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## CONTRACTUAL CONTROL OVER ADJECTIVE LAW

BY NATHAN ISAACS\*

Adjective law, it is generally assumed, is a matter for the courts.<sup>1</sup> The only reference to any attempt to control questions of practice and procedure contained in the ordinary treatises on contract law comes under the general proposition that it is against public policy and therefore beyond the power of contracting parties to interfere with the ordinary course of justice. To this proposition there are, of course, exceptions. But the authors generally do not feel called upon systematically to present these exceptions so as to inform the draftsman of a contract just exactly what, if anything, can be done towards supplementing or limiting the ordinary means of enforcement provided by the law in ordinary cases.

Nevertheless business men do actually find it advisable to insert

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<sup>1</sup> The expression "adjective law" is here used of rules of procedure and administration as distinguished from rules of substantive law, as first suggested by Bentham. The exact sense in which these words are used differs rather widely in the various treatises on Jurisprudence. Cf. HOLLAND, p. 76; POLLOCK, FIRST BOOK OF JURISPRUDENCE, pp. 79, 250; SALMOND, JURISPRUDENCE, 6th ed., p. 437. Hohfeld suggests a more accurate differentiation between primary rights and secondary rights. The position taken in this paper is that none of these distinctions is fundamental and that any attempt to exclude consideration of adjective law as such from the subject matter of contracts is based on the misconception that the distinction is clear and fundamental.

What is said below of the treatment in the text-books on contracts does not apply, of course, to the large encyclopedic works. PAGE on CONTRACTS in his second edition devotes a section of the second volume which deals with the subject matter under the title "Concerning Procedure and Remedies" (§ 726). In this and neighboring sections a vast amount of case material is indexed, most of which upon examination is found merely to reiterate the general principles that agreements interfering with the course of justice are void. As Mr. Page remarks, "We have become so accustomed to this rule that we have never studied the possible workings of any other." In the present study an attempt is made to sketch another rule—that of a limited power of control by contracting parties over matters that concern them though ordinarily not classed as substantive law.

clauses in their contracts aimed at the creation of better modes of enforcement than those ordinarily provided by law and at the regulation of details coming in every stage of procedure from the summons through the trial down to final execution. Some of these attempts are ridiculously crude. For example, one great railroad prints on its commutation tickets the statement that any attempt to use the ticket after its expiration shall be conclusive evidence of fraud on the part of the holder. There is room, however, for innumerable more carefully devised propositions that will directly or indirectly affect the enforcement of a contract in case of attempted breach or the obtaining of redress in case of an actual breach. An effort will be made here to bring together rather than fully to discuss the various types of attempts that are constantly being made in this direction. From a consideration of them it may appear that they serve a genuine function in the business world and that it is not quite necessary nor proper to deal with them as illegitimate offspring of contract law. They may be roughly classified for our purpose as positive and negative, the former having to do with additional safeguards and remedies not ordinarily provided by the law and the latter with attempts to limit or change the ordinary application of the law to cases of the kind in question.

#### I. SELF-HELP BY CONTRACT.

In the discussions of self-help as distinguished from judicial help in the enforcement of our rights, it is customary to point out how in modern society the self-help that was common in early days has practically disappeared. Blackstone is quoted to the effect that in his day self-defense, recaption or reprisal, re-entry on land, abatement of nuisance and distress for rent were the only instances left in which one could take the law into his own hands.<sup>2</sup> It is generally added that most of these examples have disappeared in most jurisdictions since his day. But these discussions overlook the growth of *contractual* self-help. Lien law, for example, which in Blackstone's day was simply a branch of procedure applicable in certain cases, has since been taken over into the law of contracts so that the self-help of holding or even of disposing of another's goods may easily be provided for in many contracts. There is, of course, nothing new in contractual attempts to provide a mode of enforcement where the ordinary

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<sup>2</sup> 3 COMMENTARIES, pp. 3-16.

provisions of the law of contract are inadequate. Dean Wigmore has shown how the pledge idea antedates in most civilizations the notion that it is a function of courts to collect ordinary debts.<sup>3</sup> In fact, the history of some branches of our law, notably mortgages, is an account of the efforts of the courts to limit the effect of contractual self-help and bring it more or less within the bounds of ordinary legal procedure. Yet new modes of self-help are constantly being devised. To take a few instances from modern business, there are the post-dated check, the conditional sale, the taking over of a voting interest in a business or the taking over by a creditor of complete control of a business pending the payment of its debt to him. In these cases, as in the case of a mortgage, as abuses develop from the literal enforcement of the drastic terms, the law attempts to tone down the self-help contractually provided for. The most notable example in recent years is perhaps that of the conditional sales agreement which no longer means what it says in most states but is simply interpreted as if it were a sale of goods with a mortgage back to the unpaid seller. It must not be overlooked, however, that legislatures have recognized the propriety of some varieties of contractual self-help and have even encouraged or extended them by statute. The Sales Act, for example, gives the unpaid seller, in the absence of a contract to the contrary, several alternatives which he did not have at common law. As summarized in Section 53, even after the property in the goods has passed to the buyer, the unpaid seller has

“(a) A lien on the goods or right to retain them for the price while he is in possession of them.

“(b) In case of the insolvency of the buyer, a right of stopping the goods *in transitu* after he has parted with possession of them.

“(c) A right of resale as limited by this Act.

“(d) A right to rescind the sale as limited by this Act.

Business men find it necessary to resort to contractual provisions for self-help, particularly in cases where they deal with persons without property. For this practical reason there has grown up in some industries the practice of requiring a deposit from employees trusted with funds or valuable goods or, what amounts to the same thing, a provision whereby the employer may retain for stated periods a part of the employee's earnings.

It is even possible to give new life to a dying provision in the law of self-help by means of a contract. Thus it is not uncommon in

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<sup>3</sup> “The Pledge Idea,” 10 HARV. L. REV. 341; 11 *Ibid.* 18.

leases to provide not only that the landlord shall have a lien on the tenant's goods brought on the premises, but that in case of their having been removed, the landlord may follow the goods and distrain and take possession of them as if the goods had not been removed.

It is thus extremely difficult to predicate any limits as to the possibility of private arrangements between parties for the purpose of facilitating or safeguarding transactions except in those few cases in which the law has stepped in to prevent too drastic an application of the principle of contractual self-help.<sup>4</sup>

## II. THE MODIFICATION OF ORDINARY PROCEDURE.

### A. *Resisting Ordinary Provisions.*

The idea of resisting the ordinary provisions of the law for the enforcement of contracts strikes us today at first glance as an impertinence, to say the least. It seems almost axiomatic that procedure is a matter for the courts. The elementary treatises tell us unqualifiedly that "all agreements for pecuniary consideration to control the regular administration of justice are void as against public policy without reference to the question whether improper means are contemplated or used in their execution. Such agreements are evil in their tendency and therefore it is the policy of the law to discourage them by consistently holding them void."<sup>5</sup> It is well to remember, however, that Anglo-American law has achieved this position only through a long and peculiar history. In the Roman system a contractual theory of procedure seems to be assumed: that is to say, an actual or fictitious pact is entered into at one stage of the case to the effect that the defendant will pay the plaintiff a certain sum if such and such of the plaintiff's allegations are found to be true. This contractual theory prevails even if the cause of action is a pure delict. In the Anglo-American system, on the other hand, we have a delictual theory of procedure even though the cause of action is in contract. This is true in spite of the fact that there is a contractual phase in the joinder of issues by which the matter in dispute is left to the court or to the jury. The agreement here has reference to the mode of trial. It is not the basis of the obligation to abide by the judgment. It is

<sup>4</sup> Part III of SCHAUB and ISAACS, *THE LAW IN BUSINESS PROBLEMS*, dealing with the enforcement of contracts, is divided into two parts: the first dealing with the ordinary machinery provided by the law and the second with special contractual modes of safeguarding and facilitating credit. Cases are there collected illustrating the business practices referred to in the above paragraph.

<sup>5</sup> Cf. article "Contracts" in 6 R. C. L. § 751.

therefore not quite so appropriate to speak of our judgments as quasi-contractual obligations as it is so to describe the judgments under the Roman system; yet we have taken over this theory of the obligation of a judgment somewhat mechanically from the continent of Europe. The significance of our delictual mode of procedure in this connection is that it leaves little room for a contract as to purely precedural matters.

Nevertheless we do find it desirable at times to agree not to sue in a particular case, or, if sued, not to plead a particular defense.<sup>6</sup> A perfectly legitimate motive in this connection may be to prevent a multiplicity of suits. In such a case the stipulation of the contract may take the form of an agreement not to sue any one but a specified person. Such agreements have in proper cases been upheld.<sup>7</sup> A more common attempt is to limit the area within which a suit can be brought. This is more dangerous inasmuch as it arouses the jealousy of the court as to its jurisdiction. Agreements seeking wholly to deprive any sovereign of jurisdiction are usually conceded to be void.<sup>8</sup> Partial limitations, on the other hand, have been upheld. In Massachusetts the case of *Mittenthal v. Mascagni*<sup>9</sup> suggested for a while the possibility of a reasonable limitation of the area within which a suit can be brought. But this seems to have been shaken by the recent case of *Nassau River Paper Co. v. Hammermill Paper Co.*<sup>10</sup> in which it was held that a stipulation in a contract between a domestic and a foreign corporation that no action should be maintainable against the latter except in certain courts of its own state was invalid.<sup>11</sup> The principle of these cases may seem at first sight to render general arbitration clauses ineffectual to oust the courts of jurisdiction. Yet courts have not overlooked the advantage to society of upholding arbitration agreements so far as possible. The chief means of distinguishing between such agreements and stipulations to oust the court from its jurisdiction has been to interpret the agreements as involving nothing but a condition precedent to the fixing of the liability of the defendant. Of course where the arbitration serves to define a duty rather than to determine the question of

<sup>6</sup> Cf. the numerous cases collected in the notes to § 399 of the article "Contracts" in *CORPUS JURIS*, involving attempts in this direction many of which were, of course, held contrary to public policy. Of course forbearance to sue after a controversy has arisen is almost universally held not only legal but a good consideration for a counter-promise.

<sup>7</sup> Cf. *Lawrence v. Schaefer*, 20 N. Y. App. Div. 80 (1897); affirmed 42 N. Y. Sup. 992.

<sup>8</sup> *Insurance Co. v. Morse*, 20 Wall. 445 (U. S. 1874), holding void an agreement not to remove a case to the Federal Courts.

<sup>9</sup> 103 Mass. 19, 66 N. E. 425 (1903).

<sup>10</sup> 223 Mass. 8, 111 N. E. 678 (1916).

<sup>11</sup> Cf. *Gaither v. Charlotte Motor Car Co.*, 109 S. E. 362 (N. C. 1921).

its infringement, the condition precedent can easily be enforced. As a matter of fact, it is sometimes extremely difficult to determine whether a particular arbitration agreement has reference to the defining of a duty or to the ascertainment of a breach. For example, in those cases in which an architect's certificate is required as a condition precedent to the duty of a contracting party to accept a building, in substance the architect is clearly substituted for a tribunal.<sup>12</sup> Yet these cases have not only been given full force and effect, but in Pennsylvania where a statute was passed in 1907 requiring a court to ignore such an agreement, the statute was held unconstitutional.<sup>13</sup> It appears, then, that by means of the condition precedent contracting parties may go a great way towards the selection of tribunals other than the courts for the adjustment of certain of their disputes. Whether an agreement making one of the parties the sole judge of the cause of action arising out of the contract can be so upheld is a more difficult question.<sup>14</sup> In general, it is hardly to be expected that this phase of contractual control over adjective law, namely the complete resistance of the ordinary procedure of the courts, will be the most fruitful.

We turn now to efforts merely to vary the ordinary procedure or anticipate it without ousting the court of its jurisdiction over a complete subject matter.

### *B. Varying Details of Adjective Law.*

In the first place we must consider the possibility of waiver of many of the provisions of adjective law, which aim primarily to give each side a day in court and a fair hearing. Thus one may waive details connected with the summons and the summons itself in the absence of a statutory provision making it clear that the interest of the state rather than that of the individual is the basis of the requirement of the particular detail of summons sought to be waived. An agreement that substituted service shall take the place of actual service is generally effective.<sup>15</sup> In like manner waivers are effective in the case of many other details provided by statute for the safeguarding of a litigant down to the waiver of exemptions, though states differ very radically

<sup>12</sup> Cf. WILLISTON, CONTRACTS, §§ 794-798. See, A. C. Burnham, "Arbitration as a Condition Precedent," 11 HARV. L. REV. 234.

<sup>13</sup> P. L. 1907, p. 381, § 1. Held unconstitutional in *Adinolfi, Appellant, v. Hazlett*, 242 Pa. 25, 38 Atl. 869. (1913).

<sup>14</sup> *Fidelity etc. Co. v. Elckhoff*, 63 Minn. 170, 65 N. W. 351 (1895); *White v. Middlesex R. Co.*, 135 Mass. 216 (1883).

<sup>15</sup> Cf. *Copin v. Adamson*, 9 Exch. 345 (1874).

in the comparative emphasis they place upon the social or purely personal nature of the interest served by the various stipulations sought to be waived. Where courts realize, for example, that homestead exemptions are primarily calculated to serve the interests of the state and the family rather than that of the insolvent debtor, they do all in their power to ward off interferences with them through contractual waiver.<sup>16</sup>

A most effective weapon of enforcement in most jurisdictions is the warrant or power of one of the contracting parties to appear on behalf of the other and confess judgment as provided in the judgment note. The possibilities, however, of this weapon are by no means limited to promissory notes. In Pennsylvania, for example, the power of confessing judgment for rent due is very common in leases. In addition it is sometimes provided that the landlord may appear on behalf of the tenant and confess a judgment in ejectment so that the very first intimation that comes to the tenant after his alleged breach of the terms of the lease is the appearance of a sheriff ready to remove his goods forcibly from the premises excepting, of course, such as the landlord may care to levy upon for the payment of the rent due or to become due. The attitude of the several states towards this type of warrant is by no means uniform. In some it is provided by statute that no confession of judgment is effective unless the debtor appears in person. In others not only is the presence of the debtor dispensed with, but it is deemed a sufficient compliance with the terms of the warrant if the creditor, without actually appearing in any court on behalf of the debtor, merely files the necessary document with the prothonotary or clerk of court. And after a judgment is rendered on the basis of such a warrant or power of attorney, the

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<sup>16</sup> It is generally said that exemption laws are not a part of the contract but a part of the remedy and therefore subject to the law of the forum. *Chicago etc. R. Co. v. Sturm*, 107 U. S. 710, 43 L. Ed. 1144 (1899). Outside of Pennsylvania it is generally held that a debtor's waiver of his exemption right by stipulation of an executory contract is void. 25 C. J. 111. The opposite rule prevails, however, in Pennsylvania. *Beatty v. Rankin*, 139 Pa. 358, 21 Atl. 74 (1890), and cases there cited. Thus a tenant may waive his right to exemption as against distress for rent although the statute expressly provides for such an exemption. *McKinney v. Reader*, 6 Watts 34 (Pa. 1837).

As to right of privilege of trial by jury, that may, of course, be waived by a stipulation between the parties, and little or no difficulty seems to be experienced in enforcing a stipulation of this kind contained in the original contract. *The Bank of Columbia v. Okely*, 4 Wheat. 235, 4 L. Ed. 559 (U. S. 1819). On the waivers spoken of in this paragraph, perhaps the best collection of authorities in existence is that in Chapter 23 of PAGE, *CONTRACTS*, 2d ed., entitled "Contracts-Waiving Rights." Unfortunately there is very little guidance offered among the conflicting decisions on practically every point, but this situation is almost inevitable in an encyclopedic work with reference to a branch of the law in which the personal interests of the parties are brought into such frequent clash with the interests of society in the various objects for which the rights sought to be waived were created. Differences in the statutes creating or declaring the several rights are also a factor, making the formulation of principles difficult, if not impossible.



opportunities that the debtor has of having the judgment set aside or modified differ very materially. Without going into the technical learning of this subject, which in most cases is nothing more than statutory construction, it is clear that so far as the power to confess judgment is an institution recognized by our law, it is in effect, though perhaps not in theory, a very drastic mode of controlling procedure by contract.<sup>17</sup>

A more direct and, on the whole, a less successful form of attempts to control adjective law is concerned with rules of evidence. Theoretically what is and what is not admissible evidence is a simple question for the court to determine.<sup>18</sup> A provision in a lease, for example, that it shall be inadmissible in evidence if presented for certain types of cases is very properly held void.<sup>19</sup> Likewise a stipulation that a certain document such as a voucher shall be conclusive evidence of a debt or of the existence of any other fact is void.<sup>20</sup> In a recent Iowa case, the provision in the by-laws and certificate of membership in a beneficial association that "disappearance or long continued absence of the member, unheard of, shall not be regarded as evidence of death or any right to recover" was held void.<sup>21</sup> It is possible, however, to constitute a finding of any kind as *prima facie* evidence.<sup>22</sup> It is also possible, indirectly by a particular officer or a certificate or document to give overwhelming effect to a particular document by means of a stipulation that no condition, representation, or warranty shall be binding on one of the contracting parties unless incorporated into that document or, what amounts to the same thing, the stipulation that a particular document shall be construed without reference to any other papers as constituting the contract between the two parties.<sup>23</sup> Such a possibility is based on the very simple principle that the "integration" of papers must depend upon the intent of the parties<sup>24</sup> and where such intent is clearly expressed, it will naturally control the question whether this or that document should be usa-

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<sup>17</sup> Perhaps no state goes further than Pennsylvania in recognizing and making effective such powers of attorney. In other jurisdictions not only has a tendency been shown to construe them very strictly, but statutes have been passed either doing away with their effectiveness entirely or limiting their use. *Cf.* 23 *Cyc.* 699.

<sup>18</sup> *Ferguson v. Rogers*, 129 Ark. 197, 195 S. W. 22 (1917), but *cf.* *Roeh v. Business Men's Protective Ass'n.*, 164 Ia. 199, 145 N. W. 479 (1914); *Lewis v. Brotherhood Accident Co.*, 194 Mass. 1, 79 N. E. 802 (1907).

<sup>19</sup> *N. Y. etc. Orphan House v. Hoyle*, 79 N. Y. Misc. 301, 139 N. Y. Sup. 1098 (1913).

<sup>20</sup> *Guaranty Co. of North America v. Charles*, 92 S. C. 282, 75 S. E. 387, (1912); *N. Y. Fidelity etc. Co. v. Crays*, 76 Minn. 450, 79 N. W. 531 (1899); *contra* *Fidelity etc. Co. v. Baker*, 136 Ark. 227, 206 S. W. 314 (1918).

<sup>21</sup> *Fleming v. Insurance Co.* 180 N. W. 202 (Ia. 1920).

<sup>22</sup> *Cf.* *Fidelity etc. Co. v. Elckhoff*, note 14 above.

<sup>23</sup> *White Sewing Machine Co. v. Miller*, 66 Minn. 119, 120, 68 N. W. 851 (1896).

<sup>24</sup> *Cf.* WILLISTON, CONTRACTS, § 633.

ble as evidence. In like manner it is possible to render a particular proposition incontestable indirectly if not directly. One may either estop himself by his writing or stipulate that a particular proposition will not be contested except in a certain way or within a certain time limit.<sup>25</sup>

On the question of the powers of parties to a contract to change the lawful time within which an action may be brought, courts are by no means in agreement. It would seem that a stipulation falling within the statutory period of limitations should, if reasonable, be upheld.<sup>26</sup> On the other hand, to lengthen the period by contract might seem like trying to pick oneself up with his own bootstraps.<sup>27</sup> Yet for the very purpose of lengthening the period one may slap a seal on his otherwise perfect, simple contract and thus effectually, though not in terms, contractually control even this feature of adjective law.

As to what does or does not constitute a waiver of a condition in a contract, it would seem again that the question is primarily one of law for the courts. Yet leases constantly repeat such stipulations as that a consent on the part of the landlord to assign or sublet the property once shall not operate as a waiver of the condition against assigning or against subletting. So far as the question is one of interpretation either of the original condition or of the terms of the waiver, it is, of course, quite reasonable to give such effect to explicit words explaining the relation between the condition and any contemplated waiver in advance.<sup>28</sup>

Judicial review, on the whole, we have come to look upon as a sort of super-constitutional right. We feel that a man is entitled not only to one day in court but to two or possibly three. The psychological explanation of this attitude is probably that where review by higher tribunals is provided for it is a little clearer that

<sup>25</sup> The clause now commonly inserted in insurance policies that after being in force a specified time they shall not be disputed or shall be incontestable precludes any defense after the stipulated period on account of false statements which had been warranted to be true even though made fraudulently. Cf. the cases collected in 25 Cyc. 873 and the recent case of *Chinery v. Insurance Co.*, 182 N. Y. Sup. 555 (1920), pointing out the requirement that the time should not be unreasonably short. Other recent cases in which the validity of the clause is discussed and upheld are *Ramsey v. Insurance Co.*, 297 Ill. 592, 131 N. E. 108 (1921) and *Insurance Co. v. Miller*, 245 U. S. 96, 65 L. Ed. 155 (1920). In *Golden Cross v. Overton*, 203 Ala. 335, 83 So. 59 (1919), it is suggested that the incontestability clause must not be taken as an assurance against crime but an assurance against the *hazard of litigation*.

<sup>26</sup> *Fullam v. New York Union Ins. Co.*, 7 Gray 61 (Mass. 1859); *Northwestern Ins. Co. v. Phoenix Oil etc. Co.* 31 Pa. 448 (1858); *contra French v. Lafayette Ins. Co.*, 5 McLean 461 (U. S. 1853).

<sup>27</sup> Cf., however, *State Loan and Trust Co. v. Cochran*, 130 Cal. 245, 62 Pac. 466, 600 (1900); *Parchen v. Chessman*, 49 Mont. 326, 142 Pac. 631, 146 Pac. 469 (1914); *State Trust Co. v. Sheldon*, 68 Vt. 239, 35 Atl. 177 (1896).

<sup>28</sup> A long line of cases interpreting the famous *Dumpor's Case*, 4 Coke Rep. 119-b (1603), seems eventually to lead to a theory of the intent of the parties as the basis for deciding whether any particular case does or does not constitute a waiver of any given covenant.

one is subject not to the pronouncements of men but to the pronouncements of law speaking through a whole system of courts. Yet it is quite possible by statute or otherwise to limit the right to judicial review. It is also possible effectively to waive one's rights in this connection or even to contract in advance that the decision of the trial court shall be binding on the parties.<sup>29</sup> So long as access to a court is not entirely cut off, the agreement is not obnoxious to the doctrine that the courts must not be ousted from their jurisdiction.

The remedy in every case should follow, theoretically, from the law of the case<sup>30</sup> and not from any stipulation of the parties of the nature of a penalty. It is needless to discuss in this connection, however, the utter impossibility of drawing a perfect distinction between penalties and liquidated damages. Suffice it to say here that stipulations as to damages furnish one of the commonest illustrations in actual life of the power of parties to a contract to anticipate and in measure control adjective law. It has been held proper, however, for one to agree for a consideration that either of several remedies may be applied.<sup>31</sup> The stipulation that no damages shall be awarded has been upheld.<sup>32</sup> As to costs, considerable latitude is allowed excepting where the matter is narrowly regulated by statute.<sup>33</sup> The Negotiable Instruments Law by stipulating that an agreement as to costs shall not impair negotiability has probably stimulated the practice of contracting with reference to costs in advance.<sup>34</sup> Beyond damages, at least so far as the remedies sought are equitable, it is rather difficult for the parties effectually to control the outcome of their cases for the simple reason that so much lies in the discretion of the court. Yet they can do a great deal towards making clear in their agreements that such phrases as render proper specific performance or accounting are present in or are of the essence of their agreement. Thus by adding a negative clause to an agreement of employment to the effect that

<sup>29</sup> Hostetter's Appeal, 92 Pa. 132 (1879); *Hoste v. Dalton*, 137 Mich. 532, 100 N. W. 750 (1904). Cf. *Stedeker v. Bernard*, 93 N. Y. 589, 591 (1883).

<sup>30</sup> *Columbian Woodmen v. Payne*, 88 So. 454 (Ala. 1920).

<sup>31</sup> *Proctor Troy Properties Co. v. Dugan Store, Inc.*, 191 App. Div. 685, 181 N. Y. Sup. 786 (1920). Yet in a recent case it has been held that an agreement not to prevent an injunction suit as a part of a contract for personal services does not preclude an action for breach of contract. *Reisler v. Dempsey*, 173 N. Y. Sup. 212 (1918). An agreement to waive the right to proceed by attempt to enforce alimony is illegal. *Glickman v. Glickman*, 194 App. Div. 100, 185 N. Y. Sup. 421 (1920).

<sup>32</sup> *Cf. Geiser Mfg. Co. v. Krogman*, 111 Ia. 503, 82 N. W. 938 (1900).

<sup>33</sup> *Cf.*, however, *Northwestern Mutual Life Ins. Co. v. Butler*, 57 Neb. 198, 77 N. W. 867 (1898), in which the very unusual cost element of expenses incurred in procuring and continuing abstract of title for the purposes of foreclosure suit in a mortgage was held improper in a bond and mortgage.

<sup>34</sup> NEGOTIABLE INSTRUMENTS LAW, § 2, paragraph 5. For a variety of clauses taking advantage of this provision, cf. BRANNAN, NEGOTIABLE INSTRUMENTS LAW, 3rd ed., pp. 10-15.

the employee shall not work elsewhere, they strengthen their chances of an injunction, though of course in the absence of anything unique about the services of the employee in question, they do not insure the application of such a remedy.

Various attempts have been made to control in advance in a manner differing from that prescribed by statute the administration of various estates. Business contracts frequently stipulate what shall happen in the case of bankruptcy. Partnership agreements show a wide latitude, especially in their death clauses, as to the winding up of the partnership affairs. Occasionally an agreement of all parties in interest with reference to the administration of an estate is upheld provided it does not run counter to the appropriate law of the state with reference to wills and the like.<sup>35</sup> Finally, the attempt to modify procedure may extend even to the point of an agreement not to bid at a judicial sale. Such an agreement has been upheld where there was full knowledge and consent on the part of all interested parties and no fraud on the court.<sup>36</sup>

SUMMARY.

All that has been undertaken here is an enumeration of types of attempts by contracting parties to control details of adjective law. Many of them have been upheld in spite of the sweeping proposition so common in the textbooks and in the opinions of courts to the effect that all such agreements are void. This development has not been accomplished without a great deal of persistence, especially on the part of business men, a persistence that has led to experimentation with innumerable expedients among which comparatively few have survived the onslaught of the courts. To all of this we may react as Lord Holt did in another matter and ask why merchants cannot be satisfied to proceed according to law.<sup>37</sup> Or we may assume another point of view: that flexibility in procedure is a matter of genuine importance at times in the business world. Historically the expression *secundum legem mercatoriam* which was known in the law books as early as the Thirteenth Century meant originally "following a particular procedure rather than according to a particular system of substantive law."<sup>38</sup> It was a procedure distinguished above all things by its speed and certainty and the absence of technicality. When the great lawyers

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<sup>35</sup> *Cf.*, however, *Cox v. Grubb*, 47 Kans. 435, 28 Pac. 157 (1891).

<sup>36</sup> *Maffet v. Ijams*, 103 Pa. 266 (1883).

<sup>37</sup> In *Clerke v. Martin*, 2 Ld. Raym. 757 (1702) and *Buller v. Cripps*, 6 Mod. 29 (1704).

<sup>38</sup> Isaacs, "The Merchant and His Law," 23 *JOUR. POL. ECON.* 530.

of the Sixteenth and Seventeenth Centuries conquered the special courts and took over as their booty all of the Law Merchant, they rendered a great service to English law; but one of the prices paid for this service was the subjection of all parties before the law to a procedure that had never been framed for all their cases. A struggle for emancipation from this procedure characterizes the legal history of the last century. In this struggle, which is by no means complete, contractual efforts have played a part. And why not? After all, the distinction between adjective law and substantive law presents no difference in kind. Both affect human relations in exactly the same way. In fact they frequently appear to be merely different ways of stating the same proposition with reference to a legal relation when that relation is properly analyzed. The interest of contracting parties in the question what is likely to happen in court is by no means an intermeddling in matters which do not concern them. Whatever the law may think about it, an uncollectible judgment for damages is to the business world not an adequate remedy. An indefinitely delayed satisfaction may for all practical purposes be as bad as no satisfaction at all. Furthermore, it is not merely the part of society which extends credit that is interested in the improvement of enforcement machinery. The seeker of credit is even more directly interested, for everything that tends to make enforcement difficult or insecure intensifies the difficulty of obtaining credit and its cost when obtained. Whatever purposes may be served by a standardized system for the enforcement of contracts, there is still a place for individual treatments of special needs and accordingly a genuine call for the draftsman of contracts to understand just wherein and how *modus et conventio vincunt legem*.