Historical Perspectives on Nebraska Law Concerning Arbitration Agreements

John M. Gradwohl

University of Nebraska College of Law

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[I]t is well settled in this state that a provision in a contract requiring arbitration, whether of all disputes arising under the contract, or only the amount of loss or damage sustained by the parties thereto, will not be enforced, and that refusal to arbitrate is not available to the parties in an action growing out of the contract.

—Roscoe Pound, Commissioner, Nebraska Supreme Court, 1901¹

An arbitration agreement is used as a convenient tool to settle disputes without going to court and to promote the peaceful settlement of disputes. The grounds for impeachment of the agreement and the decision of the arbitrators are necessarily narrow, in order to accomplish the public policy objective of an arbitration agreement. The range of impeachment inquiry has long been settled in Nebraska. “An award, whether under the statute or common law is, in the absence of fraud or mistake, binding upon the parties thereto, and the burden of alleging and proving its invalidity rests upon the party seeking to impeach it.”

—Paul W. White, Chief Justice, Nebraska Supreme Court, 1975²

I. INTRODUCTION

At the common law, voluntary agreements to arbitrate all disputes arising between the parties under the instrument were invalid. Since the landmark decision of the House of Lords in Scott v. Avery³ in 1856, however, English and American common law rules have allowed enforcement of an agreement to arbitrate a specific dispute or type of dispute under the instrument. Nebraska does not recognize the common law distinction between an agreement

* Professor of Law, University of Nebraska. B.S. 1951, LL.B. 1953, University of Nebraska; LL.M. 1957, Harvard Law School. Most of the historical research was done by Jill Gradwohl, a second year student at Texas A & M University.

to arbitrate all matters and an agreement to arbitrate a particular matter.

Nebraska Supreme Court decisions have held that any executory arbitration agreement can be repudiated by either party up to the point an award has been entered by the arbitrator. In addition, through a major error of historical analysis participated in by the legendary Roscoe Pound during his tenure as Nebraska Supreme Court Commissioner, Nebraska has attributed its extreme restrictions on arbitration agreements, in part, to language in the Nebraska Constitution. The Nebraska Constitutional provisions to which the restrictions are attributed are direct descendants of Magna Carta obligations which remain the law of England. William Penn carried the Magna Carta obligations into Pennsylvania's Frame of Government in 1682 and from there they made their way into the constitutions of other states. During the controversial struggle for statehood, they were placed in Nebraska's secretly and hastily drawn Constitution of 1866.

Arbitration agreements continue to be entered into frequently in a variety of circumstances, despite the risks of unenforceability. Generally, arbitration systems work well because the parties

4. For the precise time at which an executory agreement for arbitration or a submission to arbitration becomes irrevocable, see text accompanying notes 40-43 infra. For cases allowing revocation prior to an award, see notes 56, 61, 62 & 132 infra.
5. See 1 E. COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 45-56 (1809). Article 40 of the Magna Carta read: "We will sell to no man, we will not deny or defer to any man either justice or right." This Article was merged first into Article 39, the forerunner of due process and jury trial requirements, and then both Articles were merged into Article 29 where they have since remained.
7. The texts of the early state constitutions cited in this article can be found in F. THORPE, AMERICAN CHARTERS, CONSTITUTIONS AND ORGANIC LAWS, 1492-1908 (1909) [hereinafter cited as THORPE]. Frame of Government of Pennsylvania of 1682, Laws Agreed Upon In England, art. V (5 THORPE 3060) ("That all courts shall be open, and justice shall neither be sold, denied nor delayed."); id. art. VIII ("That all trials shall be by twelve men, and as near as may be, peers or equals, and of the neighborhood, and men without just exception . . . .").
8. For the historical development of these provisions in the United States, see A. HOWARD, THE ROAD FROM RUNNYMEDE 88-91, 203-15, 284-97, 340-44 (1968). For a current compilation of state constitutional provisions as to sale, denial, or delay of justice, see id. at 483-84, and for state constitutional provisions guaranteeing remedies by due course of law, see id. at 485-86.
9. Professor Frank Forbes, College of Business Administration, University of Nebraska at Omaha, is presently carrying out a research grant from the Small Business Administration to determine the nature and extent of the use of arbitration in Nebraska. From the initial responses to 800 questionnaires distributed within the state, 27 indicated a prior involvement with arbitration,
honor, rather than repudiate, their agreement to arbitrate. However, although there are strong arguments in favor of greater use of arbitration arrangements as a means of dispute resolution, agreements to arbitrate all or any disputes under Nebraska contracts run a substantial risk of invalidity if either party withdraws prior to the arbitrator's award.

The single purpose of this article is to recite the sequence of events which has produced Nebraska's present law concerning voluntary arbitration agreements. Since the prohibition against voluntary arbitration agreements has been tied to the constitution, Nebraska, unlike other states, has severely limited the authority of the legislature, courts and administrative agencies to provide for the enforcement of arbitration agreements.

II. NEBRASKA CONSTITUTION OF 1866

The judicial remedy and jury trial provisions of the Nebraska Constitution, which were relied upon in 1902 by the Nebraska Supreme Court Commissioners in refusing to enforce arbitration agreements, were included in Nebraska's original Constitution of 1866. They provided in part that "[a]ll courts shall be open, and every person for an injury done him ... shall have a remedy by due course of law, and justice administered without denial or delay," and that "[t]he right of trial by jury shall remain inviolate." The development of those provisions in the Constitution of 1866 does not support the expansive reading they were subsequently given.

Attempts to form a constitutional convention had failed in 1860 and 1864 because of strong opposition to statehood. Chief Justice O. P. Mason, who was present at the secret meetings in an Omaha law office when the constitution was drafted in January, 1866, and

10. See notes 85-86, 111-17 & accompanying text infra.
11. Neb. Const. of 1866, art. I, § 5 (4 Thorpe 2349) ("The right of trial by jury shall remain inviolate, but the legislature may authorize trial by a jury of a less number than twelve men, in inferior courts."); id. § 9 (4 Thorpe 2350) ("All courts shall be open, and every person for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and justice administered without denial or delay.").
12. Id. § 9 (4 Thorpe 2349).
13. Id. § 5 (4 Thorpe 2350).
14. The accounts vary as to precisely where and by whom the constitution was drafted, although all reports place the location at a law office in Omaha and
who as President of the Council cast the deciding vote in its favor, later stated: "A small number of men, without authority of law, drew up the constitution; and the legislature provided for its submission to a vote of the people."\(^ {15}\)

The constitution was not printed for the use of the 1866 Legislature but it was rapidly considered and adopted in both Houses between February 5 and February 8, 1866.\(^ {16}\) Amendments were not allowed, and "few of the legislators had more than a foggy notion of the constitution's provisions."\(^ {17}\) The validity of the constitution was drawn in question because of this largely unauthorized procedure and because of requirements concerning equal rights imposed by Congress and agreed to by the Nebraska Legislature subsequent to the people's approval of the constitution in a contested election.\(^ {18}\) In a split decision by Nebraska Supreme Court judges, all of whom had participated in either the drafting or legislative approval of the constitution, its validity was sustained on the basis that once Nebraska was admitted to statehood, the propriety of adopting the constitution became a political question not open to judicial review.\(^ {19}\)

The Constitution of 1866 was called "a conglomerated patchwork\(^ {;}\) it is neither the Ohio nor the New York code, which are radically different from foundation to turret, but is a compromise between the two with a lot of loose rubbish culled from all the rest..."

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15. Brittle v. People, 2 Neb. 198, 226 (1873) (Mason, C.J., dissenting). The majority opinion also acknowledged the circumstances under which the document was prepared:

As is well known, the constitution was originally drafted in a lawyer's office by a few self-appointed individuals. These importuned the legislature then sitting to submit it to a vote of the people. . . .

. . . Yet we have seen that it was born in a law office, instead of a convention; that it was made by no one under any authority whatever; and that it might as well have been made by any one else as by those who did draft it.

Id. at 211, 214-15.


17. J. Olson, supra note 16, at 130.


19. Brittle v. People, 2 Neb. 198, 216 (1873) ("When the fact of admission is established, the Court are bound by it, and cannot go behind it.").
of the states thrown in.” The judicial remedy and jury trial sections included in the Nebraska Bill of Rights appear to have been taken from the Ohio Constitution.

The inferences, if any, which should be drawn from the constitutional history of the judicial remedy and jury trial provisions are that Nebraska was adopting the general rules of other states. Thus, Commissioner Oldham’s comments in 1902 that Nebraska had adopted special constitutional judicial remedy and jury trial rules seem unwarranted.

The 1866 and 1867 Nebraska Legislatures also adopted or carried forward a number of statutes involving arbitration. No reason appears for thinking that the 1866 constitutional drafters or legislators intended any change in the common law rules pertaining to arbitration agreements or that any peculiar effect be given the Nebraska Constitution. The Constitution of 1866 could only be amended following a constitutional convention. A convention in 1871 changed “remedy by due course of law” to “remedy by court of law,” but that constitution was not adopted by the people. The Constitution of 1875 continued the provisions of the Constitution of 1866 on judicial remedy and jury trial without substantial amendment.

III. STATUTORY ARBITRATION

Arbitration pursuant to a Nebraska statute (“statutory arbitra-

20. 3 Nebraska Constitutional Convention, supra note 16, at 495 (quoting an 1869 newspaper comment when a move for a new constitution was under-

21. Ohio Const. of 1851, art. I, § 5 (5 Thorpe 2914) (“The right of trial by jury shall be inviolate.”); id. § 16 (5 Thorpe 2915) (“All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have a remedy by due course of law, and justice administered without denial or delay.”).

22. See text accompanying note 105 infra.

23. Neb. Terr. Rev. Stat. ch. 1, §§ 13-30, at 8-10 (1866) (fence viewers); id. ch. 7, §§ 3-16, at 154-56 (holding and claiming estrays); id. ch. 35, §§ 3-6, at 258 (mechanics’ liens); id. pt. 2, tit. 28 §§ 856-861, at 545-46 (general statutory arbitra-


25. 1 Nebraska Constitutional Convention, supra note 16, at 350 (A. Sheldon ed).

26. Neb. Const. of 1875, art. I, § 6 (4 Thorpe 2362) (“The right of trial by jury shall remain inviolate, but the legislature may authorize trial by a jury of a less number than twelve men, in courts inferior to the district court.”); id. § 13 (4 Thorpe 2362) (“All courts shall be open, and every person, for any injury done him in his lands, goods, person, or reputation, shall have a rem-

27. NEBRASKA LAW REVIEW [Vol. 58:438
VOLUNTARY ARBITRATION

Voluntary arbitration is primarily an adjunct of the judicial process. Some of the statutory authorizations for arbitration stem from Nebraska territorial legislation. No general statutes for voluntary arbitration agreements, other than these statutory arbitration procedures, have been enacted. The decisions involving statutory arbitration, together with the decisions involving common law arbitration agreements, make clear that there is presently no legislative power to provide for the enforcement of executory arbitration agreements, at least to the extent that the arbitration would become a substitute for a previously existing judicial remedy.

The first Territorial Legislature in 1855 adopted statutes to allow the voluntary submission of "all controversies which might be the subject of civil actions" to arbitration in lieu of judicial decision. These sections were taken from the Iowa Code of 1851.

27. A number of statutes refer expressly to arbitration or arbitrators. See Neb. Rev. Stat. § 14-1246 (Reissue 1977) (joint bridge commission property); id. § 21-1562(1) (foreign nonprofit corporation admission); id. § 21-20,105(1) (foreign business corporation's right to transact business); id. § 22-215 (division of assets and liabilities upon formation of new counties); id. § 25-2103 to -2120 (Reissue 1975) (statutory arbitration of "all controversies which might be the subject of civil actions, or arising out of a contract with the Department of Roads"); id. § 28-613(1)(f) (Cum. Supp. 1978) (bribing an arbitrator); id. § 30-2491(2) (Reissue 1975) (arbitration of secured claim under Nebraska Probate Code); id. § 30-2653(19) (Cum. Supp. 1978) (power of conservator to settle claim by or against the estate of the protected person, except wrongful death, tort or similar claim); id. § 44-811 (Reissue 1974) (claim for loss or damage, assessment by insurance companies); id. § 52-102 (Cum. Supp. 1978) (subcontractor's and laborer's lien); id. §§ 54-403 to -406 (Reissue 1974) (damages caused by trespassing animals); id. § 67-309(3)(e) (Reissue 1976) (partnership claim or liability); id. § 71-3613(5) (Department of Health under tuberculosis statutes); id. § 77-2407 (claims arising out of a contract with the Department of Roads); id. § 77-2901 (Article IX, Arbitration, Multistate Tax Compact); id. §§ 77-3301 to -3316 (Interstate Arbitration and Compromise of Death Taxes Act); id. § 81-1108.26 (state agencies' allocation of heat and power costs); id. § 84-410 (authority of state surveyor to settle disputed surveys and boundaries; prima facie evidence of correctness); id. §§ 86-408 to -410 (acquisition of existing telephone systems by public telephone system). See also Neb. Rev. Stat. § 25-414(2) (Reissue 1975) (venue under Model Uniform Choice of Forum Act); id. § 44-1525(9)(K) (Cum. Supp. 1978) (unfair or deceptive act of insurance company to induce claimant to settle by making known a practice to appeal from arbitration awards in favor of insured).

Some appraisal statutes amount to extrajudicial arbitration. See, e.g., Neb. Rev. Stat. § 8-182 (Reissue 1977) (dissenting state bank shareholders upon reorganization as a national bank); id. § 8-229 (dissenting state trust company shareholders upon reorganization as a national bank); id. § 25-1099 (Reissue 1973) (amount of replevin bond); id. § 39-1517 (Reissue 1974) (appraisal of township machinery upon formation of county road system); id. § 54-748 (value of diseased animal ordered to be destroyed).


and remain in the present statutes in virtually the identical form they appeared in 1855.\textsuperscript{30}

The statutes require that the parties to an existing civil cause of action must sign a written agreement\textsuperscript{31} and acknowledge the instrument before a county judge.\textsuperscript{32} Unless otherwise agreed by the parties, the rules applicable to referees are applied.\textsuperscript{33} The written award must be filed in court\textsuperscript{34} and docketed.\textsuperscript{35} It can "be rejected by the court for any legal and sufficient reason, or it may be recommitted for a rehearing to the same arbitrators, or any others agreed upon by the parties."\textsuperscript{36} The award has the effect of a jury verdict\textsuperscript{37} and is appealable.\textsuperscript{38} If the statutory procedure is followed, the submission is not revocable by one of the parties alone.\textsuperscript{39} Otherwise, the submission is treated as a common law agreement and can be revoked by either party before the award is made or published.

In Butler v. Greene,\textsuperscript{40} the court clarified the period of time during which a submission to arbitration is revocable. A hearing had been held before three arbitrators on Greene's claim against Butler for loss of Greene's watch and chain which Butler held as a bailee. No award was decided upon by the group, but the arbitrators' "individual views were disclosed to inquirers."\textsuperscript{41} Upon learning that two of the arbitrators favored Butler, Greene revoked his submission to arbitration. Later, the arbitrators did enter an award in favor of Butler by a majority vote. Greene sued Butler in court and Butler pleaded the arbitration award as a defense. The court sustained Greene's revocation of the submission since "[t]he revocation was prior to the written award, and it was also prior to any definite and conclusively expressed decision of the arbitra-

\textsuperscript{30} \textit{NEB. REV. STAT.} §§ 25-2103 to -2120 (Reissue 1975). Also, the territorial legislation setting out civil jurisdiction and procedure of justices of the peace contained very similar procedures allowing the plaintiff and defendant to consent at any time before trial or judgment to having the cause submitted to three arbitrators. 1859 Neb. Terr. Laws (6th Sess.) 55, 70-71 (1 Comp. Sess. Laws 626, 633 (1855-1865)). The sections were carried in the justice of the peace statutes until the office was abolished in 1973. \textit{See NEB. REV. STAT.} §§ 27-1001 to -1007 (Reissue 1964) (repealed by L.B. 1032, 1972 Neb. Laws 333, 452-53).

\textsuperscript{31} \textit{NEB. REV. STAT.} § 25-2104 (Reissue 1975).

\textsuperscript{32} \textit{Id.} § 25-2105.

\textsuperscript{33} \textit{Id.} § 25-2108.

\textsuperscript{34} \textit{Id.} § 25-2113.

\textsuperscript{35} \textit{Id.} § 25-2114.

\textsuperscript{36} \textit{Id.} § 25-2115.

\textsuperscript{37} \textit{Id.} § 25-2116.

\textsuperscript{38} \textit{Id.} § 25-2117.

\textsuperscript{39} \textit{Id.} § 25-2109.

\textsuperscript{40} 49 Neb. 280, 68 N.W. 496 (1896).

\textsuperscript{41} \textit{Id.} at 285, 68 N.W. at 498.
tors."\(^{42}\) If, instead, the panel of arbitrators had actually agreed upon the result and had given a written award to one of the arbitrators for delivery to the parties, Greene would not have been able to revoke the submission.\(^{43}\)

Territorial legislatures also enacted laws providing for arbitration of specific subjects, such as damages caused by trespassing animals,\(^{44}\) the value of care provided stray animals returned to their owner,\(^{45}\) the dimensions of fences or partitions dividing adjoining land,\(^{46}\) and the value of labor or materials giving rise to a contractor's or mechanic's lien.\(^{47}\) Like court-appointed referees,\(^{48}\) appraisers,\(^{49}\) and "juries,"\(^{50}\) however, these arbitration procedures were undoubtedly a part of, or in addition to, the state's judicial procedures and not a substitution for the final authority of the courts. At least, that seems very clear from the court's adjudication in 1903 sustaining the constitutionality of the herd laws.\(^{51}\)

The herd statutes, successors of which are still in effect,\(^{52}\) allowed a person whose cultivated land was damaged by another person's stock running at large to impound the animals, notify the owner, and initiate arbitration proceedings. At an early date, the court recognized that "[t]he object of the provision for arbitration is to afford a speedy and inexpensive mode of ascertaining the damages sustained by trespass of stock upon cultivated lands. Courts construe proceedings of this kind with great liberality in all matters except as to the jurisdiction."\(^{53}\) But the constitutionality of these sections was saved by an interpretation that the statutes

\(^{43}\) See Hughes v. Sarpy County, 97 Neb. 90, 149 N.W. 309 (1914).
\(^{44}\) E.g., 1855 Neb. Terr. Laws (1st Sess.) 223 (1 Comp. Sess. Laws 94-95 (1855-1865)). The territorial laws cited in notes 44-45 were adopted in a virtually identical form on several occasions, and were made applicable to different counties (or even precincts within a county) or slightly different subject matters (such as trespassing sheep or cattle).
\(^{45}\) E.g., 1855-1856 Neb. Terr. Laws (2d Sess.) 55-57 (1 Comp. Sess. Laws 228-30 (1855-1865)).
\(^{47}\) 1858 Neb. Terr. Laws (5th Sess.) 221-25 (1 Comp. Sess. Laws 532-33 (1855-1865)).
\(^{48}\) E.g., 1857 Neb. Terr. Laws (3d Sess.) 60-61 (1 Comp. Sess. Laws 334 (1855-1865)).
\(^{49}\) E.g., 1866 Neb. Terr. Rev. Stat. ch. 25, § 16 (appraisers to value the property of an educational institution desirous of becoming a body corporate).
\(^{50}\) E.g., 1866 Neb. Terr. Rev. Stat. ch. 36, §§ 1-29 (location, damages, and other matters in establishing mills and mill dams).
\(^{53}\) Haggard v. Waller, 6 Neb. 271 (1877) (syllabus of the court).
did not do away with the common law liability of the owners of the stock and did not deprive the owners of a judicial remedy against the impounder. Submission to arbitration was determined not to be mandatory for either party and the award was appealable to a justice of the peace.\(^5\)

The herd law decision does little to clarify the permissible limits of legislative authority. As a matter of speculation, it may be that the legislature can condition a new statutory right or remedy which does not abrogate a common law right upon submission to binding arbitration. It may also be that the legislature could authorize or require arbitration arrangements so long as the matter is subject to the overriding jurisdiction of the judicial system.

IV. NEBRASKA COMMON LAW ARBITRATION
DECISIONS: 1869-1901

A. German-American Insurance Co. v. Etherton: Laying the Foundation

The earliest Nebraska Supreme Court decisions involving arbitration were actions to enforce, or deny enforcement of, an arbitration award.\(^5\)\(^5\) It was not until 1889, in German-American Insurance Co. v. Etherton,\(^5\)\(^6\) that the court dealt with a failure to arbitrate pursuant to an agreement. One of the insurer's defenses to a fire insurance claim was the arbitration clause in the policy: "It is expressly stipulated by the parties hereto that no suit or action against this company shall be sustained in any court of law or chancery until after an award shall have been obtained fixing the amount of such claims, in the manner above provided."\(^5\)\(^7\) This clause, and the related policy provisions, could have been interpreted to require arbitration of all claims under the policy or of only the amount of the loss. With respect to the interpretation that the clause apply to all claims, the court followed the traditional common law rule and its underlying reasoning: "Where a policy provides that the whole matter in controversy between the parties, including the right to recover at all, shall be submitted to arbitra-

\(^{55}\) Murry v. Mills, 1 Neb. 456 (1869) (earliest reported Nebraska decision involving arbitration); Kelly v. Morse, 3 Neb. 224 (1874); Tynan v. Tate, 3 Neb. 388 (1874); McDowell v. Thomas, 4 Neb. 542 (1876); Hall v. Vanier, 6 Neb. 85 (1877); Sides v. Brendlinger, 14 Neb. 491, 17 N.W. 113 (1883); Graves v. Scoville, 17 Neb. 593, 24 N.W. 222 (1885); Bentley v. Davis, 21 Neb. 685, 33 N.W. 473 (1887); Westover v. Armstrong, 24 Neb. 391, 38 N.W. 843 (1888).
\(^{56}\) 25 Neb. 505, 41 N.W. 406 (1889).
\(^{57}\) Id. at 507, 41 N.W. at 406. The "manner above provided" was that "'[l]oss or damage to property partially or totally destroyed, unless the amount of said loss or damage is agreed upon between the insured and this company, shall, at the written request of either party, be appraised and determined by disinterested and competent persons,' etc."
tion, the condition is void. The effect of such a provision is to oust
the courts of their legitimate jurisdiction, which the parties cannot
do.58

The insurance company had interpreted the clause to apply to
"the amount of loss, or sum to which the assured may be enti-
tled."59 The court avoided the question of the validity of a policy
provision requiring arbitration of the amount of loss only. Reading
the policy alternatively as requiring arbitration "where the sole
question between the parties to the policy was as to the amount of
indebtedness," it held that the insurance company could not in-
voke the arbitration clause since it did not admit liability under the
policy.60 This distinction, however, was not expressed in the sylla-
bus of the case which stated in general terms that "[a] provision in
a policy that no suit or action against the insurer 'shall be sus-
tained in any court of law or chancery until after an award shall
have been obtained' by arbitration, 'fixing the amount' due after
loss, is void, the effect of such provision being to oust the courts of
their legitimate jurisdiction."61

During the next few years, the defense of failure to arbitrate
was rejected in a line of insurance cases.62 In addition to following
the rationale of German-American Insurance Co. v. Etherton, the
court held that the arbitration clauses violated the valued policy
law63 where there was a total loss.64

B. Schrandt v. Young: Commissioner Pound's Initial Dicta

The first Nebraska case to present a failure-to-arbitrate defense
in a general contract matter was Schrandt v. Young65 decided by

58. Id. at 508, 41 N.W. at 406.
59. Brief for Plaintiff In Error at 3, 49 Nebraska Briefs (Neb. State Lib.):
    These provisions secure that the amount of loss, or the sum to which
    the assured may be entitled shall never be the subject of controversy
    in the courts but shall be determined by agreement or arbitration,
    and the action must be for the amount thus determined, and can be
    for nothing else.
60. 25 Neb. at 508, 41 N.W. at 406.
61. Id. at 505, 41 N.W. at 406 (syllabus of the court).
    Eddy, 36 Neb. 461, 54 N.W. 836 (1893); Home Fire Ins. Co. v. Bean, 42 Neb. 537,
    60 N.W. 907 (1894); National Masonic Accident Ass'n v. Burr, 44 Neb. 256, 62
    N.W. 466 (1895); Insurance Co. of N. Am. v. Bachler, 44 Neb. 549, 62 N.W. 911
    (1895); Home Fire Ins. Co. v. Kennedy, 47 Neb. 138, 66 N.W. 278 (1896); Aetna
    "the amount of insurance written on [the] policy shall be taken conclusively
    to be the true value of the property insured."
64. Home Fire Ins. Co. v. Bean, 42 Neb. 537, 60 N.W. 907 (1894); German Ins. Co. v.
    Eddy, 36 Neb. 461, 54 N.W. 836 (1893).
65. 62 Neb. 254, 86 N.W. 1085 (1901).
Commissioner Roscoe Pound in 1901. In *Schrandt*, plaintiff initiated an action of replevin for sheep placed with defendant for care under a written contract. A jury found for defendant on the merits and the main issues on appeal centered on the damages plaintiff owed defendant for wrongfully taking possession from defendant by replevin. The contract for care of the sheep contained a provision for arbitration:

In the event of difficulty between parties of this contract in settling or dividing wool or increase, party of the first part may choose an arbitrator and party of the second part choose an arbitrator and the two arbitrators so chosen shall choose a third arbitrator and said arbitrator shall determine the interests of theaggistment under the terms of this contract and the number of sheep and lambs or pounds of wool, the price or value of sheep or lambs, or wool belonging to the interest of party of the second part and party of the first part may at his option pay to said party of the second part the value of said interest or may deliver to said party the number of sheep and pounds of wool so determined by said arbitrators, party of the first part agrees at the termination of this contract to make and deliver to the party of the second part a good and sufficient bill of sale to the one-half (1/2) of the increase of said herd after the original number of sheep shall have been made good as hereinafter provided.66

The lower court excluded all evidence of the arbitration clause and plaintiff's demand for arbitration. Commissioner Pound dealt with the arbitration issue in a single classic sentence appearing near the end of the otherwise lengthy opinion:

Whatever distinction may be made elsewhere between arbitration generally and arbitration as to damages only, it is well settled in this state that a provision in a contract requiring arbitration, whether of all disputes arising under the contract, or only of the amount of loss or damage sustained by the parties thereto, will not be enforced, and that refusal to arbitrate is not available to the parties in an action growing out of the contract.67

There was a clear basis for the court's avoiding any statement as to the validity of "arbitration as to damages only". The action was for replevin. As a defense in that action, the arbitration provision might easily have been interpreted as an "all disputes" clause. Defendant's position was essentially one of "no liability" as in *German-American Insurance Co.* v. *Etherton*.68 The parties had met and agreed upon an arbitrator.69 Later, after bringing replevin and regaining possession, plaintiff moved to have the case referred to arbitration.70 Plaintiff's brief distinguished prior Nebraska decisions on the ground that the clause involved "was simply as to the

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66. Transcript of Schrandt v. Young, No. 9,585 (Office of the Clerk, Nebraska Supreme Court) (attached to Defendant's Answer) (misspellings in original); Brief for Plaintiffs In Error at 2-3, 196 Nebraska Briefs (Neb. State Lib.).
69. Brief for Plaintiffs In Error at 3, 196 Nebraska Briefs (Neb. State Lib.).
70. Id. at 2.
amount of damages, and not as to the liability.”  

71 Defendant did not argue the “arbitration as to damages only” issue on the merits, but contended simply that since plaintiff had already initiated replevin and taken possession of the sheep, defendant was entitled to defend in the tribunal chosen by plaintiff.  

72 Additionally, plaintiff’s motion was to consolidate that proceeding with another and refer both to arbitration, which defendant argued was not feasible.  

73 Commissioner Pound might have avoided making the statement regarding “arbitration of damages only” by interpreting the clause as an all disputes clause, by treating the defense as one denying liability, or by sustaining one of defendant’s apparently valid defenses on the issue.

Commissioner Pound’s language “well settled in this state” seems suspect. All of the previous decisions involved insurance agreements,  

74 and none expressly addressed the bald issue of enforceability of an arbitration clause as to amount of loss only.  

75 In German-American Insurance Co. v. Etherton, the court avoided deciding this issue because the insurer denied liability under the policy. The subsequent decisions were grounded on the Etherton precedent and similarly contained an alternative basis for decision. The single authority cited by Commissioner Pound as support for his entire ruling as to arbitration was National Masonic Accident Association v. Burr.  

76 In Burr, the arbitration clause, which was contained in the articles of incorporation of the mutual insurance association, was a contract to arbitrate any disputed claim.  

77 Additionally, the Association defended the claim on the ground that plaintiff had not paid a prior assessment, thus causing the coverage to lapse prior to the accident. The authorities upon which the court’s decision in Burr relied similarly involved alter-

71. Id. at 3.  
72. Memorandum Brief for Defendant In Error at 5, 196 Nebraska Briefs (Neb. State Lib.).  
73. Id.  
74. See cases cited in notes 56 & 62 supra.  
75. See notes 55-64 & accompanying text supra.  
76. 44 Neb. 256, 62 N.W. 466 (1895) (cited in Schrandt v. Young, 62 Neb. 254, 267, 86 N.W. 1085, 1090 (1901)).  
77. Id. at 262-63, 62 N.W. at 468:  

Disputed claims shall be adjusted as follows: Should such a claim arise it shall be referred to a committee of three, all of whom shall be master Masons, one to be chosen by the assured or his representative, one by the association, and the two so chosen shall select the third; none of whom shall be relatives of the assured or have any pecuniary interest in the claim. No suit shall be brought upon any disputed claim before the same shall have been arbitrated by such committee, and the award of such committee shall be final and conclusive upon the claimant and the association.

78. Id. at 263, 62 N.W. at 468.
native bases for their results. None of these Nebraska decisions was clear authority for Commissioner Pound's phrase in *Schrandt* that agreements to arbitrate "only . . . the amount of loss or damage sustained" would not be enforced.

On this issue, Commissioner Pound's opinion does not cite, nor do any of the other cases in this line of decisions cite, the cases involving an agreement to arbitrate a claim which might be the subject of a civil action but in which the statutory arbitration procedures were not followed. These decisions might have provided some precedent for the decision in *Schrandt*, but the issue on which Commissioner Pound wrote scarcely seems to have been "well settled" at that time. It did, however, become very well settled just eighteen months later, in part due to this language in *Schrandt*.

Up to this point, the Nebraska decisions had rested solely on common law considerations. There was no citation or discussion of Nebraska statutes or constitutional provisions in these early decisions.

V. THE COMMISSIONERS' DECISIONS OF 1902

A. Grounding the Refusal to Enforce Arbitration Agreements in the Nebraska Constitution

The Nebraska Supreme Court first squarely addressed the issue of the validity of executory arbitration agreements pertaining to a single subject in two Commissioners' decisions adopted by the court on December 3, 1902. The deficiencies of the judicial analysis in these decisions lie not so much in the substantive outcomes of the cases but in the attribution of the holdings to the Nebraska Constitution. It is this constitutional stranglehold on the enforceability of voluntary arbitration agreements, placing the subject beyond legislative, judicial or administrative determination, which has left Nebraska arbitration agreements in precarious legal and practical circumstances.

Both *Hartford Fire Insurance Co. v. Hon* and *Phoenix Insurance Co. v. Zlotky* arose under the New York Standard Form fire insurance policy. The lower courts rejected failure to arbitrate

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80. See, e.g., Butler v. Greene, 49 Neb. 280, 68 N.W. 496 (1896).

81. 66 Neb. 555, 92 N.W. 746 (1902).

82. 66 Neb. 584, 92 N.W. 736 (1902).

83. Id. at 585, 92 N.W. at 736:

In the event of disagreement as to the amount of the loss the same
defenses. On appeal, the insurers presented an imposing number of state and federal decisions which had followed the English precedents in sustaining the validity of the New York Standard Form. The claimants argued almost exclusively from the prior Nebraska cases. The briefs did not cite any provisions of the Nebraska Constitution. Hartford Fire was decided by Commissioners Kirkpatrick and Hastings of Department 1 and Phoenix Insurance by Commissioner Oldham of Department 2, with Commissioner Pound concurring in a separate opinion.

The Commissioners' opinions recognized that there were "many" federal and state court decisions distinguishing agreements to arbitrate damages only from agreements to arbitrate all disputes. No contrary authority was cited in the opinions. Faced with the difficult problem of prior Nebraska dicta at variance with overwhelming precedent elsewhere, the Commissioners apparently reached on their own for the Nebraska Constitution. In order to avoid the impact of precedents from other jurisdictions, they based the holdings on the Nebraska Constitution. The chain of analysis proceeds along different lines in the two cases but both are grounded on the Nebraska Constitution's judicial remedy and right to trial by jury provisions. The opinions wrongly relied on a surface glimpse of the face of the constitutional language without placing the constitutional provisions in their proper perspectives within Nebraska jurisprudence and within the law of other jurisdictions.

shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss.

* * * No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements.

84. The briefs in both cases can be found in 257 Nebraska Briefs (Neb. State Lib.).
85. Hartford Fire Ins. Co. v. Hon, 66 Neb. 555, 562-63, 92 N.W. 746, 749 (1902) ("We are not unmindful of the fact that there are many cases in both federal and state courts recognizing the distinction sought to be maintained here.").
86. Phoenix Ins. Co. v. Zlotky, 66 Neb. 584, 586, 92 N.W. 736, 736 (1902) ("[I]t is contended that a different rule applies when the agreement is for the arbitration of but one question, i.e., the amount of damage. Numerous cases are cited from both the state and federal courts tending to support this contention . . . .").
87. For text of these provisions, see note 26 supra.
1. Hartford Fire

The judicial analysis in Hartford Fire begins with an elaboration of the “any dispute” holding of the Supreme Court of the United States in Insurance Co. v. Morse, a leading authority relied upon in German-American Insurance Co. v. Etherton. The opinion does not note, however, that subsequently in Hamilton v. Liverpool, London & Globe Insurance Co. the United States Supreme Court had expressly sustained an agreement to arbitrate the amount of loss or damage under a fire insurance policy. In Hamilton, the Court stated:

Such a stipulation, not ousting the jurisdiction of the courts, but leaving the general question of liability to be judicially determined, and simply providing a reasonable method of estimating and ascertaining the amount of the loss, is unquestionably valid, according to the uniform current of authority in England and in this country.

The analysis in Hartford Fire then proceeds to attribute the invalidity of an agreement to arbitrate all disputes to the judicial remedy provision of the Nebraska Constitution. It reasoned that if an agreement to arbitrate all disputes is offensive, then so is an agreement to arbitrate a pivotal or substantial issue of controversy, since “courts will not lend their aid in the enforcement of contracts the effect of which would be to close their doors to suitors who would otherwise be entitled to their protection.” Further, the opinion states, to the extent the agreement relates to the ascertainment of the amount of loss, it violates the Nebraska Constitution’s right to trial by jury. The opinion traces the holdings of other jurisdictions to the House of Lords’ decision in Scott v.

88. 87 U.S. (20 Wall.) 445 (1874).
89. 136 U.S. 242 (1890).
90. Id. at 255.
91. 66 Neb. at 556, 558, 92 N.W. at 747:
   It is an incident of every contract that a breach on the part of one of the parties thereto gives to the other a cause of action enforceable in a court of law or equity, and an agreement between parties to a contract that neither shall maintain a suit thereon after breach—any differences to be settled by arbitration—is without binding force, as tending to oust the jurisdiction of the courts. . . . The provision found in the constitution of the state . . . embodies the same general proposition: “All courts shall be open, and every person, for any injury done him in his lands, goods, person, or reputation shall have a remedy by due course of law, and justice administered without denial or delay.” Thus it will be seen that a stipulation that no suit shall be maintainable upon the contract after breach, is void. This proposition, we understand, is conceded in the case at bar; and if the stipulation above quoted results in ousting the courts of jurisdiction, it must be held unenforceable.
92. 66 Neb. at 562, 92 N.W. at 749.
93. Id. at 561, 92 N.W. at 749.
Avery,\textsuperscript{94} which it finds to be "unsound"\textsuperscript{95} and impractical.\textsuperscript{96} It cites the syllabus in German-American Insurance Co. v. Etherton\textsuperscript{97} as having been the law of the damages-only arbitration issue,\textsuperscript{98} seizing upon the insurer's erroneous claim that the case actually was determined by the valued policy law (which was not yet in effect),\textsuperscript{99} and ignoring the denial of liability point upon which the opinion of the court had actually rested its decision. It found this doctrine to have "been assumed to be firmly established in the body of our law"\textsuperscript{100} and to have "become a rule of property."\textsuperscript{101}

Still, Hartford Fire might have been decided as a common law case to effectuate the court's fundamental policy expressed throughout the opinion: "It seems clear to us that an agreement which deprives a party of a right to the protection of the courts upon a single question, which may be the question of greatest importance in the controversy, violates the principle involved to the same extent as would an agreement requiring all matters to be submitted."\textsuperscript{102} Had the decision proceeded merely on this common law approach, it would not have locked the result into the Nebraska Constitution. As it was, the decision not only misread and failed to properly apply the precedents of other jurisdictions but also limited the authority of the state's legislative, judicial and administrative agencies to deal effectively with the issue later on.

\textsuperscript{94} 10 Eng. Rep. 1121 (H.L. 1856).
\textsuperscript{95} 66 Neb. at 563, 92 N.W. at 749: "We have made a very careful examination of the arguments advanced in the several opinions given by the lords in support of the conclusion reached by the majority, and with all due respect, are forced to the conclusion that the position taken is unsound."
\textsuperscript{96} Id. at 563-64, 92 N.W. at 749-50:

Upon what sound reason can it be said that an agreement to submit one or two of the questions in controversy can be sustained? As we have seen, the one or two questions may be the questions of vital importance, and the third question may sink into insignificance, or may be entirely eliminated by the arbitration of the two questions. Or suppose ten questions are in controversy: Will the courts say that a contract to submit nine is valid and will be enforced, so long as the party has one question left, concerning which he has a right to be heard in the courts? Of course, the one remaining question may be of minor importance, and the party may not desire to go into the courts upon that... The distinction made by the learned lords in Scott v. Avery, does not rest upon sound principles. It is a difference in degree rather than in kind.

\textsuperscript{97} For text of syllabus, see text accompanying note 61 \textit{supra}.
\textsuperscript{98} 66 Neb. at 564-65, 92 N.W. at 750.
\textsuperscript{99} Id. at 565, 92 N.W. at 750.
\textsuperscript{100} Id.
\textsuperscript{101} Id.
\textsuperscript{102} Id. at 564, 92 N.W. at 750.
2. Phoenix Insurance

Phoenix Insurance is a shorter opinion. In examining the common law distinction between agreements to arbitrate solely the amount of damage and agreements to arbitrate all matters, the opinion initially strikes directly at *Scott v. Avery*, since the reasoning of the state and federal cases was founded on this "leading case." The opinion states:

Long after the announcement of the opinion in *Scott v. Avery*, ... the people of the State of Nebraska adopted a constitution containing a Bill of Rights, enumerated among which were that "the right of trial by jury shall remain inviolate," and that "all courts shall be open, and every person, for any injury done him in his lands, goods, person, or reputation, shall have a remedy by due course of law," etc.

This statement, however, overlooks several important factors: the presence of the Magna Carta judicial remedy and right of trial by jury provisions in English law; the murky history of the Nebraska Constitution of 1866 which brought the requirement into Nebraska law; and the presence of similar constitutional provisions in other states which have followed the reasoning of *Scott v. Avery*.

The *Phoenix Insurance* opinion then determines that the language of the syllabus in *German-American Insurance Co. v. Etherton* was a "solemn adjudication of a question then in issue before the court." The opinion concludes:

We have no disposition to change a rule of this court which is in harmony with the genius and spirit of our constitution, and which has entered into every contract of insurance made in this state since its announcement, sixteen years ago, merely for the purpose of putting ourselves in closer touch with the House of Lords. There is no better reason for upholding a contract that in advance ousts the jurisdiction of a court of law from finding the amount of damage in a dispute between assured and insurer, than there would be for upholding contracts ousting the jurisdiction of courts on any other question that might arise between them; and whenever we say that the jurisdiction of courts may be contracted away in advance on

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105. Id. at 586, 92 N.W. at 737.
107. For text of syllabus, see text accompanying note 61 supra.
108. 66 Neb. at 587, 92 N.W. at 737:

We can not agree with counsel for the insurance companies that this long line of decisions rests on a mere *dictum* of the court in the case of *German-American Ins. Co. v. Etherton*, ... and that the question now at issue was not properly before the court . . . . The right of appraisal as a condition precedent to the right of action in a court of law, was an issue as well defined in *German-American Ins. Co. v. Etherton*, ... as it is in the case now pending; and the rule in that case, instead of announcing a mere *dictum*, is a solemn adjudication of a question then in issue before the court.
any question, we open a leak in the dyke of constitutional guarantees which might some day carry all away. 109

Commissioner Pound concurred in a brief opinion which spoke to several issues involved in the court's determination. His entire opinion reads:

I do not think the constitutional provision with reference to trial by jury has any bearing upon the question involved in this case. The same provision is to be found in the constitution of the United States and in the constitutions of the several states. Notwithstanding these provisions and the jealousy with which the right of trial by jury is guarded by the federal courts, those courts and most of the state courts uphold the distinction between an agreement to arbitrate the whole matter in dispute and an agreement for arbitration of the amount of loss or damage only, as made in the case of Scott v. Avery. Were the question a new one, I do not believe this court would take the stand to which it is now committed. But every court, in the course of time, develops some peculiar doctrines with respect to which it differs from others of coordinate jurisdiction. Where these peculiar doctrines work no harm, certainty and consistency are no less important than agreement with other courts. The rule in question has been announced so many times that it may be said to have entered into the contracts in force in this state, and is commonly understood by all persons to govern the agreements which they make. It is by no means a bad rule and I see no reason to believe that it operates unjustly.

I am therefore of the opinion that the rule ought to be adhered to, and that the judgment should be affirmed. 110

Commissioner Pound was correct that the constitutions of the United States 111 and all of the previously admitted states 112 con-

109. Id. at 587-88, 92 N.W. at 737.
110. Id. at 588-90, 92 N.W. at 737-38 (Pound, C., concurring).
111. U.S. CONST. amend. VII.
112. ALA. CONST. of 1865, art. I, § 12 (1 THORPE 118); ARK. CONST. of 1864, art. II, § 6 (1 THORPE 289); CAL. CONST. of 1849, art. I, § 3 (1 THORPE 391); CONN. CONST. of 1818, art. I, § 21 (1 THORPE 538); DEL. CONST. of 1831, art. I, § 7 (1 THORPE 583); FLA. CONST. of 1865, art. I, § 6 (1 THORPE 686); GA. CONST. of 1865, art. I, § 8 (1 THORPE 810); ILL. CONST. of 1818, art. VIII, § 6 (2 THORPE 981); IND. CONST. of 1851, art. I, § 20 (2 THORPE 1075); IOWA CONST. of 1857, art. I, § 9 (2 THORPE 1137); KAN. CONST. of 1855, art. Bill of Rights, § 5 (2 THORPE 1242); KY. CONST. of 1850, art. XIII, § 8 (3 THORPE 1313); LA. CONST. of 1864, tit. VII, art. 105 (3 THORPE 1442); ME. CONST. of 1864, Declaration of Rights, XIX (3 THORPE 1743); MASS. CONST. of 1789, pt. I, XV (3 THORPE 1891-92); MICH. CONST. of 1850, art. VI, § 27 (4 THORPE 1955); MINN. CONST. of 1857, art. I, § 4 (4 THORPE 1992); MISS. CONST. of 1832, art. I, § 28 (4 THORPE 2051); MO. CONST. of 1865, art. I, § 17 (4 THORPE 2193); NEV. CONST. of 1864, art. I, § 3 (4 THORPE 2402); N.H. CONST. of 1792, art. XX (4 THORPE 2473-74); N.J. CONST. of 1844, art. I, § 7 (5 THORPE 2600); N.Y. CONST. of 1846, art. I, § 2 (5 THORPE 2653); N.C. CONST. of 1776, Declaration of Rights, XIV (5 THORPE 2788); OHIO CONST. of 1851, art. I, § 5 (5 THORPE 2914); ORE. CONST. of 1857, art. I, § 18 (5 THORPE 2999); PA. CONST. of 1838, art. IX, § 6 (5 THORPE 3113); R.I. CONST. of 1842, art. I, § 15 (5 THORPE 3224); S.C. CONST. of 1865, art. IX, § 7 (6 THORPE 3278); TENN. CONST. of 1834, art. I, § 6 (6 THORPE 3427); TEX. CONST. of 1866, art. I, § 8 (6 THORPE 3570); VT. CONST. of 1793, ch. I, art. 10 (6 THORPE 3763); VA. CONST. of 1776, Bill of Rights, § 11 (7 THORPE 3814); W. VA. CONST. of 1861-1863, art. I, §§ 7-8 (7 THORPE 4015); WIS. CONST. of 1848, art. I, § 5 (7 THORPE 4077).
tained a right to trial by jury. It is a serious deficiency in Commissioner Pound's concurrence that he did not carry his analysis similarly to the judicial remedy provision in the Nebraska Constitution. The constitutions of at least twenty-five of the thirty-six states admitted prior to Nebraska contained virtually identical provisions for a judicial remedy by due course of law at the time Nebraska became a state on March 1, 1867. In addition, thirty-seven states in addition to Nebraska had a similar provision between 1867 and 1902 had such a constitutional provision when Commissioner Pound concurred in *Phoenix Insurance.* By that time, thirty-seven states in addition to Nebraska had a similar state constitutional requirement of a judicial remedy. The briefs of the insurers in *Hartford Fire* and *Phoenix Insurance* cited cases from many of these states, including Ohio from which Ne-
braska apparently adopted its constitutional language, as sustaining the validity of the New York Standard Form clause. Commissioner Pound, therefore, might well have taken the same position on Commissioner Oldham's reliance on the judicial remedy provision as on his reliance on the right to a trial by jury provision.

B. Consequences of Choosing a Constitutional Basis

Commissioner Pound may not have perceived the full impact of placing the decision on the constitution rather than on common law grounds. His statements that "[w]ere the question a new one, I do not believe this court would take the stand to which it is now committed" and that "[t]he rule in question has been announced so many times," indicate that he may not have understood the full consequences of the decision in Phoenix Insurance. The constitutional issue had not been previously decided. The Nebraska Constitution was not referred to in any previous decision or in the briefs of the parties. No similar case from any other jurisdiction was cited in the opinion as authority for placing such a holding on a state constitutional basis.

Commissioner Pound was apparently considering the effect of the substantial precedents from other states drawing the common law distinction between clauses requiring arbitration of the damage issue only and clauses requiring arbitration of all matters. As a matter of constitutional law, there would appear to be no reason for the Nebraska Court to have treated the issue any differently. In fact, Commissioners Kirkpatrick and Oldham may have relied on the Nebraska constitutional provisions for the first time simply because the past dicta of the Nebraska decisions were directly contrary to the common law precedents. Normally, the common law precedents would be followed, as a matter of stare decisis and as a result of the statute adopting "so much of the common law of England as is applicable and not inconsistent" with the Nebraska constitution or statutes. The 1902 Commissioners' opinions

N.W. 746 (1902); Brief for Plaintiff in Error at 13-15, 30-34, Phoenix Ins. Co. v. Zlotky, 66 Neb. 584, 92 N.W. 736 (1902). For state cases, see Hartford Brief at 14-16; Phoenix Brief at 15-18, 34-50. For English cases, see Hartford Brief at 14; Phoenix Brief at 18-22.

117. Phoenix Ins. Co. v. Carnahan, 63 Ohio St. 258, 58 N.E. 805 (1900).


119. Id. at 589. 92 N.W. at 737-38.

120. NEB. REV. STAT. § 49-101 (Reissue 1974). This provision was adopted by the first Territorial Legislature on March 16, 1855. 1855 Neb. Terr. Laws (1st Sess.) 328 (1 Comp. Sess. Laws 144 (1855-1865)).
represented the first holdings on an arbitration of damages only clause when the court had not been provided an alternative ground for decision, and they were the first opinions to rely on the Nebraska Constitution.

In January 1903, the month after *Phoenix Insurance*, Commissioner Oldham of Department 2, with Commissioners Pound and Barnes concurring, held in *Randall v. Gross* that the arbitration feature of the herd laws was constitutional. Plaintiff brought replevin for three hogs which had trespassed on defendant's cultivated lands and which defendant was holding to enforce the lien of the herd laws. Plaintiff contended that the herd laws, and in particular the arbitration provisions, were unconstitutional in that "they oust courts of a proper jurisdiction by compelling arbitration of the amount of damage ...." Plaintiff also argued that the statutes were an unconstitutional taking of property without due process of law under the state and federal constitutions.

Without citing *Phoenix Insurance* or *Hartford Fire*, the court found the statutes valid in that the lien provided was a cumulative remedy in rem against the trespassing stock and did not eliminate the common law rights of either party; the procedure was optional with both parties; the owner could recover the animals by tendering money as security or as a confession of judgment; and dissatisfied parties could appeal to a justice of the peace. This may have been stretching the meaning of these statutes to avoid a constitutional issue. Interestingly, after failing to follow the precedents of other states in *Phoenix Insurance* and *Hartford Fire*, the opinion concluded:

> [A] nd an examination of the adjudications of sister states on statutes similar in kind leads us to the conclusion that where the statute makes reasonable provisions and gives an opportunity for judicial investigation and provides for notice, either personal or by publication, to the owner of the trespassing animals before final judgment, the strong trend of authority is to hold that such statutes constitute a reasonable procedure in the nature of an action in rem against trespassing stock, and that proceedings under them are due process of law, and not in conflict with constitutional guarantees.

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122. 67 Neb. 255, 93 N.W. 223 (1903).

123. Id. at 260, 93 N.W. at 224.

124. Id.

125. Id. at 261-62, 93 N.W. at 225 (citations omitted).
In 1905, after Commissioner Pound had departed to become Dean of the University of Nebraska College of Law, Commissioner Oldham rejected a defense to a building construction contract of failure to arbitrate the amount of damage caused by delays in defendant’s performance of stone work on the foundation and walls of the building.\textsuperscript{126} Citing \textit{Schrandt, Phoenix Insurance} (but not \textit{Hartford Fire}), and some of the earlier insurance decisions, the opinion stated simply: “It is a rule, too well established in this court to require any further examination, that an unexecuted agreement to arbitrate will not be recognized or enforced in this jurisdiction.”\textsuperscript{127}

Commissioner Pound recognized that the rule of \textit{Phoenix Insurance} is a “peculiar doctrine” but stated that it “works no harm,” “is by no means a bad rule” and there is “no reason to believe that it operates unjustly.”\textsuperscript{128} The harm caused by the decision is in grounding the result in the Nebraska Constitution. That determination precludes the other agencies of government from any role in the policy determinations regarding arbitration. It renders the legislature, courts, and administrative agencies, as well as the parties, unable to fashion any accommodations of the various interests which might foster a policy of non-judicial dispute resolution based upon an enforceable voluntary agreement.

More than a half century later, Roscoe Pound, then one of the nation’s leading jurisprudential writers, stated:

But in recent times the exigencies of business have brought about an increasing demand for commercial arbitration and there has been judicial reconsideration of the received teaching as well as legislative provision for a system of arbitration in almost all common-law jurisdictions. . . . \textit{D}issatisfaction with juries as triers of fact in commercial litigation and the long delays due to congested dockets of the courts in metropolitan commercial centers led increasingly to legislation not only removing the common-law rule but making elaborate provision for arbitration procedure, staying of actions brought in contravention of arbitration clause or submission, specific performance of such agreements, and enforcement of awards. Arbitration is now definitely established as an extra-judicial remedy in commercial cases. . . . That commercial arbitration is a useful instrumentality of justice is demonstrated.\textsuperscript{129}

One of the major recommendations of the Chief Justice of the United States, Warren E. Burger, at a National Conference commemorating the seventieth anniversary of Roscoe Pound’s famous speech, \textit{The Causes of Popular Dissatisfaction With The Adminis-}

\textsuperscript{126} Havens v. Robertson, 75 Neb. 205, 106 N.W. 335 (1905).
\textsuperscript{127} \textit{Id.} at 207, 106 N.W. at 336.
\textsuperscript{128} Phoenix Ins. Co. v. Zlotky, 66 Neb. 584, 589, 92 N.W. 736, 738 (1902) (Pound, C., concurring). For text of Statement, see text accompanying note 110 supra.
\textsuperscript{129} 5 R. POUND, JURISPRUDENCE 358-59 (1959).
tration of Justice," was that "the well-developed forms of arbitration should have wider use." Unfortunately, in Nebraska arbitration arrangements must first clear a constitutional hurdle which Roscoe Pound in his younger years helped to create.

VI. THE LAW SINCE 1902

Since 1902, the Nebraska Supreme Court has consistently applied rules that executory arbitration agreements are unenforceable but that arbitration awards are binding except for fraud or mistake. The court has not defined the nature and extent of the


As the work of the courts increases, delays and costs will rise and the well-developed forms of arbitration should have wider use. Lawyers, judges and social scientists of other countries cannot understand our failure to make greater use of the arbitration process to settle disputes. I submit a reappraisal of the values of the arbitration process is in order, to determine whether, like the Administrative Procedures Act, arbitration can divert litigation to other channels.

The Chief Justice has continued to pursue this recommendation. Address by Chief Justice Burger, ABA Minor Disputes Resolution Conference 5-6 (May 27, 1977) (unpublished, available from Public Information Office, Supreme Court of the United States); W. Burger, Year-End Report on the Judiciary 5-6 (January 1, 1978); W. Burger, Annual Report on the State of the Judiciary 12 (Address at Midyear Meeting of ABA, February 12, 1978). The Chief Justice has recently stated:

But we must now turn to explore more fully the utilization of arbitration as an alternative in large commercial conflicts and other claims, a procedure widely employed for so long in many other countries. Much study will be required, for example, to determine whether, independent of any contract, litigants may be compelled to exhaust arbitration methods before resorting to the courts. It is not clear whether that kind of procedure would be enforceable by sanctions imposed upon litigants who refuse to resort to arbitration. Obviously, the guarantees of the Constitution must be respected in this area as they are elsewhere.

Id. at 12.


invalidity of agreements to arbitrate. The effect of the law of another jurisdiction, especially federal law, is yet to be set forth. Whether the prohibition covers nonjudicial matters is not clear. And the court has not yet ruled on whether new legislative rights not in derogation of common law may include binding arbitration.

Nebraska contracts may be subject to the substantive law of another jurisdiction which recognizes arbitration agreements. An arbitration provision in a collective bargaining agreement covered by Nebraska law is unenforceable,134 but an arbitration agreement by Nebraska parties covered by Section 301 of the federal labor law135 is enforceable in federal courts.136 The United States Arbitration Act provides:

A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.137

A contract entered into in interstate commerce or pursuant to a federal statute is enforceable in federal courts notwithstanding state constitutional provisions138 or other law to the contrary.139

County, 97 Neb. 90, 149 N.W. 309 (1914); In re Arbitration of Johnson, 87 Neb. 375, 127 N.W. 133 (1910). In Simpson, the court stated:

They decided to end their argument, not by going to court, but by providing that a vote of two-thirds of the appraisers should become final and binding on each party. Under the settled law, such an agreement and such a settled purpose does not permit a post-appraisal reargument as to whether the arbitrators were precisely correct as to the minute details of the division which the arbitration contract provided for. The fundamental purpose of the arbitration agreement was to accomplish a division of the property, and not to set up the arbitrators' decision as a further and additional ground for court dispute.

194 Neb. at 458, 232 N.W. at 137.


While the parties have not raised the issue in their arguments it would appear that under Nebraska law arbitration clauses, such as the one involved in this case, are unenforceable under Article I, Section 13 of the Constitution of Nebraska . . . . However, the contract involved in the present case, is one "evidencing a transaction involving commerce" and is, therefore, subject to the terms of 9 U.S.C.A. § 1 et seq. under the Supremacy Clause of the United States Constitution.

See Booth v. Seaboard Fire & Marine Ins. Co., 431 F.2d 212, 215 (8th Cir. 1970) (declining to rule whether an insurance contract is a transaction involving commerce).

It is not clear whether suit can be brought in Nebraska state courts to enforce an arbitration agreement authorized under federal law, or whether failure to arbitrate under such an agreement can be relied upon as a defense in Nebraska state courts. If the federal labor law, Arbitration Act or other statute is treated as creating substantive rights, it would seem that those rights would be enforceable under the constitutional jurisdiction of Nebraska district courts. The Nebraska Supreme Court rejected a failure to arbitrate defense in Wilson & Co. v. Fremont Cake & Meal Co. for the reason that "in the courts of this state the issue is one of procedure and not of substantive right, and the laws of this state are controlling." That decision, however, was rendered before the United States Supreme Court had attached prime substantive importance to arbitration agreements.

The same general problem would appear to exist with respect to Nebraska state court enforcement of an agreement to arbitrate entered into under the laws of a state recognizing such agreements, or an agreement choosing the law of another state to govern a "Nebraska contract." If the enforcement or defense pertains to a matter of "procedure," the Nebraska courts probably would not give effect to the arbitration agreement. If the matter is treated as "substantive," the arbitration agreement would presumably be respected unless the court reasons that the provision offends a strong public policy of Nebraska.

If all the Nebraska Supreme Court has done is to strike down agreements ousting the courts of their jurisdiction, arbitration arrangements pertaining to nonjudicial matters may be enforceable. For example, voluntary arrangements to arrive at a contract rather

141. NEB. CONST. art. V, § 9; NEB. REV. STAT. § 24-302 (Reissue 1975).
143. Id. (syllabus of the court, not restated in the same language in the text of the opinion: "Where arbitration constitutes a part of the contract between parties to it and an attempt is made to enforce arbitration by invoking the Federal Arbitration Act, in the courts of this state the issue is one of procedure and not of substantive right . . . .").
144. See notes 136, 139-40 & accompanying text supra.
145. See A. EHRENZWEIG, CONFLICT OF LAWS 153-54 (1962 ed.).
than remedy its breach (sometimes referred to as "interest arbitration") might be valid in Nebraska. Under traditional Restatement of Contracts rules, this type of agreement would be enforceable (but so would an agreement to arbitrate the amount of loss under an insurance policy): "A promises to sell an automobile to B at whatever price valuers to be selected by them shall fix, and B promises to buy the machine at that price. The bargain is legal." In addition, a provision in a will that a beneficiary have an option to purchase real estate at its fair market value to be fixed by a named appraiser is valid and enforceable.

The Nebraska Court does not appear to have considered the possible distinction between an arbitration agreement to remedy a breach and an arbitration agreement to arrive at a substantial condition of the contract. In Johnson v. Munsell, the parties to a partnership agreement had provided that upon the death of one partner, the remaining partners could buy the deceased's interest. In the event of a failure to agree on price, the opinion states, "then within a reasonable time its value should be determined by the surviving partners and the representative of the owner of the deceased partner's share, each selecting an appraiser and the two appraisers selecting a third, with survivors having an option to purchase said share by paying the amount of such appraisal."

In a single paragraph, the court invalidated the arbitration clause but severed it from the remainder of the partnership agreement which was enforced. Relying on Phoenix Insurance, the court stated:

With regard to the matter of the appraisal by approved appraisers, we may assume that an unexecuted agreement to arbitrate will not ordinarily be recognized by the courts of this state because the effect thereof would be

149. Id. § 551(2) & Comment a, Illustration 2.
150. Id. § 551(3) & Comment a, Illustration 3.
152. But Wilbur F. Bryant, Deputy Reporter of the Nebraska Supreme Court, may have foreseen this possibility in the note which follows the Phoenix Insurance opinions in the Nebraska Reports only. The note states:

A clause in a contract agreeing generally to submit all of the questions that might arise under the contract to arbitration, is void, the same being against public policy, because the effect is to oust the jurisdiction of the courts. Nevertheless, it is competent for parties to stipulate in a contract that the value of property contracted to be sold or delivered shall be ascertained or fixed by arbitrators chosen for the purpose. Such special stipulations in contracts, relating to the manner in which the value of things forming the subject-matter of the contract shall be ascertained, are valid.

154. Id. at 755-56, 104 N.W.2d at 319.
to oust the courts of their legitimate jurisdiction. . . . However that may be, such assumption will not avoid enforcement by courts of the valid provisions of the partnership agreement or affect the result under the circumstances presented herein.\textsuperscript{155}

The court then examined several issues pertaining to the valuation of decedent's interest in the partnership and affirmed the findings of the lower court on those issues.

There is no indication how the court would have proceeded in \textit{Johnson} had there not been a complete agreement without the arbitration feature. It might have required the arbitration to be carried out on the theory that the traditional jurisdiction of the courts was not being ousted and that there is a public policy in favor of carrying out contractual obligations. Perhaps, the court would reason that the judicial remedy provision of the constitution, itself, requires that the arbitration be enforced, since, otherwise, the decedent's representatives would have a contractual right without any remedy. The court might choose to consider the arbitration clause "void"\textsuperscript{156} and the purported agreement incomplete and ineffective. Or, the court might, itself, establish the substantive term on the basis that the underlying agreement of the parties was one of "reasonableness" which is subject to judicial determination, much like the court essentially did in \textit{Johnson}.

In this context, the court has yet to draw the line between an agreement to arbitrate and an agreement on a condition. A sale or agreement subject to an external objective contingency or factor is a valid contract.\textsuperscript{157} However, a sale or agreement subject to discretionary approval by a third party, such as an architect or appraiser, of a material element of the contract\textsuperscript{158} might fall within the prohibition against arbitration agreements. If this strict view is pursued, many common forms of business agreements might be in jeopardy.

There is an additional problem with respect to legislative arrangements which involve matters not in derogation of common law rights. It may be that these new statutory subjects can include binding arbitration mechanisms in that they do not oust the courts of traditional judicial functions.

\textsuperscript{155} \textit{Id.} at 756, 104 N.W.2d at 319.

\textsuperscript{156} The traditional black letter rule states that "the condition is void." \textit{See}, \textit{e.g.}, \textit{German-American Ins. Co. v. Etherton}, 25 Neb. 505, 508, 41 N.W. 406 (1889).

\textsuperscript{157} \textit{See} \textit{Fairchild v. Fairchild}, 176 Neb. 95, 125 N.W.2d 191 (1963).

\textsuperscript{158} Although the existence of an agreement, itself, can be conditioned upon the assent of a third person, it is probably not enforceable under the general law of contracts until the assent is given. \textit{See} \textit{O'Brien v. Fricke}, 148 Neb. 397, 27 N.W.2d 403 (1947); \textit{Evans v. Platte Valley Pub. Power & Irr. Dist.}, 144 Neb. 368, 13 N.W.2d 401 (1944).
The herd law decision\textsuperscript{159} might be interpreted to imply that a statutory lien procedure could be conditioned upon arbitration so long as common law rights are not required to be surrendered. If this is the case, then arguably the Court of Industrial Relations' jurisdiction to settle industrial disputes can be interpreted to include enforcement of arbitration agreements since these public employment collective bargaining agreements stem solely from recent state statutes\textsuperscript{160}. On the same theory, other Nebraska courts as well might be required to fully enforce public employment arbitration agreements. The force of this argument is substantially weakened, however, by the supreme court's strongly worded opinion invalidating arbitration clauses in uninsured motorist insurance\textsuperscript{161}.

If there are new statutory areas in which enforceable arbitration agreements can be entered into, those areas will be difficult to define. The corporation laws, for example, may present a justification for arbitration agreements pertaining to dissension and deadlock in management since those matters are not traditionally dealt with in court. The appraisal rights given dissenting state bank and state trust company shareholders upon reorganization as a national bank\textsuperscript{162} might fall into the same category. Similarly, intrafamily disputes might be settled by an agreement to arbitrate matters not ousting the courts from whatever could be settled judicially.


\textsuperscript{160} The Court of Industrial Relations has indicated that as a matter of discretion, it will decline to exercise its jurisdiction to settle an industrial dispute where a contractually agreed arbitration of the issue is available to the parties. See Transit Workers v. Transit Auth., 3 Neb. C.I.R. Adv. 469 (1978). This is similar to a position of the National Labor Relations Board. See Collyer Insulated Wire, 192 N.L.R.B. 837 (1971). But the Court of Industrial Relations has not yet ordered enforcement of an arbitration clause.

\textsuperscript{161} Heisner v. Jones, 184 Neb. 602, 606, 169 N.W.2d 606, 609-10 (1969):

\begin{quote}
Assaults on the doctrine of the invalidity of an arbitration clause are continually reasserted in new contexts in the development of the law. It is asserted that the novel situation present in the scheme of uninsured motorist's coverage permits an application of the doctrine without the violation of the public policy principles upon which the doctrine is founded. . . .
\end{quote}

\begin{quote}
. . . [T]he compulsory arbitration clause involved in this insurance policy and considered in the context of an uninsured motorist's coverage is void and of no force and effect because it contravenes public policy expressed in German-American Ins. Co. v. Etherton, . . . . in that it operates "to oust the courts of their legitimate jurisdiction."
\end{quote}

VII. CONCLUSION

None of the unsettled areas of Nebraska law concerning voluntary arbitration agreements would be particularly bothersome were it not for the fact that the impediments are constitutional in nature. The constitutional basis was wrongly arrived at by the Commissioners in 1902. But until that judicial determination is changed or the Nebraska Constitution amended, it will prohibit or endanger some very useful and beneficial arbitration arrangements. Once the constitutional obstacles are removed, there is no reason why the legislature, courts and administrative agencies will not be able to design and enforce a system under which people can agree upon their own method for resolving disputes which may arise out of their transactions.