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# The Historically Shifting Sands of Reasons to Arbitrate

James Oldham\*

## I. INTRODUCTION

It is well established that for many centuries, arbitration has been a regular, even frequent, method of dispute settlement in the Western World. Derek Roebuck has done path breaking research demonstrating this in his recent book covering the middle ages (1154-1558)<sup>1</sup> and in his contribution to this symposium, “The English Experience: What the First American Colonists Knew of Mediation and Arbitration.”<sup>2</sup> My own work, with the excellent help of co-authors Henry Horwitz and Su Jin Kim, has explored English patterns from the late 17<sup>th</sup> century into the 1800s, also tracing the English approach into the American colonies and the early Republic. Recourse to arbitration has not always been satisfying, yet for the most part it has attracted participants because of four recognized attributes: speed, economy, informality, and finality. Other attributes can also be identified, such as the opportunity to participate in the selection of the arbitrator, including those with special qualifications, and the confidentiality of the process, at least in the private sector. I would add two more attributes that may be somewhat surprising – the *availability* of discovery and the capacity for handling cases of considerable complexity.<sup>3</sup> Of course, not all of these attributes have been present during all phases of the evolution of the process.

What I want to do today is to say a bit more about how arbitration was practiced in 18<sup>th</sup>-century England, with some comparison to the practice in America. First, let me give a brief background snapshot. Two texts on arbitration were published in England in the 17<sup>th</sup> century – an anonymous 93-page tract titled *Arbitrium Redivivum: Or the Law of Arbitration* (1694), and a 250-page text on arbitration by Grays Inn barrister John March, first published in 1648.<sup>4</sup> March declared that, “Arbitrements were never more in use than now,” and “most men either have been or may be Arbitrators.”<sup>5</sup> He said, moreover, that “as long as Differences and Contentions arise among men, which will be to the World’s End, certainly the learning of Arbitrements will deserve our Knowledge.”<sup>6</sup> That was true in 1648, and it is still

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1. DEREK ROEBUCK, *MEDIATION AND ARBITRATION IN THE MIDDLE AGES: ENGLAND 1154 TO 1558* (2013).

2. Derek Roebuck, *Beyond the FAA: Arbitration Procedure, Practice, and Policy in Historical Perspective*, 2016 J. DISP. RESOL. (forthcoming 2016).

3. I emphasize “availability” because one characteristic of traditional labor arbitration in the United States has been the *absence* of discovery.

4. See J. MARCH, *MARCH’S ACTIONS FOR SLANDER AND ARBITREMENTS* (1648).

5. J. MARCH, *MARCH’S ACTIONS FOR SLANDER AND ARBITREMENTS* 149 (W.E. ed. 1674).

6. *Id.*

true. And as the anonymous author of the 1694 *Law of Arbitration* declared, “Arbitrament is much esteemed and greatly favoured in our Common Law . . . to prevent the great Trouble and frequent Expense of Law-suits.”<sup>7</sup>

Some of you will be familiar with the statute that the British Parliament enacted in 1698, as drafted by John Locke in his capacity as a member of the London Board of Trade.<sup>8</sup> For a brief explanation, I will borrow from the presidential address that I gave to the National Academy of Arbitrators at its annual meeting in May 2014:

Locke . . . understood and appreciated the arbitration process. Even in his time, it was open to common law courts to refer a case to arbitration when the facts of a litigated case seemed to call for it. This might occur, for example, when a dispute arose over a construction contract, and the case could be referred to an architect or an engineer to arbitrate the disagreement in a final and binding way. This was done by writing out the agreement to arbitrate and entering it in the judicial records as a court order. Thus, if either party thereafter refused to honor the agreement, that party could be held in contempt of court.

John Locke was familiar with this process, and he understood that the key to effective enforcement of arbitration agreements would be the penalty that would attach for dishonoring any such agreement. He perceived that the threat of being arrested and imprisoned for contempt of court would provide a strong incentive to parties to arbitration agreements to honor those agreements. Thus he recommended that the Board of Trade petition Parliament to enact a statute that would make the contempt power of the common law courts available to private parties even when no actual law suit had been commenced. This is exactly what happened. Parliament passed a statute in 1698 that expressly authorized private parties who wished to arbitrate their differences to file an affidavit to that effect laying out their agreement to arbitrate and its terms, and to have that agreement entered in the court’s order books, “subject to all the penalties of contemning a Rule of Court . . . [as if] a suitor or defendant in such Court.”<sup>9</sup>

And now I want to supplement the historical record with what I think will be new information on four of the arbitration attributes: economy, discovery, expertise, and complexity.

## II. ECONOMY

The traditional advantage of arbitration as a substantially more economical way to settle a dispute than full-dress litigation remains true for some types of arbitra-

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7. *Preface: To the Reader* to *ARBITRIUM REDIVIVUM: OR THE LAW OF ARBITRATION* (1694) (unpaginated).

8. Henry Horwitz & James Oldham, *John Locke, Lord Mansfield, and Arbitration During the Eighteenth Century*, 36 *HIST. J.* 137 (1993).

9. James Oldham, *Presidential Address: Historical Perspectives on the Judicial Enforcement of Arbitration Agreements*, in *THE TEST OF TIME* 27 (Richard N. Block ed., Bloomberg Law 2015) (citations omitted).

tion, but the advantage is shrinking. International arbitration has always been complex and expensive, and the costs are rising.<sup>10</sup> The same can be said of many domestic commercial arbitration cases. And non-union employment arbitration has broken away from traditional labor arbitration – a traditional heritage in which the role of the labor arbitrator was regarded, to some extent, as a public service, accompanied by extremely low arbitrator per diems. Arbitrators in non-union employment cases now charge healthy hourly rates, and substantial pre-trial discovery is common.

This was much different than in earlier eras. Consider, for example, the 1825 Missouri statute “Arbitration: An Act regulating Arbitrations and References.”<sup>11</sup> This Act was Missouri’s version of the 1698 John Locke statute, allowing controversies to be referred to arbitration and to have the written submissions made rules of court.<sup>12</sup> Section 7 of the Act provided, “[t]hat each arbitrator or referee shall be allowed for every day’s attendance to the business of his appointment, one dollar and fifty cents.”<sup>13</sup> And traveling back to 18<sup>th</sup>-century England, the contrast is even sharper. Especially interesting are observations by the author of a scarce 1833 publication, John Palmer’s *Supplement to the Attorney and Agent’s Table of Costs*.<sup>14</sup> Palmer noted that the practice of referring “mercantile cases to Arbitration after they had been called on for trial, very much increased in the latter years of Lord Mansfield’s Chief Justiceship.” He explained that “At first this was attended with little expense to the Parties, for the Writer of this [Supplement] remembers when a merchant or a gentleman would have felt himself degraded by an offer of payment for what was considered a voluntary act of kindness.”<sup>15</sup> One of Lord Mansfield’s favorite merchants, however, Thomas Gorman of New Broad Street, “had so many Cases referred to him that, that he at length made a Charge (a very moderate one) for his trouble, and Arbitration became part of his business.”<sup>16</sup> Palmer added that, “Other merchants followed his example, and were, in fact trading Arbitrators, and it became usual to refer Cases of all sorts to Arbitration.”<sup>17</sup> Further,

[t]he late Mr. Lowten of the Temple, who acted as Clerk of Nisi Prius, had a great number of references for which he seldom charged more than three Guineas. The practice still increased, and of late years, causes have been referred chiefly to Barristers, who now charge Three Guineas for each meeting. So that after the parties have been at the expenses of preparing for Trial, employing Counsel, and going into Court (where they have the court Fees to pay), they are often at a heavy Charge for an award.<sup>18</sup>

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10. See e.g., DAVID A.R. WILLIAMS & AMOKURA KAWHARU, WILLIAMS & KAWHARU ON ARBITRATION 573 (2011).

11. 1825 Mo. Laws 1:137-139.

12. See *infra* p. 47.

13. 1825 Mo. Laws 1:137-139. The same sum was to be paid to each witness in attendance, and to sheriffs, constables, clerks, and justices of the peace for “services performed in relation to any arbitration or reference.” *Id.* (This princely sum, of course, would not be trivial in today’s dollars.)

14. I am grateful to Henry Horwitz for this reference. The tract is in the British Library, BL 514 k.16(3). See J. PALMER, SUPPLEMENT TO THE ATTORNEY AND AGENT’S TABLE OF COSTS 73 (1833).

15. PALMER, *supra* note 14, at 73.

16. *Id.*

17. *Id.*

18. See JAMES OLDHAM, THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY, Vol. I, 152-53 (1992) (discussing Thomas Lowten).

Looking back, perhaps the main significance of John Palmer's observations is not the fact that arbitrators in late 18<sup>th</sup> century England viewed their arbitration work as something of a public service, but rather that by 1833, most cases were apparently being referred to barristers, and the costs of the process were spiraling upward. Under such circumstances, the legalization of the arbitration process surely would soon follow.

### III. DISCOVERY

It hardly needs saying that in 21<sup>st</sup>-century litigation, the discovery process looms large, both in time and expense. In 18<sup>th</sup>-century England, the rules of practice were dramatically different. Let us turn to the two cases that were said to have created the rule that private parties could not, by an agreement to arbitrate, "oust the common law courts of jurisdiction" – the rule that crossed over to America and eventually provoked the enactment of the Federal Arbitration Act in 1924.<sup>19</sup> I refer in particular to the 1743 decision by Lord Chancellor Hardwicke, *Wellington v. Mackintosh*.<sup>20</sup>

In earlier work, I augmented the brief printed report of *Wellington* with a more extensive manuscript version and argued that the case did not, in fact, truly support the "no ousting" proposition.<sup>21</sup> The plaintiff in *Wellington* filed a bill of discovery in Chancery, accusing his partner in trade with fraud. The defendant's plea (his answer) was that the dispute should have gone to arbitration in accordance with the arbitration clause in the articles of partnership to which the plaintiff and defendant were parties. Hardwicke rejected the plea, but said, "I would not have it understood, that such an agreement might not be made in such kind of articles, and pleaded, but such a clause should have in it a power given to the arbitrators to examine the parties, as well as witnesses, upon oath."<sup>22</sup> The remainder of Hardwicke's opinion, as given in the printed report, is as follows:

But this bill is to discover and be relieved against frauds, impositions, and concealments, for which the arbitrators could not examine the parties on oath.<sup>23</sup> Persons might certainly have made such an agreement as would have ousted this court of jurisdiction; but the plea here goes both to the discovery and the relief; and if I was to allow the plea as to the relief, I

19. See Oldham, *Presidential Address*, supra note 9, at 24-25; *Id.* at 25 (citing *Wellington v. Mackintosh*, 2 Atk. 569 (Chancery 1743)); *Id.* (citing *Kill v. Hollister*, 1 Wils. 129 (K.B. 1746)).

20. *Wellington v. Mackintosh*, 2 Atk. 569 (Chancery 1743).

21. JAMES OLDHAM, *Detecting Non-Fiction: Sleuthing Among Manuscript Case Reports for what was Really Said*, in *LAW REPORTING IN BRITAIN 136-37* (1995).

22. *Wellington*, 2 Atk. at 570.

23. Here, Hardwicke may simply have been saying that it would be beyond the power of an arbitrator to examine the parties under oath as to possible criminal behavior, but he may also have been alluding to what came to be called the "party witness rule" – that parties to civil litigation were not competent to testify under oath, because they were obviously interested parties, and thus not trustworthy. To modern legal eyes, this rule seems preposterous. See James Oldham, *Truth-Telling in the Eighteenth-Century English Courtroom*, 12 *LAW AND HIST. REV.* 95, 107-17 (1994) (discussing the party witness rule).

could not as to the discovery, and then the court too must admit a discovery, in order to assist the arbitrators, which is not proper for the dignity of the court to do.<sup>24</sup>

The manuscript report of the *Wellington* case provides additional details, including a brief description of arguments of counsel.<sup>25</sup> The hearing was one of several arguments on Pleas and Demurrers heard in Lincoln's Inn Hall during Easter Term, 1743.<sup>26</sup> The plaintiff and the defendant were partners in Blackwell Hall Factors, and the Bill prayed a general accounting and satisfaction of what was found to be due to the plaintiff.<sup>27</sup> Toward that end, the Bill requested discovery about several transactions claimed to have been fraudulent.<sup>28</sup> The defendant's Plea recited a clause from the Articles of Partnership requiring that any difference that should arise between the parties was to be referred to two arbitrators, one to be chosen by the plaintiff, the other by the defendant.<sup>29</sup> The defendant claimed that he had offered to name an arbitrator, but that the plaintiff had absolutely refused to do so, and

[i]n support of the Plea, the reasonableness of submitting such matters to arbitration was insisted on, where the parties might choose proper judges for themselves versed & knowing in the matters of their controversy, & the Statute of king William [the John Locke statute] was urged to show the great encouragement which the Legislature gives to such submissions.<sup>30</sup>

The plaintiff responded that

this Plea plainly goes too far in respect that it tends to cover the prayer of discovery as well as the prayer of relief & that it would be the greatest hardship upon the plaintiff if he could not compel the defendant to answer to the charges of the fraud, which were matters that lay entirely in his own knowledge, which discovery could not be had before arbitrators.<sup>31</sup>

And besides, "such agreement of the parties ought not to be permitted to oust the jurisdiction of the court."<sup>32</sup>

The version of Lord Hardwicke's opinion in the manuscript report, responding to both parties, is as follows:

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24. *Id.*

25. Easter 16 Geo. 2 (Lincoln's Inn Library, MS Coxe 46, folios 166-171) (copy on file with the journal).

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at folio 168.

31. Easter 16 Geo. 2, at folio 169 (Lincoln's Inn Library, MS Coxe 46, folios 166-171) (copy on file with the journal).

32. *Id.* at folio 169-70. The plaintiff's counsel also said "that there had been a case where upon this foundation such a plea as is now pleaded was overruled, but the name of this case or the time when it was so determined was forgot." *Id.* at folio 170. See OLDHAM, *Detecting Non-Fiction*, *supra* note 21 at 137.

Lord Chancellor Hardwicke [said that] he would not declare that a plea of this kind could not be good. But [he said] if it was good it would extend as well to the discovery as the relief prayed for by the Bill, for this Court will not allow Bills of Discovery to aid proceedings before arbitrators. But [he said] he thought this plea [was] not good, for that the defendant in support of it ought to answer to the charges of fraud, which here he had not done. But as to the covenants tending to oust the jurisdiction of the Court, he thought that an objection of no weight, for most certainly men may submit their differences to the arbitration of persons chose (*sic*) by them without applying to the Courts of Public Justice.<sup>33</sup>

So for present purposes, the takeaway from *Wellington* is that even though it was beneath the dignity of the Court of Chancery to grant a Bill of Discovery in aid of a pending or proposed arbitration, the Chancellor said that the parties could in their arbitration clause give the arbitrator special powers, such as to examine the parties and the witnesses under oath.

At this point, asking your indulgence, I should like to leap across the pond and refer to an opinion given in 1845 by Supreme Court Justice Joseph Story. In the address that I have already mentioned that I gave to the National Academy of Arbitrators in May 2014, I took issue with the comments Justice Story made in *Tobey v. Bristol*,<sup>34</sup> a case in which the plaintiff sought judicial enforcement of an arbitration agreement allegedly breached by the defendant. Justice Story declared (incorrectly, in my view) that “it cannot be correctly said, that public policy, in our age, generally favors or encourages arbitrations, which are to be final and conclusive, to an extent beyond that which belongs to the ordinary operations of the common law.”<sup>35</sup> He claimed (also, I think, incorrectly) that judicial enforcement of arbitration agreements occurred only pursuant to legislation that equipped arbitrators with all of the powers that judges would have, and that the arbitration decisions could always be appealed to the courts.<sup>36</sup> In his *Commentaries on the Law of Partnership as a Branch of Commercial and Maritime Jurisprudence*,<sup>37</sup> Story was more specific. He said that no action at common law could be brought to enforce such an arbitration agreement, as “it is against the policy of the common law, and has a tendency to exclude the jurisdiction of the Supreme Courts, which are provided by the Government with ample means to entertain and decide all legal controversies.”<sup>38</sup> He added, moreover, that there could be no specific enforcement in equity of any arbitration clause, “not merely upon the ground of public policy, but also upon the ground of the utter inadequacy of arbitrators to administer entire justice between the parties, from a defect of power in them to examine under oath, and to compel the production of papers.”<sup>39</sup>

So what should we think about Justice Story’s observations? Lord Chancellor Hardwicke in 1743 saw no reason why parties to arbitration agreements could not

33. Easter 16 Geo. 2, at folio 170-71 (Lincoln’s Inn Library, MS Coxe 46, folios 166-171) (copy on file with the journal).

34. *Tobey v. Bristol*, 23 F. Cas. 1313 (C.C. Mass. 1845) (No. 14,065).

35. *Id.* at 1321.

36. See Oldham, *Presidential Address*, *supra* note 9, at 24 (discussing the *Tobey* case).

37. J. STORY, COMMENTARIES ON THE LAW OF PARTNERSHIP, AS A BRANCH OF COMMERCIAL AND MARITIME JURISPRUDENCE (1841).

38. *Id.* at 311.

39. *Id.*

include provisions that would give arbitrators interrogation and discovery powers. And in fact, that is exactly what happened during the second half of the 18<sup>th</sup> century in the English practice of referring litigated cases to arbitration.

Many years ago, while studying Lord Mansfield's long run as Chief Justice of the Court of King's Bench (1756-1788), I thumbed through every page of the King's Bench Rule Books for the 32-year period.<sup>40</sup> I extracted information from all of the arbitration agreements that had been entered. Most of these agreements would have been reached by counsel for the parties during the conduct of jury trials, usually at the suggestion of Mansfield as the sitting trial judge. These were called "references," that is, the parties in each such case agreed to suspend the jury trial and to refer their dispute to arbitration, consenting also to have their agreement made a "rule of court," that is, a court order. Also included in the Rule Books were arbitration agreements "by submission," that is, arbitration agreements that were "submitted" by affidavits as if there were pending lawsuits, though in fact the captions entered in the rule books were "pretend" lawsuits, as authorized by the John Locke statute of 1698.<sup>41</sup> As stated earlier, the advantage of entering the agreement in the Rule Books was that the contempt power then became available if either party to the agreement subsequently dishonored it.

I then catalogued these agreements to arbitrate that had been entered in the Rule Books and published the results for the references as a lengthy Appendix to the Mansfield volumes, tabulating the case names, the originating lawsuit, the names and occupations of the designated arbitrators (given for most of the cases), and describing any special features that appeared in the agreements. In an explanatory footnote, I noted that early in Mansfield's time as Chief Justice certain provisions began to appear regularly, soon becoming standard.<sup>42</sup> These included two procedural provisions of significance to the present topic, discovery: authorization by the parties (1) for the witnesses to be sworn, also for the parties to give sworn testimony (notwithstanding the fact that they could not testify under oath in court because of the party witness rule);<sup>43</sup> and (2) for the production of relevant documentary evidence.<sup>44</sup>

In London in 1849, only a few years after Justice Story died, Francis Russell published the first edition of *A Treatise on the Power and Duty of an Arbitrator and the Law of Submissions and Awards*, 927 pages long, and an American edition was published in Philadelphia the same year.<sup>45</sup> This volume is an extraordinary trove of information about English arbitration practice, with full explanations of statutory developments, including a major statute enacted in 1833-34, 3 & 4 W. IV. This statute expressly authorized arbitrators in references or submissions that had been made rules of court to administer oaths themselves, and to compel the production

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40. The Rule Books for the Court of King's Bench are held by The National Archives in London, known as the Public Record Office when I did my research. The plea side Rule Books are at KB 125. Each volume contains a large variety of official King's Bench orders. These were copied daily by hand into the books by court clerks. King's Bench Rule Books, Plea Side, The National Archives (Kew, London) 125/155 – 125/173 (1757-1788) [hereinafter RULE BOOKS].

41. 9 Will. 3, c. 15.

42. OLDHAM, *THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW*, VOL. II 1541 n.5 (1992).

43. *Id.* at 1543 n.11. See *supra* note 23 and accompany text (discussing the party witness rule).

44. OLDHAM, *THE MANSFIELD MANUSCRIPTS*, *supra* note 42, at 1542 n.8.

45. FRANCIS RUSSELL, *A TREATISE ON THE POWER AND DUTY OF AN ARBITRATOR AND THE LAW OF SUBMISSIONS AND AWARDS* (1849).



of relevant documentary evidence.<sup>46</sup> Russell described the “old practice for swearing witnesses” as follows:

As before the recent statute the arbitrator had no power to administer an oath, it was usual, when a cause was referred at Nisi Prius [at a jury trial], and the witnesses were in court, for each attorney to write down the names of his witnesses, together with the name of the cause, upon a piece of paper, and give it to the crier of the court, who would thereupon swear the witnesses. In other cases, when the submission contained a clause for making it a rule of court, or when the reference was by rule of court, or judge’s order, a similar list was made out, stating also whether the persons to be sworn were parties or only witnesses. It was taken to the judge’s chambers, or to the court in Westminster, and the judge’s clerk had the witnesses sworn, and gave a memorandum to that effect signed by the judge.<sup>47</sup>

This procedure was no longer necessary after the statute of 3 & 4 W. IV – as Russell wrote, “The more usual and convenient course now is, to have the witnesses sworn before the arbitrator at the meeting at which they attend to give their evidence.”<sup>48</sup> The statute of 3 & 4 W. IV also expressly authorized the compulsory attendance of witnesses and production of documents, the latter if necessary by a subpoena *duces tecum*, and these orders could be obtained from a judge in chambers.<sup>49</sup> Thus, to close the loop, Justice Story’s comments in the *Tobey* case about the discovery limitations of arbitration were outdated and inaccurate.

#### IV. EXPERTISE

Earlier I described the arbitration agreements that were entered in the King’s Bench Rule Books for the plea side (civil cases) from 1755 through 1786.<sup>50</sup> Most of these cases were “references” from jury trials in which “a juror was withdrawn,” that is, the jury trial was suspended in order to refer the matter to arbitration, with the expectation that a final and binding award would ensue.<sup>51</sup> Also a large number of Rule Book orders were “submissions,” entered by affidavit and bond as if real lawsuits, even though they were merely free-standing agreements to arbitrate that had been authorized by the John Locke statute to be entered as rules of court. The Rule Book entries for all of these references and submissions include not only the discovery provisions already discussed,<sup>52</sup> but also the names and occupations of the designated arbitrators.

Several surprises are revealed by the composite picture.<sup>53</sup> First, very few men were significant repeaters as arbitrators. One “gentleman” stood out – Thomas

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46. See *id.* at 172-78 (citing and quoting 3 & 4 Will. 4 c. 42, §§ 40 & 41).

47. *Id.* at 176-77 (footnotes omitted).

48. *Id.* at 177.

49. *Id.* at 172-73.

50. See *supra* notes 40-42 and accompany text.

51. See OLDHAM, THE MANSFIELD MANUSCRIPTS, *supra* note 18, at 157.

52. See *supra* p. 47.

53. The summary statistics that follow are derived from my own catalog of all of the arbitration rules of court extracted from the King’s Bench Rule Books for the years 1756-1786. See RULE BOOKS, *supra*

Lowten, mentioned earlier,<sup>54</sup> to whom over 60 cases were referred across the years covered. Only five others heard more than five cases.<sup>55</sup> Nearly two dozen arbitrators heard three to five cases each; almost 75 heard two cases each; and an amazingly large number, approximately 770 men, served as arbitrators in only a single case each, and the range of occupations in this group was exceedingly large.<sup>56</sup> Esquires, merchants, and gentlemen predominated, followed by substantial groups of surveyors and carpenters or builders.<sup>57</sup> It is clear that in a great many of these cases, the arbitrator's expertise was distinctly relevant to the nature of the dispute. Countless examples could be given, but a representative selection from cases tried by Lord Mansfield will serve:

Examples of Reliance on Arbitrator Expertise

Occupation	Arbitrator	Case Name	Dispute	MMSS page <sup>58</sup>
Architect	George Dance	Chapman v. Rutland (1764)	work & labor performed	1551
Architect	James Paine	Wheeler v. Jones (1777)	ownership of a wall	1587
Architect	Benton Couse	Holland v. Vardy (1779)	value of brick-layer's work	1595
Carpenter	William Edwards	Verren v. Bell (1760)	work done for defendant	1547
Carpenter	John Atkins	King v. Byrne (1771)	privy drainage into house	1569
Carpenter	Edward Burton	Wetherall v. Pitstow (1773)	carpenter's bill	1572
Carpenter	Robert Hudson	Bass v. Stanley (1777)	obstructing right of way	1586
Grocer	Samuel Smith	Sukring v. Pritzler (1773)	sale of sugar	1573
Hosier	Armstrong Jones	Thompson v. Cherry (1766)	value of goods sold	1556
Merchant	James Tierney	Curtis v. Dunbar (1776)	prize money	1555
Merchant Merchant	Francis Baring John Gentil	Perry v. Ve-zian (1778)	quality of kid-skins	1591
Merchant	John Schoolbred	Croskey v. Parker (1781)	partnership debt	1603

note 40. That catalog is far too long to be reproduced here; however, salient features of all of the references to arbitration that were made rules of court in trials conducted by Lord Mansfield are in print. See OLDHAM, THE MANSFIELD MANUSCRIPTS, *supra* note 42, at 1540-1625 (Appendix E).

54. See OLDHAM, THE MANSFIELD MANUSCRIPTS, *supra* note 18 and accompanying text.

55. See RULE BOOKS, *supra* note 40.

56. See *id.*

57. See *id.*

58. Page references are to cases catalogued in Appendix E in volume II, *The Mansfield Manuscripts*. See OLDHAM, MANSFIELD MANUSCRIPTS, *supra* note 42, at Vol. II Appendix E.

Merchant	Thomas Gorman	Symond v. Edie (1782)	settling bill of exchange accounts	1606
Merchant	Thomas Gorman	Herrezuelo v. Sherrer (1792)	amounts owing on insurance policies	1606
Merchant	Thomas Gorman	DeEquino v. Hodgson (1782)	amounts owing on insurance policies	1607
Shipbuilder	Thomas Taylor	Greaves v. Quallett (1773)	amount owing for work & materials	1573
Shipbuilder	James Menetone	Smith v. Thwaite (1785)	work & labor on defendant's ship	1620
Ship Captain	Thomas Gowland	Shepherd v. Smith (1779)	amount due from last voyage	1594
Stationer Stationer Stationer	George Street Michael Flower Thomas Wright	Bloxam v. Cooksey (1769)	price of rags and selling of paper	1565
Surveyor	John Phillips	Cox v. Frognall (1765)	to survey work done by defendant	1552
Surveyor	Alexander Aitkens	Bowdler v. Dalmahoy (1765)	value of carpenter's work & labor	1554
Surveyor	Richard Grace Richard Hilton	Hemsley v. Simpson (1771)	value of work, labor & materials	1568
Surveyor	George Dance	Norton v. Bacon (1772)	value of work & labor	1571
Surveyor	Richard Norris Thomas Skinner (auctioneer)	Ridout v. Whitcombe (1772)	value of fixtures at bankrupt works	1572
Surveyor Surveyor	John Robinson Charles Mills	Bryson v. Quarry (1775)	how plaintiff is to enjoy ancient lights	1578
Surveyor	Robert Milne	Cook v. Bisson (1776)	proper height of obstruction to reflux of tide	1582
Surveyor	Robert Milne John Smeaton (engineer)	Cook v. Bisson (1777)	proper height of obstruction to reflux of tide	1558

## V. COMPLEXITY

In addition to specific occupational expertise that related to the subject matter of the dispute being arbitrated, some cases were so convoluted and complex that they were considered too difficult for a jury to comprehend, and were instead referred to arbitration, often to skilled barristers.<sup>59</sup> Sometimes complicated business lawsuits in England in the late 18<sup>th</sup> century would never have reached a jury because they were not “suits at common law” but were suits in equity in the Court of Chancery, where there were no juries.<sup>60</sup> The most common example of this type of case was the suit in which the plaintiff sought an accounting, for example in activities of a partnership or in a bankruptcy proceeding. Such a case would ordinarily be referred to one of the twelve Masters in Chancery to work out the accounts.<sup>61</sup> In the 1794 case of *Barnard v. Assignees of Price*, the plaintiff had filed initially in the Court of Chancery seeking an accounting from the assignees of Price, after Price had become bankrupt.<sup>62</sup> At the plaintiff’s request, the case was referred to a Master in Chancery, but to everyone’s surprise, the Master punted, sending the case to the Court of King’s Bench for the verdict of a jury “on the state of this long and complicated account.”<sup>63</sup> The case was presented to Chief Justice Kenyon and a special jury of merchants on December 18, 1794 by two of the leading barristers of the day, William Garrow and Thomas Erskine.<sup>64</sup> According to the report of the case in *The Times*, Garrow said that “the case consisted of such volumes of paper, that he should have no difficulty to say, without danger of being contradicted, that it was absolutely impossible for a Court and a Jury to decide that cause.”<sup>65</sup> He said that if it had originated in a court of law, “it would have been considered as one of those causes, which, from unavoidable necessity, must be referred to arbitration.”<sup>66</sup> Garrow, therefore, suggested to Erskine that they should do just that—send the case to arbitration.<sup>67</sup> Erskine said that “he had no objection to refer it, provided they could get some gentleman (who must be a young man) to devote the remainder of his days to this business.”<sup>68</sup> In the end, Garrow and Erskine agreed to refer the case to (young) barristers George Holroyd and John Bayley.<sup>69</sup> Lord Kenyon said “it could not be in better hands; and the verdict would be entered up, as the arbitrators should direct.”<sup>70</sup>

Brief reports of cases with comparable outcomes appeared intermittently in *The Times*. In *Handy v. Camden*, for example, counsel for the plaintiff was reported to have said that “he must go through accounts to upwards of 10,000, and he thought it would have been proper to have brought their night-caps, unless they chose to

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59. See James Oldham, *On the Question of a Complexity Exception to the Seventh Amendment Guarantee of Trial by Jury*, 71 OHIO ST. L. J. 1031, 1033-35 (2010).

60. *Id.*

61. *Id.* at 1033.

62. THE LONDON TIMES, Dec. 19 1794, at 3.

63. *Id.* See also Oldham, *On the Question of a Complexity Exception*, *supra* note 61 at 1033-34.

64. THE LONDON TIMES, Dec. 19, 1794, at 3.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. THE LONDON TIMES, Dec. 19, 1794, at 3. In the news account, Bayley is spelled Baillie. *Id.*

refer it.”<sup>71</sup> The parties chose to refer it to a Mr. Norris of the Sun Fire Office.<sup>72</sup> In an account on August 18, 1791 of the summer assize docket at Bury St. Edmund’s, *The Times* included a paragraph on a case being presented by counsel James Mingay to a special jury, “an action against the Trustees of the navigable communication between Ipswich and Stowmarket,” and

after getting a little way into the cause, and the jury confessing themselves not competent to decide on the skill or merits of canal-cutting, nor of the value of materials, nor of their use or necessity, and not much elucidation being expected from either the Bar or the Bench on such a subject, the parties agreed to refer the matters in dispute to a gentleman of skill and experience in this branch of the business.<sup>73</sup>

Similarly, in the combined cases of *Smith v. Searles* and *Searles v. Smith* that were to have been tried before King’s Bench Justice Gould and a special jury, “the learned Judge recommended references as the best mode of complete investigation; and in pursuance of this advice, Mr. Serjeant Runnington was appointed the sole arbitrator.”<sup>74</sup>

Two more examples that came before Mansfield’s successor as Chief Justice of King’s Bench, Sir Lloyd Kenyon, deserve mention. In *Wilkinson v. Wilkinson*, the plaintiff and defendant were brothers “who were reported to have sunk a half a million of money in iron works.”<sup>75</sup> The plaintiff accused his brother of having broken up some of the iron works, and

LORD KENYON said, this was a cause of all others that pressed the parties to go to a reference. Both the Plaintiff and the Defendant were men of character. A cause of this sort was so multifarious, that it would be impossible ever to get to the end of it at *Nisi Prius*. It was pursuing a shadow, and he was very clear that it ought to go to a reference. It appeared that there were three Bills in Chancery, each of them several thousand sheets long. His Lordship thought it was of some importance for the parties to understand that the Court of Chancery would not settle all these accounts for at least these fifty years, so that if it continued in that Court, it would descend as a legacy to their Executors, Administrators, &c . . . . By the recommendation of the Lord Chief justice, it was agreed, that all subjects in dispute between the parties, should be referred to a number of Iron-Masters that should be elected by the parties.<sup>76</sup>

Finally, in *Assignees of Lewis and Potter v. The Assignees of Livsey, Hargrave, and Co.*, a motion was argued before the full Court of King’s Bench to set aside an arbitration award that had sorted out complicated accounts in the insolvency of both

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71. THE LONDON TIMES, Aug. 16, 1787, at 3.

72. *Id.*

73. THE LONDON TIMES, Aug. 18, 1791, at 4.

74. THE LONDON TIMES, Nov. 8, 1792, at 3.

75. THE LONDON TIMES, Oct. 7, 1795, at 2.

76. *Id.*

parties, accounts worth approximately £340,000.<sup>77</sup> The arbitrators had been appointed after eight years of litigation had failed to resolve matters.<sup>78</sup> Among the observations by Chief Justice Kenyon, as reported by *The Times*, were the following:

Arbitrations were extremely beneficial in many cases, and in no instance were they more beneficial than in this very case, where there was an immense number of commercial accounts between two houses trading to an extent . . . almost unexampled in the history of the commerce of this country. In order to settle both the law and the facts of this case, the parties selected three Merchants of competent knowledge, and of minds sufficiently enlightened on the subject, . . . who went through the whole of it . . . , and after all this, the Court was to let the whole loose again, and open the door to fresh litigation? . . . his Lordship said that he had not the least particle of doubt that justice had been done, but he did not go on that ground, but on the ground that it had been decided by Judges of the parties own choosing, and as nothing improper was imputed to them in the manner of deciding it, he should dread the consequences of opening it again.<sup>79</sup>

Lord Kenyon, therefore, thought that the motion to set aside the award should be denied. And according to the report in *The Times*, “The other Judges were of the same opinion” – “[t]hey thought it had been decided honestly, ably, and uprightly, and that the facts submitted to the Arbitrators were peculiarly fit for the decision of commercial men.”<sup>80</sup>

## VI. CONCLUSION

Even in the late 18<sup>th</sup> and early 19<sup>th</sup> centuries there were, of course, those who were not enthusiastic about the arbitration process. One of our founding fathers, Daniel Webster, was an outspoken critic. As he once wrote: “No man, in this age, contends for the illiberal constructions and black-lettered niceties of the ancient gown-men; nor will a wise man push to the other extreme, and overwhelm all certainty and all rule in the chaos of *arbitration* principles.”<sup>81</sup> Yet, as the cases that have been discussed demonstrate, many of Webster’s contemporaries in the English legal community turned to arbitration to *avoid* the chaos of trying to present and argue complex matters, especially financial ones, to a jury. The arbitration process also provided a way to dodge restrictive evidentiary rules that governed the common law courts, such as the party witness rule and the need to go to Chancery for purposes of discovery. And perhaps most important was the advantage of placing a dispute before an arbitrator who possessed expertise or skills that allowed him to

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77. THE LONDON TIMES, Feb. 11, 1797, at 3.

78. *Id.*

79. *Id.*

80. *Id.*

81. 1 THE PAPERS OF DANIEL WEBSTER: LEGAL PAPERS 172 (Alfred S. Konefsky & Andrew J. King, eds., 1982).

understand the dispute much more readily and fully that would have been true of a common law judge.<sup>82</sup>

Arbitration today is certainly not the bargain that it once was, but it remains economically preferable to litigation in many contexts. Also, today, the discovery advantage is often its *absence* rather than its availability. But overall, the process of arbitration, venerable across at least six centuries, continues to be of substantial utility as a civilized, peaceable means of final and binding dispute settlement.

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82. As I have discussed elsewhere, another choice that was available and advantageous was to pay extra for a special jury, often a jury of merchants, who would often know more about a mercantile dispute than the sitting judge. This was often done, but arbitration was simpler, and, as shown by the 1791 Bury St. Edmunds case (above), even special juries had their limits. See Oldham, *On the Question of a Complexity Exception*, *supra* note 61, at 1041-51.