony in 1664 but was split into two proprietary colonies, East Jersey and West Jersey, in 1682.¹⁷⁷ After a time, both colonies were sold to Quakers, but they developed along different lines.¹⁷⁸ West Jersey's laws and courts reflected its Quaker heritage and proximity to Quaker-dominated Pennsylvania.¹⁷⁹ It was the first Quaker colony to be established in America and "[p]erhaps its most significant and lasting characteristic was the pervasive influence of the liberal and humane Quaker philosophy."¹⁸⁰ East Jersey also had a considerable number of Quakers who were predominant in land holding and government, but its population was more diverse than West Jersey, and its laws were more reflective of Puritan New England.¹⁸¹

Throughout the proprietary period, the "overwhelming majority of West New Jersey settlers were Quakers."¹⁸² The proprietors "for the most part were indifferent to the welfare of the inhabitants" and, as a result, "[b]asic concepts of conduct were continually renewed, fortified, and redefined" by the Quaker leaders.¹⁸³ In both colonies, Quakers served in governmental capacities as governors and assembly members.¹⁸⁴

The East and West Jersey colonies remained separate until 1702, when they were combined to form the royal colony of New Jersey.¹⁸⁵ After becoming a united royal province, New Jersey was ruled by a provincial governor and his councilmen who were appointed equally from what had been East Jersey and West Jersey.¹⁸⁶ New Jersey also had a legislature or assembly comprised of representatives from each of New Jersey's seven counties.¹⁸⁷ The legislature "had no part in constituting or regulating the courts. . . ."¹⁸⁸ The judiciary consisted of local justices of the peace and county courts, which had a limited jurisdiction; the supreme court, which exercised appellate and original jurisdiction; and, finally, the

177. 1 A. CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA* 194 (University of Oklahoma Press 1965).

178. PETER CHARLES HOFFER, *LAW AND PEOPLE IN COLONIAL AMERICA* 32 (The Johns Hopkins University Press 1992).

179. *Id.*

180. RICHARD P. MCCORMICK, *NEW JERSEY FROM COLONY TO STATE: 1609-1789* 38 (D. Van Nostrand Company, Inc. 1964).

181. HOFFER, *supra* note 178, at 32.

182. JOHN E. POMFRET, *THE PROVINCE OF WEST NEW JERSEY, 1609-1702: A HISTORY OF THE ORIGINS OF AN AMERICAN COLONY* 216 (Princeton University Press 1956).

183. POMFRET, *supra* note 182, at 216.

184. RUFUS M. JONES, *THE QUAKERS IN THE AMERICAN COLONIES* 379 (Macmillan and Co., Limited 1911).

185. MCCORMICK, *supra* note 180, at 58.

186. *Id.* at 59-61.

187. *Id.*

188. *Id.* at 62.

governor and his council, which served as the province's highest court by hearing appeals from the supreme court.¹⁸⁹

It was during this time, at the turn of the century, that the population in New Jersey began to change.¹⁹⁰ Immigration was increasingly non-Quaker and, by the early 1700s, "no more than half of the inhabitants of the province were Quakers."¹⁹¹ This diversity was reflected throughout the provincial period as New Jersey was settled by high populations of Dutch, German, Swedish, and French settlers.¹⁹² The colony remained largely agricultural with some iron mining, lumbering, fishing, skilled craftsmanship, and small scale commercial activities. Commercial activity was widely dispersed and "merchants as a class were not so powerful or influential as in the neighboring colonies [of Pennsylvania and New York]."¹⁹⁴

New Jersey was also diverse religiously, with Presbyterians and Quakers holding the largest number of congregations and the Dutch Reformed, Baptists, and Anglicans holding lesser numbers of congregations.¹⁹⁵ There were also smaller numbers of German Lutherans, Swedish Lutherans, and Methodists.¹⁹⁶ Many of the congregations were hampered by an inability to secure pastors. The Presbyterians seemed to lead in strength with well-educated pastors and their own college, the College of New Jersey (later Princeton).¹⁹⁷ Nevertheless, the Quakers asserted a distinctive influence in West Jersey throughout the 1700s.¹⁹⁸ Although they began to withdraw politically because of their pacifism, "[m]ore than any other denomination, they were to serve as the moral conscience for the new society."¹⁹⁹ Throughout the 1700s, Quaker mores exerted influence in "the cultural pattern of the Delaware valley."²⁰⁰ The Quakers predominated in humanitarian concerns, and "as the years passed they won many allies among the members of other denominations."²⁰¹

During the provincial era, "the assembly remained a powerful organ of the popular will."²⁰² Although often divided into various factions, including Scotch proprietors, English proprietors, various business

189. *Id.*

190. *Id.* at 52.

191. *Id.*

192. *Id.* at 80-81.

193. *Id.* at 87-92.

194. *Id.* at 91.

195. Out of 180 total congregations, the congregations held by each of these sects were: Presbyterian, 50; Quaker, 40; Dutch Reformed, 30; Baptist, 30; and Anglican, 20. *Id.* at 93.

196. Out of 180 total congregations, the German Lutherans, Swedish Lutherans, and Methodists combined held 10 congregations. *Id.* at 93.

197. *Id.* at 93.

198. *Id.* at 95.

199. *Id.*

200. *Id.* at 52.

201. *Id.* at 102.

202. *Id.* at 63.

investors, Quakers, and Anglicans, “the assembly was a potent instrument of representative government. . . [and] little could be done in the colony that did not have a fair measure of public acceptance.”²⁰³

This same strength of the assembly was reflected in early statehood. When New Jersey declared itself an independent state, it set up a new state government in 1776 that reflected the legislative and judicial branches of the provincial government but was greatly weighted in authority toward the legislature.²⁰⁴ Throughout the 1780s, the Quakers dominated former West Jersey politics while former East Jersey was dominated by a faction of agrarian-debtors.²⁰⁵ East Jersey and West Jersey members of the legislature were frequently in conflict over key issues such as boundary lines and finances.²⁰⁶

After the Revolution, Quakers continued to be a powerful force and the competing political parties vied for their support in the early 1800s.²⁰⁷ The law did not change to any great extent after the Revolution since the New Jersey Constitution continued those laws that had been on the statute books as of 1776.²⁰⁸ This included the English common law as practiced in New Jersey prior to 1776.²⁰⁹

As the history of New Jersey shows, the Quaker influence was widespread during its founding and continued to affect the cultural development of the new state after the Revolutionary War. As the Quakers settled the area that came to be the state of New Jersey, they brought with them their own unique customs and traditions. Among these was a strict adherence to the use of arbitration as the preferred means of dispute resolution. One of the best ways to highlight the importance Quakers placed on arbitration as a means of dispute resolution is by exploring the records of their monthly and yearly meetings.

Extrajudicial Dispute Resolution Among Quakers in New Jersey

As they made the New World their home, the Quakers established worship and monthly organizational meetings in both East and West Jersey.²¹⁰ They also established quarterly and yearly meetings, with the yearly meeting alternating between Burlington, West Jersey and Philadelphia, Pennsylvania until 1764, and remaining in Philadelphia thereafter.²¹¹

203. *Id.* at 63, 78.

204. *Id.* at 158.

205. CARL E. PRINCE, *NEW JERSEY'S JEFFERSONIAN REPUBLICANS: THE GENESIS OF AN EARLY PARTY MACHINE: 1789-1817* 7 (University of North Carolina Press 1964).

206. MCCORMICK, *supra* note 180, at 159.

207. WALTER R. FEE, *THE TRANSITION FROM ARISTOCRACY TO DEMOCRACY IN NEW JERSEY: 1789-1829* 134-35, 150 (Somerset Press, Inc. 1933).

208. *4 NEW JERSEY: A HISTORY 1148* (IRVING S. KULL, ed.) (The American Historical Society, Inc. 1930).

209. *Id.*

210. POMFRET, *supra* note 182, at 217.

211. *Id.* at 219-25.

Before the establishment of the yearly meeting, the Burlington Monthly Meeting “exerted remarkable leadership among the Quaker communities.”²¹² In 1679, Quakers at the Thirdhaven Monthly Meeting were instructed that “no Friend go forward in any suit of law without the advice and consent” of the Monthly Meeting.²¹³ At the 1681 Burlington Yearly Meeting, the Quakers were instructed not to resolve their disputes in courts of law but, instead, first to bring their disputes to the Monthly Meeting to be resolved: “It is ordered that if any differences do arise betwixt any two persons that profess Truth, that they do not go to law before they first lay it before the particular Monthly Meeting that they do belong unto.”²¹⁴

Under this system, a dispute was to be submitted first to the reference of at least two Friends and, if that proved to be unsatisfactory, it was to be resolved at the Monthly Meeting.²¹⁵ Compliance was taken seriously, and the Burlington Monthly Meeting warned strongly about the judgment one would incur for repudiating the arbitrators’ award.²¹⁶ Both the disputes and the means by which they were settled were to be reported at the Monthly Meeting.²¹⁷ This policy was reiterated at the 1710 Yearly Meeting:

‘As to Friends going to law with one another, it is the sense of this meeting that such things may not be admitted among us, but that as one party is ever in the wrong, that they may be found out and proper advice given and justice demanded; which, if neglected or refused, let such be testified against, as unworthy of our communion, and that without too much delay; that where the law of God, of righteousness, and Truth doth not take place in the heart, the law of men may curb and punish the wrong and injustice.’²¹⁸

The Quakers were clear in stating that to go to law was to be excommunicated from the Quaker society. The penalty for going to law was harsh, but the meeting record did go on, however, to list some narrow circumstances in which the Quakers believed the ability to receive a judgment of law was necessary and, therefore, permissible:

‘Yet nevertheless, in cases of executors, attorneys, factors, or the like, where both parties are agreed, but cannot effect the right and just part without a judgment of law in some temporal court, which, if necessary, must be had for the legal security of one or both, this meeting thought fit to declare, that any Monthly Meeting may judge of such necessity, and as they see cause, suffer the parties to have legal proceedings, so as not to reproach the Truth by contention or otherwise; being at the request of them both, and no other way to obtain their right and safety.’²¹⁹

212. *Id.* at 224.

213. EZRA MICHENER, A RETROSPECT OF EARLY QUAKERISM; BEING EXTRACTS FROM THE RECORDS OF PHILADELPHIA YEARLY MEETING AND THE MEETINGS COMPOSING IT 266 (T. Ellwood Zell 1860). This text is a reproduction of the records of the Philadelphia Yearly Meeting as well as the Burlington Monthly Meeting (among others).

214. *Id.* at 266-67.

215. POMFRET, *supra* note 182, at 225.

216. *Id.* at 225.

217. *Id.* at 225.

218. MICHENER, *supra* note 213, at 267-68.

219. *Id.* at 267-68.

At the following Yearly Meeting, the Quakers addressed some details of the alternative to using courts of law and held that, in cases where arbitrators were in disagreement and the Monthly Meeting had judged the cases, the party who felt wronged by the Monthly Meeting's decision would have the right to appeal to a superior meeting (such as the Quarterly or Yearly Meeting).²²⁰ Thus, while, as stated previously, Quakers placed great emphasis on their members abiding by the decisions of arbitrators, they also provided for those instances in which justice would demand the need for an appeal.

Several years later, at the 1719 Yearly Meeting, the meeting records again asserted both the general notion that Quakers were not to go to courts of law and also the special circumstances in which the judgment of a court of law might be deemed necessary for recovery:

In cases of debtors absconding, bankrupts, &c., the Monthly Meetings may 'permit, or hold excused, such as shall appear to them really necessitated to proceed otherwise.' And executors, administrators, &c., 'may be permitted to have the matter tried at law, or rather first determined in our friendly way, and then by consent, confirmed by a judgment, as the meeting may see occasion upon the matter to advise and direct; with this caution and care, that the parties on both sides concerned therein, do still appear and behave towards each other in brotherly love.'²²¹

The language here is important not only for the general rule and exceptions it provides, but also for the emphasis it places on Quakers settling *all* disputes outside of court, ("*first* determined in our friendly way"), even those that may later need a judgment of law in order to be effective. It was at this meeting that the Quakers also asserted that Quakers should not go to courts of law with non-Quakers without first attempting to resolve the dispute through arbitration.²²² This policy acknowledged that non-Quakers could not be required to submit their disputes with Quakers to arbitration but nevertheless encouraged Quakers to offer arbitration as an option for settling their disputes with non-Quakers whenever prudently possible.

The record of this meeting also reiterated the procedures regulating dispute resolution between Quakers, stating that a Quaker in conflict with another Quaker should first go to the other person and try to work it out. If that proved unsuccessful, he should take one or two Friends, "either the overseers or other discreet, judicious Friends"²²³ with him to try to work out a judicious end to the matter.²²⁴ If the dispute remained unsettled and the accompanying Friends could not persuade the disputing

220. *Id.* at 276-78.

221. *Id.* at 268.

222. *Id.* at 269.

223. *Id.* at 270.

224. Quaker teaching here stems from what must have been the familiar teachings of Jesus as recorded in *The Gospel of Matthew*. "Moreover, if thy brother shall trespass against thee, go and tell him his fault between thee and him alone: if he shall hear thee, thou hast gained thy brother. But if he will not hear thee, then take with thee one or two more, that in the mouth of two or three witnesses every word may be established." *The Gospel of Matthew* 18:15-16 (King James).

Friends to end their dispute, then the accompanying Friends were “to admonish and persuade the parties to choose referees or arbitrators.”²²⁵ Adherence to the award was emphasized with the statement that the disputing Friends should “engage themselves to stand to and abide by the determination of such referees or arbitrators, as usual in such cases.”²²⁶

In cases in which one party refused to arbitrate, the Quakers provided that the complying party should report the noncompliance to the Monthly Meeting where the parties could then “nominate, and each choose, one or more Friends, as the importance of the matter may require; and the meeting add one or more Friends to them, as they see occasion, for the determining of the said difference by majority.”²²⁷ If the party refusing to arbitrate did not attend the meeting, the meeting would nevertheless move forward in appointing arbitrators and a time and place for the arbitration.²²⁸ In recognition that noncompliance might continue, the record stated that

... if either party refuses to attend the arbitrators, and submit their case, or [to] stand to and abide the award, judgment, or determination of the Friends so nominated, chosen, or appointed, such person must be dealt with as one disorderly, and that regards not peace either in himself or in the Church, and that slights the love, order, and unity of the brethren. And, after due admonition, if he or she persists therein, let such be disowned and testified against by the meeting. . . .²²⁹

Once a party had been disowned, the offended Friend could “seek his remedy against him or her (so disowned) at the law.”²³⁰ This meeting also affirmed both the need for strict adherence to the arbitration award and the ability of disputing Friends to appeal from awards that they believed to be unjust.²³¹ The fact that the Quakers fully intended their members to live by these regulations is evidenced by the disowning of a member at the 1734 Concord Monthly Meeting for refusal to arbitrate and refusal to accept the judgment of the arbitrators appointed.²³² An offending Friend would remain ostracized from the Society “until he, from a sense of his error, do make such an acknowledgment as may be to the satisfaction of this meeting.”²³³ Two years later, the 1736 Concord Monthly Meeting record showed the appointment of arbitrators for a party who was not willing to arbitrate²³⁴ and in 1756, twenty years later, the Thirdhaven

225. MICHENER, *supra* note 182, at 270.

226. *Id.* at 269-70.

227. *Id.* at 267-68.

228. *Id.* at 271.

229. *Id.* at 270. Quaker doctrine here is a direct continuation of the teachings in *Matthew*. After requiring discussion one-on-one or, if necessary, with one or two other Christian brothers, Jesus then states, “And if he shall neglect to hear them, tell it unto the church: but if he neglect to hear the church, let him be unto thee as an heathen man and a publican. *The Gospel of Matthew* 18:17 (King James).”

230. MICHENER, *supra* note 182, at 270.

231. *Id.*

232. *Id.* at 272.

233. *Id.*

234. *Id.*

Monthly Meeting record showed a Quaker applying for and receiving permission to go to a court of law “for the recovery of some small debts, that he has due to him from sundry persons who are not Friends. . . .”²³⁵

Thus, throughout the first half of the eighteenth century, Quakers not only asserted a policy of submitting their disputes to arbitration whenever possible, but also supported that policy through the actions and declarations of their monthly and yearly meetings.

The Burlington Court Book shows that, shortly after the promulgation of the Quaker order to refrain from lawsuits, Quakers rarely appeared in the court minutes and, even then, it was often when only one party was a Quaker.²³⁶ Quakers did, however, serve in large numbers as judges in the courts and also as representatives in the West New Jersey assembly.²³⁷ Although they were opposed to using the court system themselves, they served in these capacities in an effort keep down the number of lawsuits as well as their costs.²³⁸ They used arbitration among themselves and “kept their own members out of the courts to a great extent.”²³⁹ In addition, the Burlington minutes reveal cases that employed arbitration “to end suits already begun before the secular tribunal.”²⁴⁰

It was this Quaker ideology that prevailed in the court system throughout the proprietary period and the call was for a “spirit of open, easy, and inexpensive justice. . . .”¹⁴¹ As stated by Jerold Auerbach in his work, *Justice Without Law*, the essence and outworking of this Quaker ideology was that:

No attorneys’ fees were required, anyone could plead his own cause. If conflict could not always be suppressed prior to litigation, the pressure for harmonious resolution was evident even after litigation began. At various stages the parties might request arbitration; at times the court ordered it. Arbitrators constantly struggled to reassert the principle of harmony. (One award instructed the disputants that ‘all quarrels, etc. between the said parties to this day cease.’ Another set of arbitrators pleaded ‘for the ending of all differences from the beginning of the world to the date hereof.’)²⁴²

235. *Id.*

236. THE BURLINGTON COURT BOOK: A RECORD OF QUAKER JURISPRUDENCE IN WEST NEW JERSEY: 1680-1709 xii (H. CLAY REED & GEORGE J. MILLER EDs., 1994) (reprint Kraus Reprint Co. 1975) (American Historical Association 1944) (hereinafter, BURLINGTON COURT BOOK). The Burlington Court Book is a reproduction of the minutes of the Burlington Court from 1680-1709.

237. *Id.* at xlvi, xlvi, li.

238. *Id.* at xlvi.

239. *Id.* at xlvi.

240. *Id.* at xlvi.

241. POMFRET, *supra* note 182, at 185. See also BURLINGTON COURT BOOK, *supra* note 236.

242. JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? 30 (Oxford University Press 1983) (citing TOLLES, MEETING HOUSE AND COUNTING HOUSE, 64-65, 75-76; ODIORNE, ‘Arbitration and Mediation,’ 164-65; REED AND MILLER, BURLINGTON COURT BOOK, xii, xlvi, 2, 29, 39, 44, 46, 70, 299, 339).

Horwitz's Pennsylvania Statutory and Case Law Conclusions as They Apply to New Jersey: Overview of Pennsylvania Statutes

Pennsylvania adopted an extrajudicial dispute resolution statute early on, in 1705.²⁴³ The Act allowed disputing parties to refer their dispute to arbitration and have the award entered in court. It stated:

In all cases where the plaintiff and defendant have accounts to produce one against another they may either by themselves or attorneys consent to a rule of court for referring the adjustment thereof to certain persons, mutually chosen by them in open court, the award, or report of such referees, being made according to the submission of the parties, and approved of by the court, and entered upon the record, shall have the same effect, and shall be deemed to be as available in law, as a verdict given by the jury. The awarded to be paid, shall have judgment, or a scire facias for the recovery thereof, as the case may require.²⁴⁴

An 1806 Act provided for two additional means by which parties could resolve their disputes extra-judicially: (1) by agreeing to submit to arbitrators of their choosing before going to court, or (2) by agreeing, in a pending court action, to consent to the court's rule of reference, which would refer their cause to arbitrators of their choosing.²⁴⁵ The 1806 statute also provided for the procedural requirements of arbitration through oaths and procedures governing the final award.²⁴⁶ In 1836, Pennsylvania passed a new law of arbitration that allowed for both compulsory and voluntary arbitration. This law replaced the 1806 statute and, according to Horwitz, with the passage of the 1836 statute, arbitration came to be highly regulated in Pennsylvania.²⁴⁷

Horwitz argues that Pennsylvania passed these arbitration statutes with the intent to regulate arbitration. He suggests that, in Quaker Pennsylvania, extrajudicial dispute resolution was effectively limited to a function of the court and an item of statutory law not so it could be promoted, but so it could be regulated and, by the mid-1830s, strictly interpreted nearly out of existence.²⁴⁸

The Unanswered Question

In his Pennsylvania account, Horwitz explains early Quaker promotion of arbitration, but then focuses on the political motivations of an emerging legal elite in order to explain the elimination of extrajudicial forms of dispute resolution. But there is a question left unanswered here: what happened to the Quakers? The underlying assumption seems to be that the Quakers lost their influence (at best) or were absorbed into the

243. FRANCIS KELLOR, *ARBITRATION AND THE LEGAL PROFESSION: A REPORT PREPARED FOR THE SURVEY OF THE LEGAL PROFESSION 13* (American Arbitration Association 1952).

244. *Id.* at 32 (quoting the Act).

245. *Id.* at 13.

246. *Id.*

247. *Id.* at 14.

248. HORWITZ, *supra* note 1, at 152-154.

legal system (at worst) in the 1780-1860 time period. But this seems unlikely. Pennsylvania was “at the forefront of the colonies in providing for arbitration.”²⁴⁹ Furthermore, it was populated by Quakers who supported extrajudicial dispute resolution not for political reasons, but for ideological reasons—reasons which were core to their understanding of what it meant to be Quakers. Would their ideals be cast off so easily by the rising legal elite, as Horwitz seems to suggest?

Not in New Jersey. Although Horwitz claims that the emerging Pennsylvania legal elite was politically motivated to bring about a revolution in the use of arbitration through the passage and strict construction of Pennsylvania’s arbitration statutes, the history of New Jersey suggests a very different purpose in the creation, application, and support of New Jersey’s arbitration statutes. In its comprehensive extrajudicial dispute resolution statute of 1794, the New Jersey legislature provided for several different kinds of extrajudicial dispute resolution, each of which the New Jersey judiciary supported, according to its statutory provisions, throughout the antebellum period. Furthermore—and this is where the ideological factor comes into play—the statutory regulations and the actual use of extrajudicial dispute resolution in New Jersey mirrored not only the common law of England but, more significantly, the rules and regulations that had been laid down by New Jersey Quakers for the use of extrajudicial dispute resolution among their members as early as the mid- to late-1600s. Thus, far from evidencing a politically motivated legal elite which sought to eliminate extrajudicial dispute resolution, the New Jersey statutes and their interpretation by the judiciary reflect a long-standing Quaker religious ideology that favored extrajudicial methods of resolving disputes.

Quaker Influence on Extrajudicial Dispute Resolution Statutes in West New Jersey, East New Jersey, and the Unified New Jersey State

This specifically Quaker influence on New Jersey’s extrajudicial dispute resolution statutes is demonstrated throughout New Jersey history. On September 20, 1682, the assembly of the colony of West Jersey passed the first arbitration law of any of the colonies.²⁵⁰ The law stated that lawsuits below a certain amount should be submitted to arbitration.²⁵¹ By 1688, East Jersey had followed suit and included arbitration in its laws as well.²⁵² Arbitration remained “an important method of settling disputes among the colonists” of New Jersey and, after the Revolution, New Jersey continued to support arbitration by adopting the English common law with its understanding of arbitration.²⁵³

249. HORWITZ, *supra* note 1, at 151.

250. KELLOR, *supra* note 243, at 11-12 (citing COMMERCIAL ARBITRATION IN NEW JERSEY, by S. Whitney Landon, Jr. (1925)).

251. *Id.* at 12.

252. *Id.*

253. *Id.* Throughout the eighteenth and nineteenth centuries, England supported four forms of arbitration through either the common law or Acts of Parliament: (1) arbitration by

The first New Jersey state statute referring to arbitration was passed on June 2, 1790.²⁵⁴ The statute was a supplement to a previous act regarding the making of a bank, dam, and waterworks along Newton Creek. The supplement included a provision by which individuals aggrieved under the Act could bring their grievances to reference. Under this section, an aggrieved individual could submit the grievance to reference by providing, within ten days notice to the person by whom he was aggrieved, a statement that he intended to apply to the Court of Common Pleas for an appointment of referees to settle the dispute. If the attending parties agreed, then, under a rule of reference, the judges of the Court of Common Pleas would appoint “three or more judicious Freeholders of the county” to “hear the parties and make their report at the next or any subsequent term.”²⁵⁵ The court gave the referees broad authority, stating that the referees were “fully authorized and empowered to hear and finally determine upon every circumstance, matter, and thing whatsoever that shall be laid before them by the parties” as related to the creek or dam, and that the referees could award whatever relief they believed “to be just

mutual consent outside of court (the most basic form of common law arbitration, which I have termed “Independent Arbitration”), (2) arbitration by mutual consent outside of court with award enforcement (whereby parties could seek to have their arbitration award entered as a rule of the court and thereby protected by the contempt power of the court, which I have termed “Arbitration with Award Enforcement”), (3) reference by consent under order of the court (whereby parties in a pending action could agree to refer their dispute to arbitration, instead, and have the award entered as a judgment of the court, which I have termed “Reference by Order of the Court”), and (4) reference under statutory command (whereby disputes regarding specific subject matters were required to be submitted to arbitration). See BLACKSTONE, *supra* note 38, at *16-17 and I EARL OF HALSBURY LORD HIGH CHANCELLOR OF GREAT BRITAIN, *THE LAWS OF ENGLAND BEING A COMPLETE STATEMENT OF THE WHOLE LAW OF ENGLAND* 437-493 (London, Butterworth & Co. 1907) [hereinafter *LAWS OF ENGLAND*]. England passed a comprehensive Arbitration Act in 1889 that superseded the previous laws while continuing the previous methods of arbitration. See I *THE COMPLETE STATUTES OF ENGLAND, CLASSIFIED AND ANNOTATED IN CONTINUATION OF HALSBURY’S LAWS OF ENGLAND AND FOR READY REFERENCE ENTITLED “HALSBURY’S STATUTES OF ENGLAND”* 451-71 (London: Butterworth & Co. 1929) [hereinafter *STATUTES OF ENGLAND*]. As will be demonstrated, the New Jersey Quakers required forms of arbitration that mirrored the first two of these four forms (Independent Arbitration and Arbitration with Award Enforcement). The New Jersey Legislature and Judicial system subsequently adopted both of those forms, as well as the additional form of Reference by Order of the Court. This latter form extended the power and use of arbitration by making it applicable to cases where actions were already pending. This latter form is a reflection of the Quaker admonishment for members, whenever prudently possible, to seek to remove any pending action from court and refer it to arbitration instead. Since the purpose of this article is to explore the relationship between the emerging legal profession (as embodied in the New Jersey judiciary and legislature) and the Quaker promotion of extrajudicial dispute resolution, I will primarily draw connections between the actions and attitudes of the New Jersey legal profession and the Quakers, although the principles of the common law may also be reflected.

254. A Supplement to an Act, entitled, ‘An Act to enable the Owners and Possessors of Meadow and Marsh lying on Newton Creek, in the County of Gloucester, to make and maintain a Bank, Dam and necessary Water-works, to stop the Tide out of the said Creek and to keep the Water-course thereof open and clear.’ ACTS OF THE FOURTEENTH GENERAL ASSEMBLY OF THE STATE OF NEW JERSEY, June 2, 1790, §§ 1-6.

255. *Id.* at § 5.

and equitable.”²⁵⁶

As stated in the statute, this provision was included “in order that all matters of difference now existing, or that may hereafter exist” between the parties under the statute, “may be speedily and equitably adjusted.”²⁵⁷ The purpose of the statute is reminiscent of the desire of the Kentucky courts and legislatures to end land disputes with speed and equity. The language of the statute, however, hearkens back to Quaker notions that parties in dispute could agree before or after entering a court of law to submit their differences to a panel of referees, instead. This statute recognized the validity of that option and upheld it, stating that the resulting award would be made “a judgment of the Court” and “shall be conclusive to the parties.”²⁵⁸ Thus, in 1790, the New Jersey state legislature affirmed the validity and importance of both the use of reference by parties in dispute and the court’s role in encouraging and enforcing this means of extrajudicial dispute resolution.

On December 2, 1794, New Jersey further evidenced its support for extrajudicial dispute resolution when it passed a comprehensive extrajudicial dispute resolution statute entitled, “An Act for regulating References and determining Controversies by Arbitration.”²⁵⁹ The stated purpose of the Act was “to promote trade, to facilitate the means of accommodation, to expedite the determination of controversies, and to render the awards of arbitrators the more effectual. . . .”²⁶⁰ The statute stated that the motivation behind the Act was that

it hath been found by experience, that references, made by rule of court, have contributed much to the advancement of justice, and the ease of the people, especially where long and intricate accounts, which are most proper for deliberate examination, are the subject of discussion. . . .²⁶¹

The statute assumed the existence of Independent Arbitration where parties voluntarily bound themselves to arbitration under the common law. The statute then addressed both Arbitration with Award Enforcement and Reference by Order of the Court.

Under section 1, the statute was addressed to “*all persons, who are desirous of ending, by arbitration, any controversy, suit, quarrel, or matter in contention, for which there is no other remedy but by personal action, or suit in equity*” may agree to undergo arbitration by a “a rule of the court.”²⁶² The italicized portion acknowledges of the existence of Independent Arbitration. The ability of the parties to use Independent Arbitration to settle their disputes was reflective of the very first kind of

236. *Id.*

257. *Id.*

258. *Id.*

259. ACTS OF THE NINETEENTH GENERAL ASSEMBLY OF THE STATE OF NEW JERSEY, December 2, 1794, §§ 1-6.

260. *Id.* at Preface.

261. *Id.*

262. *Id.* at § 1 (emphasis added).

arbitration promoted by the Quakers. The only pressure on the parties here would be non-legal.

The statute then went on to provide for what I have termed Arbitration with Award Enforcement. In this portion, the statute expressed the legislature's desire to "render the awards of arbitrators the more effectual" by providing that parties could strengthen the legal force of an Independent Arbitration award by making the submission and award a rule of the court.²⁶³ To do so, the parties would need to assert that agreement in the submission of their dispute to the arbitrators and, therefore, to "oblige themselves respectively to submit to the award. . . ."²⁶⁴ At this point, the arbitration would proceed much like an Independent Arbitration. The parties would choose their arbitrators and once the award had been decided upon by the arbitrators, witnesses to the agreement to make the award a rule of the court would submit an affidavit to the court. The affidavit would be filed and entered into the court records, and the award would be made a rule of the court.²⁶⁵ If one of the parties then failed to abide by the award, he would be "subject to all the penalties of contemning a rule of court, when he is a suitor or defendant in such court, and the court, on motion, shall issue process accordingly. . . ."²⁶⁶ Once the award was agreed to be made a rule of the court, it would be upheld, "unless it shall be made appear on oath or affirmation to such court, that the arbitrators or umpire misbehaved themselves, and that such award, arbitration or umpirage, was procured by corruption, or other undue means."²⁶⁷

This, too, reflected Quaker notions of arbitration in that the Quakers recognized and provided permission for those occasions in which an arbitration award would need to be entered as a rule of the court in order to provide the necessary protections for the disputing parties.²⁶⁸ Notice, however, the optional status of this provision. In order for court enforcement to occur, the statute required a witnessed affidavit stating that the parties had *mutually* agreed to enter the award as a rule of the court and to make it legally binding. The affidavit requirement seems to be an affirmation of Independent Arbitration in that the court is prohibited from involving itself in an arbitration between the parties unless it is clear that both parties agreed to the court involvement.

Section 2 provided further protections for individuals using arbitration by stating that arbitrations procured by fraud would be set aside by the court.²⁶⁹ The statute provided for the long-term security of arbitration

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. See *supra* notes 219 and 221 and accompanying text.

269. An Act for regulating References and determining Controversies by Arbitration, ACTS OF THE NINETEENTH GENERAL ASSEMBLY OF THE STATE OF NEW JERSEY, *supra* note 259, at § 1-2.

awards by providing a statute of limitations for making claims of “corruption, or undue means.”²⁷⁰ In section 6, the statute sought further to insure the fairness and justice of the awards by providing that, in arbitration cases, “every arbitrator shall . . . take an oath or affirmation,” which required him to agree “faithfully to hear and examine the cause in question, and make a just and true report, according to the best of his skill and understanding.”²⁷¹ The statute then went on to offer disputants a third means of extrajudicial dispute resolution: reference by Order of the Court.

The mechanism of Reference by Order of the Court is also reflective of Quaker ideals. Although Quakers did not wish to see their members go to courts of law, and directed them to resolve their disputes through Independent Arbitration and Arbitration with Award Enforcement whenever possible, they nevertheless recognized that there might be some occasions when parties would find themselves in court. On those occasions, the Quakers directed their members to seek once more to remove the dispute out of court and into extrajudicial dispute resolution if it would be prudent to do so.²⁷² The guidelines provided by the Quakers in their Monthly Meetings for removing a case from a court of law to reference are a precursor of this statute’s discussion and affirmation of Reference by Order of the Court.

The 1794 statute provided for the details of Reference by Order of the Court, stating that “whenever a cause shall be referred, by rule of court, to referees, the report or award of such referees, or of the major part of them, if confirmed by the court, shall be final, and conclude the parties. . . .”²⁷³ The statute provided for court-ordered enforcement and execution of the payments under the report, as well as the granting of costs to the prevailing party as would be granted under law.²⁷⁴ This language further strengthened the power of referees’ reports, perhaps encouraging parties to consider the benefits of submitting their in-court dispute to reference instead. Furthermore, the oath requirement of section 4 seemed to encourage Reference by Order of the Court between parties who had already brought their dispute into the judicial system by giving them the security of knowing that their court-appointed referees were bound by the same standards of truth and justice as in the law court.²⁷⁵

The last part of the statute that dealt with reference was section 5.

270. *Id.*

271. *Id.* at § 6, 4.

272. At the 1719 Yearly Meeting, Quakers stated that a friend in dispute should not go through litigation in a court of law without “having offered (where he safely may), . . . to put the matter to a neighborly reference” and that Friends in conflict with others should “show a willingness and readiness to agree it peaceably between themselves, or to submit to a reference.” MICHENER, *supra* note 213, at 269.

273. An Act for regulating References and determining Controversies by Arbitration, ACTS OF THE NINETEENTH GENERAL ASSEMBLY OF THE STATE OF NEW JERSEY, *supra* note 259, at § 3.

274. *Id.*

275. *Id.* at § 6, 4.

Under section 5, the statute provided the referee with a compensation of one dollar for each day spent on the reference as well as a “reasonable allowance for his expenses,” with these costs to be paid by the prevailing party, and then “allowed to such party in the taxation of costs, where costs are recoverable.”²⁷⁶ Furthermore, the statute granted to referees operating under Reference by Order of the Court the ability to issue subpoenas to call witnesses and to examine witnesses under oaths that the referees’ themselves would administer. Again, although not explicitly stated, the practical goal of such provisions seemed to be to encourage individuals to use Reference by Order of the Court by providing the referees with many of the same financial benefits and evidentiary powers held by the judicial system.

In each of the three types of extrajudicial dispute resolution included in this statute, the legislature built on notions of extrajudicial dispute resolution that had been asserted and practiced by the Quaker population for years. Thus, far from seeking to over-regulate or limit the use of arbitration, the legislature seemed to be trying to enhance the use and effectiveness of both arbitration and reference among those members of the increasingly diverse New Jersey society who might be less willing to mutually bind themselves to an arbitrator or referee to resolve their disputes.

The 1794 statute experienced only minor modifications in the following years. In 1818, the legislature passed an act that, among other things, extended to the justices of the peace and the court of common pleas the ability to conduct Reference by Order of the Court as provided for under the 1794 statute.²⁷⁷ In 1820, the legislature passed a supplement to the 1818 statute that allowed appeals from referee reports that had been entered as a judgment of the court by a justice of the peace along the same lines by which other appeals were granted.²⁷⁸

An 1821 statute also supplemented the 1818 act.²⁷⁹ Among other things, the 1821 Act restated the right to appeal from referees’ reports.²⁸⁰ To protect reports against frivolous appeals, section 6 stated that appeals would not be granted unless the appealing party filed an affidavit stating that “the said appeal is not intended for the purpose of delay, and that he verily believes that he hath a just and legal defence [sic] to make upon the merits of the case. . . .”²⁸¹ What would such a “just and legal defence” look like? In the absence of intervening statutory law, it seems that to be

276. *Id.* at § 5.

277. An act constituting courts for the trial of small causes, ACT OF THE FORTY-FIRST GENERAL ASSEMBLY OF THE STATE OF NEW JERSEY, February 12, 1818, §§ 1, 36, 40-41.

278. Supplement to the act, entitled “An act constituting courts for the trial of small causes,” passed the twelfth day of February, one thousand eight hundred and eighteen. ACT OF THE FORTY-FIFTH GENERAL ASSEMBLY OF THE STATE OF NEW JERSEY, November 17, 1820, § 1-7.

279. A further Supplement to the act, entitled, “An act constituting courts for the trial of small causes,” passed February twelfth, one thousand eight hundred and eighteen. ACT OF THE FORTY-SIXTH GENERAL ASSEMBLY OF THE STATE OF JERSEY, November 23, 1821, §§ 1-7.

280. *Id.* at § 2.

281. *Id.* at § 6.

just and legal, an appropriate challenge would assert behavior that was not in keeping with the requirements of a referee as stated under the 1794 statute, namely, that the referee would promise “faithfully and fairly to hear and examine the cause in question, and make a just and true report, according to the best of his skill and understanding. . . .”²⁸²

Judicial Response to New Jersey’s Extrajudicial Dispute Resolution Statutes

As shown through the 1794, 1818, 1820, and 1821 statutes, the New Jersey legislature looked favorably on extrajudicial dispute resolution throughout the early antebellum period. The legislature consciously or unconsciously reflected Quaker ideology in its codification of extrajudicial dispute resolution, modifying it only to extend its use to small claims and provide for necessary appeals in disputes of all sizes. The next question is how the New Jersey court system responded to the use of extrajudicial dispute resolution among the citizens who passed through its system. The research suggests, in the time period studied, the New Jersey Supreme Court remained favorable to extrajudicial dispute resolution and ruled on it in ways that, like the statutory provisions, reflected long-standing Quaker principles of resolving disputes outside of court. This attitude is attested to by four trends evident in the court’s decisions in the antebellum period: (1) affirmation all three kinds of extrajudicial dispute resolution throughout the antebellum period; (2) reflection of the common law desire to protect against fraud; (3) provision for necessary appeals while supporting the finality of awards; and (4) guarding against reversing on mere technicalities.

Court Support for All Three Kinds of Extrajudicial Dispute Resolution

Throughout the antebellum period, the New Jersey Supreme Court continued to uphold the legality and viability of all three kinds of extrajudicial dispute resolution that had been recognized first by the Quakers, and then by the 1794 statute.

In the 1791 case of *Schooley v. Thorne*,²⁸³ Reference by Order of the Court was upheld as permissible where the parties agreed to refer their dispute. The judge also recognized the traditional, common law availability of Independent Arbitration:

282. An Act for regulating References and determining Controversies by Arbitration, ACTS OF THE NINETEENTH GENERAL ASSEMBLY OF THE STATE OF NEW JERSEY, *supra* note 259, § 4. The full language states: “*And be it enacted by the authority aforesaid, That, in every cause referred by rule of court, each referee shall, before he proceeds to the business of the reference, take an oath, or affirmation, faithfully and fairly to hear and examine the cause in question, and make a just and true report, according to the best of his skill and understanding; which oath and affirmation any judge of any court of record, or any justice of the peace of this state, is hereby authorized and required to administer.*”

283. 1 N.J.L. 83 (N.J. Sup. Ct. 1791).

Every party clearly has a right to agree to submit his cause to other judges than those the law has appointed for him. The utility of these amicable references has been perceived and encouraged by the legislature, but it is a common law right, which grew into notice under the encouragement of the courts.²⁸⁴

The court further expressed support for Independent Arbitration in the 1828 case of *Sherron v. Wood*.²⁸⁵ In *Sherron*, the parties had agreed to submit their dispute to arbitration but had not agreed to make the award a judgment of the court. The award was found against Wood, and Sherron brought an action of debt on the arbitration bond. Wood brought pleas against the award. In refusing to invalidate the award, the court emphasized repeatedly that:

[t]he arbitrators are judges chosen by the parties themselves, and their awards are not examinable in a court, and then only for corruption or gross partiality. Courts of law cannot listen to suggestions contradicting the award or impeaching the conduct of the arbitrators.²⁸⁶

Moreover, the court interpreted the 1794 statute to mean that “our statute respecting arbitration” . . . says that courts . . . “never do, nor can, in a summary way, interfere with or set aside an award when the parties have not agreed that their submission to arbitration, should be made a rule of court.”²⁸⁷ Finally, the court emphasized its unwillingness to enter into disputes between parties uninvited:

If the parties wish to give this court jurisdiction over their awards, the law has provided an easy way for them to do it, by agreeing to make their submission a rule of the court. But they cannot be compelled. The statute gives them an option not to do so, and we can’t take it away.²⁸⁸

Far from usurping parties’ ability to settle their disputes extra-judicially, the court, by stating this boundary of consent, explicitly recognized areas in which parties might choose to settle their disputes apart from court interference. The court recognized these boundaries again two years later in the case of *Whitehead v. Gray* (1831), by stating that although it believed parties were often dissatisfied with arbitration awards made outside of the court of law, it would nevertheless uphold this form of extrajudicial dispute resolution, and would not interfere in it.²⁸⁹

In addition to supporting Independent Arbitration, the court also continued to show deference and favor toward Arbitration with Award Enforcement. In the 1847 case of *Bell v. Price*, the court upheld an arbitration award that had been made a judgment of the court, issuing a warning that:

[i]f the principle should be established that an award may be set aside under the circumstances in which this case is before the court, respectable and competent men will hesitate to act as arbitrators. They will not subject themselves to the

284. *Id.* at 87. (emphasis added).

285. 10 N.J.L. 7 (N.J. Sup. Ct. 1828).

286. *Id.* at 14.

287. *Id.* at 16.

288. *Id.* at 19.

289. *Whitehead v. Gray*, 12 N.J.L. 36, 36-37 (N.J. Sup. Ct. 1830).

hazard of having their judgments set aside upon a partial representation of the case to the court by a dissatisfied party.”²⁹⁰

Reference by Order of the Court was similarly upheld. In 1808, the court in *Prosser v. Richards*²⁹¹ did not find that the legislature, in the 1794 act, intended to extend to the courts of the justice of the peace the ability to refer disputes. Perhaps in response, the legislature passed a statute that granted such jurisdiction in 1818. The 1808 case should not be read as a desire to limit Reference by Order of the Court in general, however, since in 1811 the court held “[i]t is every day’s practice to enlarge by consent, rules of reference; there is nothing irregular or improper in it.”²⁹² Furthermore, courts did not seem eager to overturn Reference by Order of the Court awards, apparently doing so only when the parties had attempted to submit to reference before a case was actually pending, in contradiction to the requirements of the 1794 statute.²⁹³ The appropriate forum for resolving a dispute extra-judicially before a case was actually pending would have been Independent Arbitration or Arbitration with Award Enforcement.

These cases demonstrate that, throughout the antebellum period, the New Jersey Supreme Court continued to uphold the three different types of extrajudicial dispute resolution that were first utilized by the Quakers and then recognized under the statute. The court then continued to interact with each of these forms in turn, according to the jurisdiction the court had been granted (or not granted) over them.²⁹⁴ In fact, the court explicitly reiterated its support for all three forms of extrajudicial dispute resolution in 1845²⁹⁵ and again in 1857,²⁹⁶ refuting the idea that the goal of the

290. *Bell v. Price*, 21 N.J.L. 32, 41 (N.J. Sup. Ct. 1847). *Bell v. Price* was affirmed on appeal with extremely strong language favoring arbitration. The court stated that to allow “an appeal from the judgment of the arbitrators” was something “the settled decisions of the courts, founded in policy and justice, will never permit” (*Bell v. Price*, 22 N.J.L. 578, 591 (N.J. 1824)). See also *State v. Gulick*, 17 N.J.L. 435 (Court of Errors and Appeals held contempt power would apply to an individual who did not perform an award after it had been made a rule of the court).

291. *Prosser v. Richards*, 2 N.J.L. 356, 356-57 (N.J. Sup. Ct. 1808).

292. *Ayers v. Burt*, 3 N.J.L. 310 (N.J. Sup. Ct. 1811) (judgment was upheld), see also *Cranmer v. Taylor*, 3 N.J.L. 440 (N.J. Sup. Ct. 1811) (in response to opposition to reference in an action of ejectment, the Chief Justice stated “[i]t is the constant practice of this court to receive and confirm reports of this nature, in an action of ejectment.”).

293. See *Boroughs v. Genung*, 2 N.J.L. 96 (N.J. Sup. Ct. 1806); *Ogden v. Dildine*, 3 N.J.L. 7 (N.J. Sup. Ct. 1808). The flip side of this rule is shown in *Bickham v. Denny*, 1 N.J.L. 14 (N.J. Sup. Ct. 1790), in which the court held that a party to a dispute who had agreed to remove the dispute to arbitration could not, after the arbitration proceedings had begun, seek to remove the cause by habeas corpus.

294. *Sherron v. Wood*, 10 N.J.L. 7, 19 (N.J. Sup. Ct. 1828).

295. Although not an arbitration case, the 1845 case of *Pintard v. Irwin*, 20 N.J.L. 497 (N.J. Sup. Ct. 1845), upheld the law of arbitration and reference as contained in the 1794 statute, with the court affirming the defendants’ counsel’s assertion that “[t]here are three species of arbitration in this state. First, a common law arbitration [Independent Arbitration]. Secondly, an arbitration under a submission which provides that the submission may be made a rule of the court [Arbitration with Award Enforcement]. Thirdly, reference of a

judiciary was to usurp all forms of extrajudicial dispute resolution in the antebellum period. With these statements, the court acknowledged, again, the ability of parties to conduct Independent Arbitration apart from any statutory or court regulation as well as the ability of parties to conduct Arbitration with Award Enforcement and Reference by Order of the Court. In restating the 1794 statute in these terms, the Supreme Court of New Jersey reaffirmed a model of extrajudicial dispute resolution that had its roots in Quaker ideals of dispute resolution and had been in effect in New Jersey for over 60 years.

Protections Against Fraud

Another way in which the New Jersey Supreme Court supported common law and Quaker notions of extrajudicial dispute resolution was in its support of protection against fraud. These protections ran throughout the dispute resolution process.

First, the courts upheld the requirement of the parties' consent to settle their disputes extra-judicially, an idea that was supported by the Quakers in their realization that they could not force non-Quakers or recalcitrant Quakers to submit to their dispute resolution processes.²⁹⁷ This question particularly came up in cases involving principals and agents, or individuals acting as administrators, with the court generally holding that the award provisions had to accurately reflect the parties in dispute.²⁹⁸ In a similar vein, the court overturned an award in which not

cause to referees, upon whose judgment may be entered and execution issued, as in case of judgment upon verdict. [Reference by Order of the Court]." 20 N.J.L. at 497-504.

296. In the 1857 case of *Inslee v. Flagg*, 26 N.J.L. 368 (N.J. Sup. Ct. 1857), the court again clarified the law of arbitration and reference by parsing out the 1794 statute. First, the court stated that the 1794 statute itself referred "exclusively to two classes of cases": (1) Those where matters are in difference between the parties, and no suit has been commenced in court; there, if the parties desire to arbitrate their differences, they may make their submission a rule of court, and the court will enforce obedience to the award made, and (2) Those where suits are already pending; in which cases a reference is provided for, and the report of the referees is, in effect, substituted for the verdict of a jury." 26 N.J.L. 368, 373-74. These are the two classes of cases I have termed Arbitration with Award Enforcement and Reference by Order of the Court. The court then went on to uphold Independent Arbitration, stating, "The legislature [in creating the 1794 statute] was aware that the proceeding by arbitration already existed at common law, and would continue to exist, notwithstanding the statute. . . . 26 N.J.L. 368, 374 (emphasis added)."

297. 1719 yearly meeting, MICHENER, *supra* note 213, at 269.

298. For instance, in *Stephens v. Bacon*, 7 N.J.L. 1 (N.J. Sup. Ct. 1822), the court held that a reference report had to reflect payment between the principals who were in the original suit and not between a principal and the other party's representative agent. *See also Montfort v. Vanarsdalen*, 5 N.J.L. 803 (N.J. Sup. Ct. 1819). In *Stewart v. Richey*, 17 N.J.L. 164 (N.J. Sup. Ct. 1839), the court upheld a bond issued to an individual instead of to the same individual in his capacity as an administrator because the action had accrued after the testator's death and, therefore, the administrator was able to sue in his individual capacity. The court seemed to relax the consent requirement, however, when it upheld an award that had gone to an administrator of one of the parties, rather than to the party itself (a situation that had proved fatal to previous awards), stating: "The strict and technical rule, that a

all the plaintiffs were listed on the report.²⁹⁹

In addition to requiring the parties' consent to submit their dispute to extrajudicial dispute resolution, the New Jersey Supreme Court held that parties had to agree to the arbitrators chosen to settle their disputes.³⁰⁰ This reflected Quaker requirements that extrajudicial dispute resolution be unbiased.³⁰¹

Once arbitrators had been chosen, the court upheld the statutory requirement that they be sworn in before determining the award. Although the court did not initially see this as a requirement for the validity of the award, especially in Independent Arbitration cases,³⁰² in later cases the

submission by an administrator to arbitration. is not only a reference of the matter in dispute, but also an admission by the administrator, that he has assets, cannot prevail over the clear intention of the parties, as found upon the face of their submission." *McKeen v. Oliphant*, 18 N.J.L. 442, 449 (N.J. Sup. Ct. 1842). Similarly, the court upheld an award that found the title in land was held by one party's lessors, instead of the party himself, since the court determined the two were essentially the same. *Den V. Brands*, 15 N.J.L. 465, 465 (N.J. Sup. Ct. 1836). However, in the later case of *Hoffman v. Hoffman*, 26 N.J.L. 175, 180 (N.J. Sup. Ct. 1857), the court found an award void for uncertainty because the award did not say whether a party was to pay as an individual or as the administrator of the estate of a living individual, a question that seemed to be continually before the court. If the sum was to be paid as an individual, then all issues submitted to the arbitrators were not decided by them and the award would be void for uncertainty. See also *Montfort v. Vanarsdalen*, 5 N.J.L. 803 (N.J. Sup. Ct. 1819) in which the referees' report was struck down because it awarded a payment from Montfort as a individual instead of through his representative capacity over the estate he was administering. The court was also careful to distinguish out the role of the arbitrator from the role of others engaged in the settling of debt disputes. See *Phoenix Iron Co. v. New York Wrought-Iron Railroad Chair Co.*, 27 N.J.L. 484 where the secretary of a manufacturing company was not determined to be an arbitrator in her actions of transferring property to settle debts to creditors.

299. See *Souder v. Stout*, 3 N.J.L. 8 (N.J. Sup. Ct. 1808), in which a report entered as a judgment was reversed because the original action was brought by several plaintiffs but the referees' report only found for one plaintiff.

300. For instance, the court upheld an award in a case where two of the three arbitrators had been substituted out prior to the making of the award because "the substitutions were endorsed on the original submission and agreement, and expressly refer to what is therein contained. . . ." *McClure v. Gulick*, 17 N.J.L. 340, 342 (N.J. Sup. Ct. 1839). In a development that may be related to concerns about arbitrator fraud, awards were overturned when the justice of the peace entering the judgment had served as a referee. See dicta in *Den v. Hopkins*, 2 N.J.L. 181 (N.J. Sup. Ct. 1807) which suggested that if a judge had previously acted as an arbitrator in a case, he could not later act as a judge for the same dispute. In *Crane v. Hand*, 3 N.J.L. 9 (N.J. Sup. Ct. 1808), the report of a referee was quashed because the justice had served as a referee. The court held that a justice could not appoint himself to serve as a referee. In *Little v. Silverthorne*, 3 N.J.L. 255 (N.J. Sup. Ct. 1810), the court held that a justice could not serve as a referee because, if there was any alleged wrongdoing regarding the reference, the judge would have to sit in judgment of his own conduct as a referee. See also *Rogers v. Woodmanse*, 3 N.J.L. 510 (N.J. Sup. Ct. 1812).

301. THOMAS CLARKSON, II A PORTRAITURE OF QUAKERISM 82-83 (R. Taylor and Col, 1806).

302. In *Ford v. Potts*, 6 N.J.L. 388 (N.J. Sup. Ct. 1797), the parties had submitted their dispute to arbitration. While it was pending, the legislature passed the arbitration and reference act of 1794 that provided that arbitrators be sworn in. After the Act was passed, the arbitrators handed down their award. Potts sued, saying that the award should be invalidated because the arbitrators were not sworn in. The court upheld the award on the basis that the award was already pending at the time the statute was passed. Furthermore, the court stated

court overturned the awards because referees were not sworn in.³⁰³ Also acting in protection against fraudulent conduct, Quaker notions of arbitration required notice to the parties and prohibited ex parte meetings or perusals of evidence.³⁰⁴ While generally upholding the right of both parties to have notice about proceedings, the court seemed uncertain on what to do if one party was absent when the judgment of the award was entered.³⁰⁵

Another area in which the court seemed to uphold the statutory, common law, and Quaker predilections against fraud was in its holdings that the award must be made by all of the arbitrators to whom the dispute was submitted.³⁰⁶ Even in cases in which the court felt compelled to set

that "If the direction [by the legislature to be sworn in] is not complied with, the law subjects him [the arbitrator] to no penalty; it does not invalidate the proceedings, or empower any court to set them aside." The requirement that arbitrators be sworn in was meant to benefit the parties and if they "either neglect or omit to avail themselves of the security offered by the legislature, it would be unjust that they should be permitted to hold up the award as void. . . . The legislature have [sic] not declared, that the omission to take the oath should invalidate the award, and we cannot suppose that this was their meaning." In *Thompson v. Harvey*, 3 N.J.L. 454 (N.J. Sup. Ct. 1811) counsel said that the 1794 Act did not require arbitrators to be sworn in. The court only stated that it thought that it appeared that the arbitrators had been sworn in.

303. For cases in which the court overturned awards because arbitrators were not sworn in, see *Parker v. Crammer*, 2 N.J.L. 253 (N.J. Sup. Ct. 1807); *Cramer v. Mathis*, 3 N.J.L. 138 (N.J. Sup. Ct. 1809); *Swayze v. Riddle*, 3 N.J.L. 238 (N.J. Sup. Ct. 1810); *Little v. Silverthorne*, 3 N.J.L. 255 (N.J. Sup. Ct. 1810). In *Inslee v. Flagg*, 26 N.J.L. 368, 369-372 (N.J. Sup. Ct. 1857), the court seemed to take a different approach than it previously had regarding the need for Independent Arbitrators to be sworn in. The court held, in contradiction to the holding of *Ford v. Potts*, that it was a requirement for all arbitrators to be sworn in, even arbitrators whose awards would not be made rules of the court, regardless of the consent of the parties to proceed without a swearing-in. While this was a more comprehensive reading of the statute concerning the swearing-in requirement for Independent Arbitrators, it did not seem to be intended to suffocate the use of arbitration or reference in any of their forms since the court throughout this opinion affirmed the various types of arbitration and reference available under the statute as well as the legislature's statutory intent of making awards more effectual. *Inslee*, 26 N.J.L. at 396-375.

304. CLARKSON, *supra* note 301, at 82-83.

305. For instance, the court held that a defendant had to be present when the justice of the peace entered the referees' report into judgment, *Pierson v. Pierson*, 7 N.J.L. 125, 125-126 (N.J. Sup. Ct. 1823), and that the death of one of the parties was not sufficient to hold the referee's report invalid if the death was known but an objection was not entered at the time the report was being made (*Freeborn v. Denman*, 8 N.J.L. 116, 116-117 (N.J. Sup. Ct. 1825)). But see *Fairholme v. Forker*, 3 N.J.L. 548 (N.J. Sup. Ct. 1813). (upholding the ability of the justice to enter the judgment in the absence of one of the parties but suggesting in dicta that the court would consider a claim of illegality of the award had it been brought before them)

306. In *Moore v. Ewing*, 1 N.J.L. 167, 169-74 (N.J. Sup. Ct. 1792), arbitrators decided the award and then requested an attorney draw up the award for them. The attorney then took the award to each arbitrator individually for his signature. The court held that this invalidated the award because the arbitrators had joint authority and should have executed the award jointly as a means to protect against fraud. Although the court struck down the award to avoid fraud, the dicta was extremely favorable towards arbitration. Similarly, in *Reeves v. Goff*, 2 N.J.L. 133 (N.J. Sup. Ct. 1806), an award was overturned because the report was submitted to three referees but signed by two. The court also held that where the case had been referred to three referees, the case could not be decided and the report could not be altered outside of the presence of all three. *Egbert v. Smith*, 3 N.J.L. 482, 482-483 (N.J. Sup.

aside an award, the dicta often indicated a desire to highlight the narrowness of the decision and the court's favorable attitude toward arbitration. For instance, although compelled to set aside an award as a protection against fraud, the judge in *Moore v. Ewing* (1792) stated:

I own that I am a great friend to arbitrations; I believe them to be frequently productive of real advantage, and they are not to be hastily or inconsiderately set aside. I approve, in the highest manner, of the liberality with which courts of justice have reviewed their proceedings, particularly in modern times. . . .³⁰⁷

Providing for Necessary Appeals While Supporting Finality of the Awards

As stated previously, although the Quakers placed great emphasis on their members abiding by the decisions of arbitrators, they also provided for those instances in which justice would demand the need for an appeal.³⁰⁸ The court similarly allowed appeals as designated under the statute.³⁰⁹

Perhaps the greatest concern with appeals was that they could interfere with the finality of awards or allow the judiciary an opportunity to strike down awards at will. But just as the Quakers commanded disputing Friends to "engage themselves to stand to and abide by the determination of such referees or arbitrators,"³¹⁰ so, too, did the court seek to uphold the finality of awards in a variety of ways.

First, the court refused to set aside an award on the grounds of a faulty declaration after the award had already been entered as a judgment of the court.³¹¹ Second, the court seemed willing to strike down awards only for reasons of fraud (as shown previously) or if the award was unclear³¹² or lacked certainty or finality.³¹³ The court was not overly

Ct. 1812), *see also Hoff v. Taylor*, 5 N.J.L. 976 (N.J. Sup. Ct. 1820). *Rogers v. Tatum*, 25 N.J.L. 281, 284-285 (N.J. Sup. Ct. 1855) seemed to extend more deference to the arbitrators in the area of potential fraud by holding that as long as all three arbitrators were present to decide the award, then it was not necessary for the award to be signed by all three.

307. *Moore v. Ewing*, 1 N.J.L. 167, 169 (N.J. Sup. Ct. 1792). Reflecting a similar predilection to upholding awards, the court in *Green v. Lundy*, 1 N.J.L. 497, 498-499 (N.J. Sup. Ct. 1793) stated that the issuance of two different awards made the awards fatal, but if one award had been delivered first, then that award would have stood, regardless of the existence of a second award.

308. MICHENER, *supra* note 213, at 276.

309. *Taylor v. Vanderhoof*, 14 N.J.L. 214 (N.J. Sup. Ct. 1834). Note that the court followed the statute strictly in order to uphold the award in the 1827 case of *Coleman v. Warne*, 9 N.J.L. 290 (N.J. Sup. Ct. 1827), in which it denied the right of one party to appeal a referees' report on the basis that the party did not comply with the statutory requirement that an affidavit be filed.

310. MICHENER, *supra* note 213, at 269-70. *See also* CLARKSON, *supra* note 301, at 82-83.

311. *See Smith v. Minor*, 1 N.J.L. 19, 28 (N.J. Sup. Ct. 1790), in which the court held that an award could not be set aside by a party who took exception to the original declarations because the exception was taken after the award was already entered. The court said that there was no precedent for courts to look into the declaration after the making of an award on reference by consent.

312. *See Adams v. Scull*, 3 N.J.L. 311, 311 (N.J. Sup. Ct. 1811), in which an award was made void because the fact that "no specific penalty was awarded, but fractional parts of two

strict concerning what constituted a clear award. It confirmed that awards had to be certain and final but also stated that arbitrators did not have to use technical language in their awards.³¹⁴ It appeared to relax notions of certainty in later years.³¹⁵ Although initially awards could be overturned because parties did not decide all of the matters submitted to them,³¹⁶ the court later attempted to uphold at least a portion of an award, even when another portion was void. For instance, in *McKeen v. Oliphant*, the court reiterated the general rule that “[a]n award may be good, though part of it be made of a thing not within the submission, such part being void.”³¹⁷ In 1855, the court again reiterated that rule with the statement that an award that was overly broad remained valid with respect to the items that had been submitted to the arbitrators.³¹⁸ In the same decision, the court went on to uphold extrajudicial dispute resolution explicitly, stating that, “[t]he modern rule is, that awards shall be interpreted favorably, and that every reasonable intendment shall be made in their support. If it be possible to expound an award favorably, the court will do so.”³¹⁹

penalties” meant that no judgment had been rendered. *See also Hoagland v. Veghte*, 23 N.J.L. 92 (N.J. Sup. Ct. 1851), in which the court held that a previous award in an ongoing dispute between the parties would be conclusive and parol evidence could be used to determine what exactly had been included in a previous award and what disputes still remained.

313. For instance, in *McKeen v. Oliphant*, 18 N.J.L. 442, 442-446 (N.J. Sup. Ct. 1842), the court emphasized the rule that awards must be “certain, mutual, and final” as to matters submitted. This finality was reflected in *Webb v. Fish*, 4 N.J.L. 431, 431-434 (N.J. Sup. Ct. 1817), in which the court applied a previous award between the parties regarding ownership of a road to a subsequent conflict between the parties regarding use of the same road.

314. *Hazen v. Administrators of Daniel Addis*, 14 N.J.L. 333, 335-338 (N.J. Sup. Ct. 1834); *see also McKeen v. Allen*, 17 N.J.L. 506 (N.J. Sup. Ct. 1840). Care in use of language was required as a procedural safeguard, however, when bringing an action of debt on bond for the performance of an award. *See Henries v. Stiers*, 8 N.J.L. 364 (N.J. Sup. Ct. 1834), where the court required the plaintiff to state the same breach in both his initial declaration and his replication in order to keep one dispute before the court for resolution.

315. The court stated a more relaxed rule for certainty of an award that did not seem certain on its face and held that the award did not have to be signed by all three arbitrators so long as all three arbitrators were there to decide the award. *Rogers v. Tatum*, 25 N.J.L. 281, 284-85 (N.J. Sup. Ct. 1855); *see also Hoffman v. Hoffman*, 26 N.J.L. 175, 177-79 (N.J. Sup. Ct. 1857).

316. *See Harker v. Hough*, 7 N.J.L. 428 (N.J. Sup. Ct. 1802); *Richards v. Drinker*, 6 N.J.L. 307 (N.J. Sup. Ct. 1796); *see also Craig v. Craig*, 9 N.J.L. 198 (N.J. Sup. Ct. 1827), in which the court also seemed favorable toward reference when it struck down a report on the basis that multiple individual actions were sent to reference but the report issued by the referees was joint. In doing so, the court reluctantly stated that it would adhere to the rules of the law for safety’s sake even though “real justice may have been done between the parties by the report.”

317. 18 N.J.L. at 446; *see also* the earlier case of *Sheppard v. Stites*, 7 N.J.L. 90 (N.J. Sup. Ct. 1823) (an arbitration award was void for uncertainty only to the degree that that part of the award was uncertain) and the later case of *Hoagland v. Veghte*, 23 N.J.L. 92, 95 (N.J. Sup. Ct. 1851) (“Every intendment will be made in favor of an award, and the bad will be separated from the good, if possible.”). Also on the topic of appropriate submission and award, the court held that although arbitrators had power to award the conveyance of land, they did not have power to actually convey the land within the award. *Den v. Allen*, 2 N.J.L. 32 (N.J. Sup. Ct. 1806).

318. *Rogers*, 25 N.J.L. at 282.

319. 25 N.J.L. at 284. The case of *Smith v. Demarest*, 8 N.J.L. 195 (N.J. Sup. Ct. 1825), is such a case where every possible legal intendment was made to uphold the award. The

One other area that touched on the finality of the award was the possibility that the arbitrators had made mistakes of law or fact. In an 1855 decision favoring extrajudicial dispute resolution, the court upheld an arbitration award between the parties, saying that the statute of 1794 allowed relief from an award due only to misbehavior, corruption or undue means, which included the arbitrator misapplying the law after he had said he meant to decide by the law,³²⁰ or the arbitrator admitting to a mistake of fact.³²¹ The court continued to show deference the next year in *Richardson v. John*,³²² in which it held that parties who had submitted their differences to non-court-appointed reference were bound by the referees' report, mistakes and all: "The parties agree to take the judgment of others, instead of their own, and having so agreed, they are bound by that judgment just as much as if they had agreed upon the quantity and price themselves."³²³ The court went on to state that, "the general rule is, that where parties agree to

parties submitted their disputes to Independent Arbitration and one party sued for non-performance. The court upheld the award in spite of claims that the award did not decide all matters submitted, that it changed from what was submitted, that it was uncertain in part, and that the arbitrators had exceeded their authority. See also *Atkinson v. Townley*, 1 N.J.L. 444 (N.J. Sup. Ct. 1795), in which Townley claimed that Atkinson had conducted an ex parte meeting with the arbitrators. The court stated that "[a]wards should not be set aside on the suspicion of the interested party" and that even "[i]f the affidavit had been full and explicit, we do not think the uncorroborated affidavit of the party against whom the award is given, would be sufficient to justify us in setting it aside." For earlier example of court deference, see *Imlay v. Wikoff*, 4 N.J.L. 153, 161 (N.J. Sup. Ct. 1818), where the court stated "that the reasons for setting aside the award were insufficient" and that the award should be upheld. The court also required the parties themselves to uphold the award, and refused an action on an award by a party who had not signed a release of claims as had been required by that award. *Hugg v. Collins*, 18 N.J.L. 294, 294-295 (N.J. Sup. Ct. 1841).

320. It is essential here that the arbitrator had to both say that he meant to apply the law and then apply the law incorrectly. The court's reasoning was that this combination would suggest that the arbitrator had inadvertently gone against his own intent. In general, an arbitrator was not required to apply the law, and was not prohibited in setting forth an award in contradiction to the law, if that was the arbitrator's intent.

321. *Taylor v. Sayre*, 24 N.J.L. 647 (N.J. Sup. Ct. 1855). Even mistake of fact may not be enough, when that mistake is affirmed in the finality of a bond on the award. In *Baker v. Baker*, 28 N.J.L. 13 (1859), the arbitrator erroneously computed the interest on a debt due between the parties. Once a bond was given for the amount calculated by the arbitrator, the other party's right to claim the difference was lost.

322. 26 N.J.L. 130 (N.J. Sup. Ct. 1856).

323. *Id.* at 131. For a previous case on mistake of fact and law, see *Sherron v. Wood*, 10 N.J.L. 7, 12 (N.J. Sup. Ct. 1828), in which the court stated that, "Misconduct of an arbitrator cannot be pleaded or set up as a defence [sic] to an action at law upon an arbitration bond. The same rule prevails with respect to error or mistake of law or fact in making an award which does not appear upon the face of it." Indeed, parties could not even revoke a reference report if they wanted to. In *Ferris v. Munn*, 22 N.J.L. 161 (N.J. Sup. Ct. 1849), the court held that Reference by Order of the Court, "though made with the consent of the parties, is the act of the court, and cannot be revoked by the party, but only discharged by the court on mutual consent." But see *Berry v. Callet*, 6 N.J.L. 179 (N.J. Sup. Ct. 1822) in which the court held that a report of a sum due from the defendant to the plaintiff although intended to be final, could be returned to the auditors who made it if there was a mistake of law. It is unclear from the case language whether the auditors were filing a special report for the court or if they were acting as referees to fully resolve the dispute.

refer a matter to the judgment of others, their judgment is conclusive, unless fraud, collusion, or some plain, palpable mistake upon the face of the award appears, which is certified to or admitted by the arbitrators.”³²⁴

Guards Against Reversing on Mere Technicalities

Early on, the courts did not attempt to expand their ability to reverse awards on technicalities,³²⁵ and, indeed, upheld arbitration according to the procedural guidelines outlined in the statute.³²⁶ Areas in which the court exhibited a more confused attitude toward technicalities under the statute include the areas of evidence³²⁷ and the justice’s filing of the reference report into the docket.³²⁸ The court seemed to hold more strictly to the statu-

324. *Richardson*, 26 N.J.L. at 132.

325. For instance, in *Schneck v. Voorhees*, 7 N.J.L. 383 (N.J. Sup. Ct. 1800), arbitrators had accidentally switched the parties’ names. The error was immediately realized and rectified, and the court held that the award would stand. In *Coryell v. Coryell*, 1 N.J.L. 441, 442 (N.J. Sup. Ct. 1795) the court held that an award could be vacated by the court if one party asked for and was not granted a proper adjournment, but the court denied the attempt to vacate the award in this case on the grounds that that party seemed to ask for the adjournment only when he had a hint that the award would be unfavorable to him. In *Coxe v. Lundy*, 1 N.J.L. 295, 296 (N.J. Sup. Ct. 1794), the court held that although it had previously required arbitration awards to be stated in technical language, that was no longer a requirement, specifically because “in modern times a greater latitude and more liberality has been found beneficial to all parties, and common words are sufficient; their meaning is to be expounded according to the intentions of the arbitrators, appearing on the award.”

326. See *Pancoast v. Curtis*, 6 N.J.L. 415 (N.J. Sup. Ct. 1798), in which the court held that an award was published when it was read and filed in court and that exceptions to awards must come within the designated time period. In *Harrison v. Sloan*, 6 N.J.L. 410 (N.J. Sup. Ct. 1797), the court quashed a certiorari claiming that the individual’s right to a jury trial had been denied by the submission of his dispute to referees under the 1790 statute. The court upheld the reference, stating that the referees had to act before they could determine if the appointment of the referees was legal.

327. In the area of evidence, the court had originally held that arbitrators did not have to follow strict laws of evidence. *Livingston v. Combs*, 1 N.J.L. 50 (N.J. Sup. Ct. 1790). The flip side of this rule for arbitration was seen in *Jessup v. Cook*, 6 N.J.L. 434, (N.J. Sup. Ct. 1798), in which it was held that the arbitrators derived their authority from the parties’ consent and did not constitute a typical court. Therefore, the evidence admitted in a previous arbitration could not be admitted in a subsequent case in a court of law. Later, the court held in *Burroughs v. Thorne*, 5 N.J.L. 910 (N.J. Sup. Ct. 1820), that arbitrators needed to follow the rules of evidence regarding witnesses. See also *Lyre’s Exec. V. Fenimore*, 3 N.J.L. 489, 492 (N.J. Sup. Ct. 1812). In *Seamans v. Pharo*, 4 N.H.L. 143, 143 (N.J. Sup. Ct. 1818), the court held that court cases sent to referees needed to follow rules for affidavits. The court also held that an award would not be set aside on the grounds that one party acted as a witness when the other party had consented to the first party serving as a witness. *Fenimore v. Childs*, 6 N.J.L. 386 (N.J. Sup. Ct. 1797). In spite of its increase in applying the rules of evidence (or, perhaps, because of), the court did hold that an arbitration award could serve as evidence in a subsequent case. See *Traux v. Adm’x of Traux*, 2 N.J.L. 153 (N.J. Sup. Ct. 1807).

328. In 1801-1810, awards were overturned because the judgment was not entered on the justice’s docket. See *Crandall v. Denny*, 2 N.J.L. 128 (N.J. Sup. Ct. 1806); *Johnson v. Johnson*, 2 N.J.L. 300, 300 (N.J. Sup. Ct. 1807); *Steelman v. Stewart*, 2 N.J.L. 299 (N.J. Sup. Ct. 1807); *Little v. Fleming*, 3 N.J.L. 139 (N.J. Sup. Ct. 1809); *Moreton v. Scroggy*, 3 N.J.L. 252 (N.J. Sup. Ct. 1810). But see *Chance v. Chambers*, 2 N.J.L. 362 (N.J. Sup. Ct. 1808) (reference

tory requirements concerning time deadlines.³²⁹ In the area of determining costs, the court evidenced a trend toward upholding a variety of procedural details while still avoiding overturning awards on technicalities.³³⁰ The court overturned a report on grounds that appeared to be egregious error,³³¹ but later exhibited a very favorable attitude toward reference when, in an 1827 case upholding a report with a minor error, the court stated:

it would be entirely too strict; it would be losing the substance in search of the shadow, to set aside a report for a difference scarcely discernible, except by legal eyes, and which it is making no great presumption to suppose, was observed neither by the referees nor by the parties, who were unattended by counsel, unless indeed some practical injury has resulted to plaintiff; unless some matters not within the cause, were actually made the subjects of enquiry [sic] and adjudicated by the referees.³³²

Conclusion to the New Jersey Account

New Jersey passed its initial arbitration statutes while it was still under heavy Quaker influence. It seems unlikely that an area so heavily dominated by Quakers (and Quaker ideology) would purposefully enact

report upheld even though the justice entered only the report's substance but not the report at large into his docket). See also *Ridgway v. Fairholm*, 3 N.J.L. 464 (N.J. Sup. Ct. 1811) (court held it was not fatal that a demand was not filed with the justice, and it was a mere error and not a fatal mistake that the justice initially entered only two of the three referees on the docket).

329. In 1801-1810, an award was overturned because the report was returned after the designated time period, *White v. Kemble*, 3 N.J.L. 53 (N.J. Sup. Ct. 1808) and, in *Ross v. Ford*, 3 N.J.L. 465 (N.J. Sup. Ct. 1811), a report was struck down because the referring justice's term of office ended before the report was returned. Also related to deadlines, the court allowed a party to obtain a writ of attachment if the other party did not perform as required by the award, but the court did require there first be an order of the court to justify the issuance of the attachment. *M'Dermot v. Bulter*, 10 N.J.L. 158, 158-160 (N.J. Sup. Ct. 1828).

330. The court seemed particularly concerned about following the statutory guidelines regarding costs. In *Anonymous*, 2 N.J.L. 213 (N.J. Sup. Ct. 1807), the court complied with statutory guidelines regarding the costs that could be granted after awards had been made a rule of the court. In 1818, the court held that costs would follow established rules unless the award determined otherwise. See *Den, ex dem. Anderson v. Exton*, 4 N.J.L. 201 (N.J. Sup. Ct. 1818). In *Bishop v. Woodruff* 3 N.J.L. 110, 110-111 (N.J. Sup. Ct. 1809) the court held that a party required to pay according to the deadline given in the award must pay by the deadline and could not wait for the arrival of a statement requiring payment. In *Ogden v. Dildine*, 3 N.J.L. 7, 8 (N.J. Sup. Ct. 1808) the court reversed a report judgment for several reasons, one of which was that it was entered in figures. But see *Bozorth v. Prickett*, 2 N.J.L. 251 (N.J. Sup. Ct. 1807) (referee report upheld in spite of one party's claim that it should be struck down because the monetary award was written in figures instead of numbers); *Warder v. Whittall*, 1 N.J.L. 98, 98-99 (N.J. Sup. Ct. 1791) (court upheld an arbitration award written in terms of "sterling money of Great Britain" in spite of a New Jersey law stating that all New Jersey court judgments had to be written in New Jersey currency).

331. See *Bowen v. Lanning*, 2 N.J.L. 130, 130 (N.J. Sup. Ct. 1806) in which the court stated, of a reference that did not comply with statutory requirements and was incomplete, that, "The errors are manifest the proceedings must be set aside, and made null and void."

332. *Westcott v. Somers*, 9 N.J.L. 99, 99-101 (N.J. Sup. Ct. 1827). The difference here that one party relied on to attempt to have the report struck down was that the original rule for reference stated "all matters in difference in the said cause be submitted" and the report stated "all matters in difference between the parties in the said cause to be submitted."

legislative statutes that would undermine the form of dispute resolution Quakers believed to be the most legitimate. One might think that the legislature itself was not composed of those upholding Quaker ideology, but the governments of both East and West Jersey were controlled by Quaker ideals.³³³ West Jersey was a Quaker settlement that resembled Quaker Pennsylvania in its laws and court system, while Quakers in East Jersey had a “controlling interest in land and government.”³³⁴ Furthermore, at least one historian has stated that statutes such as those passed in East and West Jersey “were intended to advance arbitration.”³³⁵

Indeed, the 1794 statute reflected this Quaker influence, both at the time of its enactment and in the years following. And New Jersey retained this same 1794 extrajudicial dispute resolution law, with few modifications, throughout the antebellum period. Although New Jersey regulated arbitration and reference when they entered the court system, it did so according to the terms of the 1794 statute and its subsequent, minor modifications, and it did so in keeping with Quaker customs for encouraging and regulating extrajudicial dispute resolution. Thus, in contradiction to Horwitz’s Pennsylvania history, extrajudicial dispute resolution was not regulated and interpreted out of existence in New Jersey. Instead, it continued in use throughout the antebellum period, much as the Quakers had originally promoted it.

The interesting thing about Horwitz’s history is that, like New Jersey, Pennsylvania passed its first arbitration statutes while it was still highly influenced by Quaker ideas on arbitration and highly predisposed to view arbitration quite favorably.³³⁶ It does not seem consistent to hold that these two neighboring states, which shared such a strong and similar Quaker history and influence, would go on to treat extrajudicial dispute resolution so differently. Due to the foundational similarities of the two states, it is quite possible that the story of New Jersey may be the story of Pennsylvania as well.

To this end, although many of the judicial interactions with the extrajudicial dispute resolution statutes Horwitz found in Pennsylvania existed in New Jersey as well, it does not appear that, in New Jersey at least, these actions “clearly represented a newly emerging pattern of hostility to extrajudicial settlement of disputes.”³³⁷ Instead, the research shows that while New Jersey law regarding extrajudicial dispute resolution was transformed over time, it was transformed in a manner in keeping with Quaker ideology that favored extrajudicial dispute resolution, and not in a manner that intended it to be transcended by the emerging legal profession, at least not in the 1780-1860 time period.

333. HOFFER, *supra* note 178, at 32.

334. AUERBACH, *supra* note 242, at 30 (for West Jersey as a Quaker settlement.); HOFFER, *supra* note 178, at 32 (for Quaker influence in East and West Jersey).

335. KELLOR, *supra* note 243, at 16.

336. HORWITZ, *supra* note 1, at 151-52 (for pro-arbitration nature of Pennsylvania as late as 1790 and until the Revolution).

337. HORWITZ, *supra* note 1, at 152.

CONCLUSION

In his work, *The Transformation of American Law: 1780-1860*, Morton Horwitz asserts that the practice of arbitration ceased to exist in antebellum America as the result of collusion between the merchant and lawyer classes in New York, Massachusetts, and South Carolina, and as the by-product of a judicial hostility that disregarded Quaker attitudes towards dispute resolution in Pennsylvania. It is a story of a revolutionary change in the law that finds its motivations in the political and economic spheres. Horwitz suggests that his findings would be uniform across all states in the antebellum period. Yet, careful study of Kentucky and New Jersey shows that contravening social and ideological conditions prevent his findings from holding true across all states.

Horwitz begins his history of the triumph of law over arbitration from 1780-1860 with a general theme of lawyer-merchant conflict; the increase and then decrease of the use of arbitration by the merchant class; the merchants' alliance with the legal community to effectively overthrow arbitration; and the judiciary's use of statutory law to defeat arbitration awards. Horwitz claims that, in defeating those awards, the judiciary abandoned its common law deference to arbitration, began reversing on technicalities, refused to refer matters of law, and triumphed through the merchants' growing use of appeals. Each of these claims assumes a judiciary that was hostile to the use of arbitration.

A close study of the state of Kentucky demonstrates that these claims do not apply. Kentucky was an agricultural state that remained embroiled in land-dispute conflict through most of the nineteenth century. It was this social conflict over land claims, and its seeming influence in the political and economic spheres, and not a mercantile pre-commercial animosity toward lawyers, that fueled the need for and use of arbitration in antebellum Kentucky. Furthermore, Kentucky boasted a judiciary throughout the mid-nineteenth century that was extremely reluctant to overturn both common law and statutory arbitration awards. The Kentucky judiciary exhibited this attitude by focusing on intent rather than technicalities, continuing to refer matters of law, and generally supporting the use of arbitration as a valid and long-favored form of extrajudicial dispute resolution.

Research on the Quaker state of New Jersey counters Horwitz's history. Horwitz claims that the Pennsylvania Quakers initially supported the use of arbitration but that the Pennsylvania judiciary, which grew increasingly hostile to arbitration, undermined and eventually destroyed that support. Horwitz's main proof for this assertion was the manner in which the Pennsylvania judiciary applied the Pennsylvania statutes governing arbitration in the state. Thus Horwitz argues that the statutes themselves were part of the legal elite's attempt to legislate arbitration out of existence and that the judiciary's strict interpretation of those statutes ultimately led to arbitration's demise.

A study of New Jersey provides a different story. In 1794, New Jersey enacted a law supporting the use of extrajudicial dispute resolution. It was this law, with minor adjustments, that governed the use of extrajudicial dispute resolution in New Jersey throughout the antebellum period. A close study of New Jersey court dicta and decisions shows that the New Jersey judiciary consistently interpreted the extrajudicial dispute resolution cases that came before it in light of this statute. Horwitz sees the same behavior in Pennsylvania as an effort by the judiciary to construe statutory law governing extrajudicial dispute resolution strictly, so as to effectively eliminate the use of extrajudicial dispute resolution in that state. That was not the pattern in New Jersey. While it is true that the New Jersey judiciary was careful to decide its extrajudicial dispute resolution cases in keeping with the statutory law, the statutory law itself upheld and supported extrajudicial dispute resolution. More specifically, the statutory law reflected Quaker ideology of what extrajudicial dispute resolution was all about. Like the Quaker vision of extrajudicial dispute resolution, statutory extrajudicial dispute resolution in New Jersey recognized the ability of parties to settle their disputes completely outside of court while also providing for additional avenues for award enforcement and agreeing to arbitration in a pending action, protections against fraud, necessary appeals, the finality of awards, and guards against reversing on mere technicalities. Thus, by construing the extrajudicial dispute resolution decisions that came before it in light of the New Jersey extrajudicial dispute resolution statutes, the New Jersey judiciary was not evidencing political hostility toward extrajudicial means of dispute resolution but, instead, was simply continuing to support and uphold a particularly Quaker vision of extrajudicial dispute resolution as outlined by the statute.

Horwitz's history of a merchant-lawyer alliance that sought to eliminate arbitration and an emerging judiciary that was hostile to its use are inapplicable to the states of Kentucky and New Jersey in the antebellum period. In these states, existing social and ideological conditions (respectively) prompted the legislatures and the courts to uphold extrajudicial dispute resolution and to do so in a way that reflected past support of extrajudicial dispute resolution while adapting it to the current needs of their populations. Thus, for at least these two states, it seems more accurate to say that, although it was at times transformed, the use of extrajudicial dispute resolution was not transcended by the political jealousies of an emerging legal system in the antebellum period.