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APPRAISALS OF LOSS AND DAMAGE UNDER INSURANCE POLICIES

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III

1. *General.*

In the earlier articles of this series relating to appraisal provisions in fire insurance policies and in some other policies covering property loss, attention was centered upon the following matters—(1) the course of the British and American courts and of state legislatures in making some of

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those provisions irrevocable[1] and (2) the succeeding action of the American courts in frustrating and displacing those irrevocable provisions.[2]

This article embraces considerations of the more formal "enforceability" of these irrevocable appraisal provisions. It covers both common law, *i.e.*, non-statutory) and statutory enforcement procedures or remedies.

"Enforcement" at common law (*i.e.*, by non-statutory procedures) suggests, of course, specific performance of the provision by (1) plenary suit brought to obtain a general injunctional order that the non-complying party proceed with appraisal, (2) plenary suit to gain court appointment of appraisers or an umpire as may be necessary to complete the appraisal board and enable it to function as such;[3] also (3) an action for damages against a party for his failure or refusal to do his part in compliance with the intendment of the provision.

"Enforcement" by statutory procedures involves the quest of like objectives as those sought in "(1)" and "(2)" of the foregoing common law remedies by statutory motion.

2. *Enforcement at Common Law (i.e., Non-Statutory)—In Equity*

It should be observed at the outset that common law decisions ruling *irrevocability* of some of these appraisal provisions brought "specific enforcement" of those provisions in a very substantial respect. While the enforcement is effected by the insurer duly pleading the provision to suspend or stay the trial of the action brought by the insured to collect on the policy and while the sustaining of the plea is in form a negative enforcement,

1. Sturges & Sturges, *Appraisals of Loss and Damage Under Insurance Policies*, (3 pts.) (pt. 1) *Provisions For Appraisal of Loss and Damage*, 11 MIAMI L. Q. 1 (1956).

The "irrevocability" here referred to is "irrevocability by action." The term "revocability," as commonly applied to common law agreements for arbitration and the like, has the two-fold reference (1) to the termination of the agreement and of the authority of all persons under it by due notice thereof given by a party thereto before award rendered; and (2) revocability by action, whereby a party is allowed to sue in court in disregard of his agreement; the party defendant cannot effectively plead the agreement to suspend or stay the action until arbitration is had. These two specifications of common law revocability are frequently referred to as "revocability by notice" and "revocability by action," respectively.

The making of some of the foregoing appraisal provisions "irrevocable" as stated in the text, refers to the decisions of the courts ruling their irrevocability by action. Although the decisions have not determined the precise question, it is concluded that provisions held irrevocable by action would be held "irrevocable by notice" —at least so long as they remain "irrevocable by action." Apparently the standard appraisal provision enacted in the New York standard fire policy legislation (N.Y. INS. LAW § 168) is now most prevalent in American jurisdictions. See 11 MIAMI L.Q. at 22 (1956).

2. Sturges & Sturges, *Appraisals of Loss and Damage Under Insurance Policies*, (3 pts.) (pt. 2), *Irrevocable Appraisal Provisions—Frustration and Displacement—The Plethora of Waivers*, 11 MIAMI L.Q. 323 (1957).

3. Sometimes one reads of "specific performance of appraisal contracts" when the reference of the text is not confined to enforcement of the appraisal provision, but, instead, concerns the "specific enforcement" of the container contract. See, *e.g.*, note, 33 VA. L. REV. 494 (1947). Our present monograph is not concerned with any "specific performance" of the container contract.

still such suspension or stay of the trial of the cause in the court is a substantial enforcement of the provision for appraisal.[4] True, the parties may never go to appraisal, and the sustaining of the insurer's plea does not order them to do so; yet, certain it is that the matter of disputed loss will not be resolved otherwise than by appraisal so long as the ruling of irrevocability stands.[5]

It also is deemed worthy to emphasize that, in considering further instances of specific enforcement of these irrevocable appraisal provisions, we part company with decisions and judicial opinions denying enforcement of *provisions for arbitration which are subject to traditional common law revocability*. It has been declared from time to time that, as such provisions are revocable at common law, by the same token courts of equity should not decree specific performance of them either by a general order to proceed or by appointing any arbitrator or umpire to complete an arbitral board so that it can function. Reasons assigned for such rulings or opinions generally include one to the effect that such agreements are revocable "at law"; also that "equity" should not and will not undertake any decree which may be frustrated or thwarted by revocation or otherwise.[6] But in

4. Concerning the identity of the pleading at common law of the appraisal provision—whether as being one in "abatement," or in "bar," or in "suspension" or for "stay" of trial, see Sturges & Sturges, *supra* note 1, at 40-43.

5. Clearly enough, the pleading of the provision and the order of suspension or stay of trial is "equitable" in nature even though it is sought and obtained in the insured's action "at law" to collect on the insurance contract. Gatliff Coal Co. v. Cox, 142 F.2d 876, 879 (6th Cir. 1944). Compare Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978 at 987 (2d Cir. 1942). *But see* Sturges & Murphy, *Some Confusing Matters Relating to Arbitration Under the United States Arbitration Act*, 17 LAW & CONTEMP. PROB. 580 n. 43, 601-602 (1952).

6. Thus, in an early New York case, Greason v. Keteltas, 17 N. Y. 491,496 (1858), Selden, J., observed for the court of appeals that to grant specific performance "would bring such courts (*i.e.* courts of equity) in conflict with that policy of the common law which permits parties in all cases to revoke a submission to arbitration already made."

An "additional reason" was advanced "that it is against their policy (*i.e.* of courts of equity) to make decrees which they cannot enforce. If the arbitrator be named in the decree, this would violate the policy of the law as to the right of revocation; and if not named, the decree could readily be evaded by choosing an arbitrator who would refuse to act." See also note, 47 L.R.A. (n.s.) 364.

In his article, *Specific Enforcement of Arbitration Contracts*, 83 U. PA. L. REV. 160,161-164(1934-35) Professor Simpson concluded in line with the first part of the foregoing opinion, that it is "a sound ground for the refusal of equity specifically to enforce such contracts in view of their 'irrevocability' at law." (p. 164). Indeed, he assigned "revocability at law" as being the *only* sound ground for the refusal of equity to enforce such contracts, and discarded other suggestions such as those set out by Selden, J., *supra*, as to what would be the futility of an equity decree of specific enforcement. Thus, to quote Professor Simpson further: "It has been said that if the court were to order the defendant to name an arbitrator, it could not compel the execution of the decree; that even if the appointment of arbitrators could be enforced, the arbitrators so appointed could not be compelled to act as such or to agree; and that if the court were to appoint arbitrators, it would 'bind the parties contrary to their agreement.' None of these grounds seems sufficient. The ordinary processes of a court of equity will be adequate in the usual case to compel the defendant to appoint an arbitrator; if the arbitrator so appointed refuses to act (and to act in good faith), the court can compel the defendant to appoint another; and, moreover, there would seem to be no objection to an appointment by the court where the defendant has refused to appoint in accordance with his agree-

ment, since it may well be said that he must be taken to have waived his right of selection." (p. 161.)

Professor Simpson also took the position that if the common law rule of revocability were overcome, specific enforcement should follow. "Granted a change in the common law rule," he said, "there is nothing (except the numbing effect of precedent) to prevent equity from enforcing specific performance of arbitration agreements on the ground of inadequacy of the legal remedy for the breach thereof, subject, of course, to the exercise of the chancellor's judicial discretion in accordance with the principles applied in other specific performance cases." (p. 164.)

On the other hand, Professor Hayes, in his article, *Specific Performance of Contracts for Arbitration or Valuation*, 1 CORNELL L.Q. 225 (1916), found that two "main reasons" had been assigned by the British and American courts for denying specific performance of arbitration agreements, namely: "(1) The inability of the court of equity to fully execute any decree which it might make for specific performance of such an agreement. It is powerless to compel a party to perform the discretionary act of choosing an arbitrator or valuer, or to require such person to act when chosen. This is simply one application of the rule that equity cannot make a decree requiring the performance of personal acts calling for the exercise of skill or discretion. (2) The unwillingness of the court to aid in holding parties to an agreement, the object of which is to exclude the determination of controversies by the judicial tribunals." (P. 225.) According to Professor Hayes the *first* rule "seems to be the more persuasive," especially when related to the special processes of equity in determining whether or not to grant specific performance. Still the second view also must be honored because: "If the contract calls for the arbitration of controversies which by the law of a particular jurisdiction cannot be lawfully withdrawn from the cognizance of the courts, *the contract may well be held invalid both at law and in equity*." (Emphasis added.) (P. 225.)

Apparently both Professor Simpson and Professor Hayes deemed it well concluded that "equity" should consider that it should follow "the law" as to revocability of common law arbitration agreements, and, by the same token, that specific enforcement of such agreements should not be expected.

This doctrine of subservience of "equity" to "law" does not ring true. One necessarily recalls the "splendid instances," in the history of our jurisprudence "of the triumph of equitable principles over technical rules." 4 KENT, COMMENTARIES 158. See also in this connection Electrical Research Prod., Inc. v. Vitaphone Corp., 20 Del. Ch. 417, 171 Atl. 738 (1934); Ellington v. Currie, 193 N. C. 610, 137 S.E. 869 (1927).

The opinion by Justice Story in Tobey v. County of Bristol, 23 Fed. Cas. 1313 (No. 14065) (C.C.D. Mass. 1845) advanced further thought on this question of specific performance of arbitration agreements. He presented the view, in addition to those cited above, that equity should not specifically enforce arbitration agreements because of designated frailties of common law arbitration tribunals. "Now we all know," he declared, "that arbitrators at the common law possess no authority whatsoever, even to administer an oath, or to compel the attendance of witnesses. They cannot compel the production of documents and papers and books of account, or insist upon a discovery of facts from the parties under oath. They are not ordinarily well enough acquainted with the principles of law or equity, to administer either effectually. Ought then a court of equity to compel a resort to such a tribunal, by which, however honest and intelligent, it can in no case be clear *that the real legal or equitable rights* of the parties can be fully ascertained or *perfectly protected?*" (Emphasis added.) (P. 1321.)

Whether or not Story, J., would have entertained like reactions toward irrevocable provisions for appraisal of loss under insurance policies is unknown. But even as entertained with respect to agreements for arbitration they do not seem very persuasive. Professor Simpson was not persuaded. He observed as follows: "More substantial, perhaps, is the argument that, since lay arbitration tribunals do not have the facilities for investigation nor the knowledge of applicable legal principles which the courts possess, a court of equity should not compel a party to submit the determination of his rights to such a tribunal. In reply to this argument it may be said: (1) This is just what the parties have agreed to do, and, unless there exists some public policy against extrajudicial settlement of controversies, that agreement should be respected and enforced." He also cited the fact that statutes in some jurisdictions provide for the procurement of witnesses and evidence in common law arbitrations. (P. 161).

Justice Story's rationale of refusing specific enforcement because of apprehension that common law arbitration tribunals cannot make sure "that the *real legal*

the case of *irrevocable appraisal provisions*, any rationale predicated on revocability for denying specific enforcement is obviously misconceived.

Furthermore, the appraisal provision being irrevocable, it is manifest that unless the insured can gain an appraisal (or unless a "waiver" is worked against the insurer at some point along the way) the insured may have no recovery on his policy.[7] The substantial and specific enforcement accorded the insurer by duly pleading the provision makes sufficient setting for the insured's claim to a mutuality of remedy. And it seems difficult to conceive a situation constituting more fully the "inadequate remedy at law" for the insured traditionally said to inspire equity to act.[8]

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or equitable rights of the parties can be fully ascertained or perfectly protected" misjudged the common law tradition that common law arbitration pursuant to the parties' agreement therefor contemplates no such assurance. In other words, unless the parties agree otherwise, it is the intent of the common law arbitration that the arbitrators shall decide on the evidence presented to them in accord with the parties' right of hearing *what they think ought to be—i.e.* what, if anything is "justly due" by the one party to the other. See, for example, White Star Mining Co. v. Hultberg, 220 Ill. 578, 601, 77 N.E. 327, 335 (1906); King v. The Falls of Neuse Mfg. Co., 79 N.C. 360 (1878); Mickles v. Thayer, 14 Allen. 114 (Mass. 1867). And, judging by the reported cases, rarely indeed have the parties stipulated that the arbitrator should follow the law. In Burchell v. Marsh, 58 U.S. (17 How.) 344, 349 (1854) the Supreme Court of the United States observed as follows: "Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal. *As a mode of settling disputes it should receive every encouragement from courts of equity.* If the award is within the submission, and *contains the honest decision of the arbitrators, after a full and fair hearing of the parties*, a court of equity will not set it aside for error either of law or fact. A contrary course would be a substitution of the judgment of the chancellor in place of the judges chosen by the parties, and would make an award the commencement, not the end, of litigation." (Emphasis added.)

Justice Story's notation of alleged frailties of common law arbitration tribunals in that they want power to administer oaths and to compel the attendance of witnesses and the production of evidence seems never to have counted as any cause to defeat an award rendered by common law arbitrators. Indeed, the want of these powers seems never to have been presented for judicial consideration as a cause to defeat any common law award. And it is concluded that the want of these powers has rarely, if ever, assumed substantial concern to a party to a common law arbitration. Judging by the reported cases, rarely does it appear that the parties deemed it expedient to stipulate that the arbitrator or witnesses be sworn. Of course, on the other hand, nobody knows how many parties have declined common law arbitration because of these frailties. Nevertheless, the Supreme Court's foregoing admonition that common law arbitration "should receive every encouragement from courts of equity" made no exception on account of these alleged frailties.

7. If the insurer neglects or refuses to appoint an appraiser, or to do its part otherwise to bring on the appraisal, it will be ruled to have waived the right of appraisal. See Sturges & Sturges, *supra* note 2, at 341. But, of course, this does not help the insured along to an appraisal.

8. Perhaps it should be added that want of precedent should be no effective deterent to the granting of equitable relief in such cases. "A lack of precedent, or mere novelty in incident, is no obstacle to the award of equitable relief, if the case presented is referable to an established head of equity jurisprudence—either of primary right or of remedy merely." Hardy v. Bankers Trust Co. of N. Y., 137 N.J. Eq. 352, 44 A.2d 839 (1945). See also circuit Judge Brown (dissenting) in Lincoln Mills v. Textile Workers Union, 230 F.2d 81 at 89-96 (5th Cir. 1956), and Stone, J., in Park Constr. Co. v. Independent School Dist., 209 Minn. 182, 296 N.W. 475 (1941); Palma v. Watson Surplus Lines Agency, 307 P.2d 689 (Calif. Dist. Ct. App. 1957) reviewed *infra* note 17.

Moreover, when the provision is enforceable in one respect in the name of *irrevocability*, why should it not be enforceable by plenary suit looking either to a general injunctional order to proceed or to court appointment of an appraiser or umpire, or both, against either party that neglects or refuses to perform his part of the appraisal provision? Current practice under modern arbitration statutes verifies that such suits and orders are feasible.[9] Under these statutes applications (motions) by one party to an arbitration agreement against the other will bring injunctional orders to proceed with arbitration and court appointment of arbitrators to fill any vacancy in the arbitral board. It is clear, moreover, that those proceedings and orders are understood to be part and parcel of traditional *equity jurisdiction*.[10]

Accordingly, it is difficult to appreciate either the ruling (or the rationale therefor) in *Happy Hank Auction Co. v. Eagle Fire Ins. Co.*[11] decided by the New York Court of Appeals in 1956. Insured demanded appraisal; insurers refused; insurers also denied liability on the policies. Insured sued to obtain a general order against insurers to proceed with appraisal. The petition was denied. "Despite the mandatory language of the standard policy," said the court of appeals, "the New York courts have no power to require an insurer to take part in an appraisal demanded by an insured but refused by his insurer."[12] The court took note of what

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9. Instances are wanting of an impasse or of requirements of supervision accruing in carrying out the order which seem to have embarrassed the court ordering the enforcement. See *e.g.*, cases cited note 10 *infra*, see also Lincoln Mills of Ala. v. Textile Workers Union, 230 F.2d 81 (5th Cir. 1956), *as reversed*, 353 U.S. 448 (1957); In the matter of Gantt, Hurtado & Cia, 397 N.Y. 433, 79 N.E.2d 815 (1948); Western Union Tel. Co. v. American Communications Ass'n. C.I.O., 295 N.Y. 395, 68 N.E.2d 183 (1946); Marchant v. Mead-Morrison Mfg. Co., 252 N.Y. 284, 169 N.E. 386 (1929); *In re* Amtorg Trading Corp., 277 App. Div. 531, 100 N.Y.S.2d 747 (1950); Nippon-Ki-Ito Kaisha, Ltd. v. Ewing-Thomas Corp., 313 Pa. 442, 170 Atl. 286 (1934). Also note, 46 COL. L. REV. 845, 847 n. 11 (1946). Also Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957); Textile Workers v. American Thread Co., 113 F. Supp. 137 (D. Mass. 1953).

10. Shanferoke Co. v. Westchester Co., 293 U.S. 449 (1935); Reconstruction Fin. Corp. v. Harrisons & Crosfield, 204 F.2d 366 (2d Cir. 1953); Catliff Coal Co. v. Cox, 142 Fed. 876, 879 (6th Cir. 1944); Marchant v. Mead-Morrison Co., 29 *In re* Feuer Transp., 295 N.Y. 87, 65 N.E.2d 178 (1946); Finsilver, Still & Moss v. Goldberg & Co., 253 N.Y. 382, 171 N.E. 579 (1930); Matter of Lipschutz, 304 N.Y. 58, 106 N.E.2d 8 (1952). See also Sturges & Murphy, *supra* note 5, at 601-602, n. 43, and Jones, *The Nature of the Court's Jurisdiction In Statutory Post-Award Motions*, 46 CAL. L. REV. 411 (1958).

11. 1 N.Y. 2d 534, 136 N.E.2d 842 (1956).

12. Even more dubious is the ruling of the Alabama court that the courts will not restrain one party (the insured in the given case) from interfering with the appraisers and preventing them from carrying on the appraisal. *Ex parte* Birmingham Fire Ins. Co., 233 Ala. 370, 172 So. 99 (1937). It is suspected that this court was influenced to its decision by assuming that its alleged equity rule of denying specific enforcement of *revocable* common law arbitration agreements was applicable to the *irrevocable* appraisal provision before the court. Said the court: "The courts are almost unanimous that equity will not decree specific performance of a contract to submit a course to arbitration." As is pointed out above, the rationale for this alleged near-unanimity is not significant in connection with a consideration of the specific enforcement of *irrevocable* appraisal provisions.

it conceded to be a contrary ruling in Ohio. Said the court: "There is a contrary rule in Ohio, *Saba v. Homeland Ins. Co.*, 159 Ohio St. 237, 112 N.E.2d 1, 44 A.L.R. 841, but this court *is so far committed* on the question that remedial action must come from the Legislature, if at all." (Emphasis added.) The court cited no authorities whereby it became so committed.[13]

In *Saba v. Homeland Ins. Co.*,[14] the insured moved the Ohio Court of Probate to appoint an "umpire." The court did so. The supreme court sustained the action (as had the court of appeals below).

The insured and insurers failed to agree upon the amount of loss and damage; the insured duly designated his appraiser; the insurers refused his demand to select an appraiser. The "umpire" appointed by the court and the appraiser selected by the insured did an appraisal and returned their award. This appeal concerned only the validity of the appointment of the "umpire."[15]

The policies contained the New York type of standard appraisal provision providing that upon failure of the parties to agree upon the amount of loss, "each shall select an appraiser" and the two "shall first select" an "umpire"; and if the two fail to select an umpire for a period stated "then on the request of the insured or this company, such umpire shall be selected by a judge of a court of record."

The majority opinion[16] by Chief Justice Weygandt took account of the foregoing language of the appraisal provision to point out that *either* party (insured as well as insurer) is entitled to demand that the other select an appraiser and that each party (insurer as well as insured) *shall* select an appraiser. "Hence," said the court "unless these words are held to signify the exact opposite of their obvious meaning, the appraisers must be selected when demanded by the insured or by the insurer."

The court gave principal attention to defendants' contention that when they refused to select an appraiser, the insured had no other recourse than that of suing to collect on the policies. The court rejected this con-

13. The court below [286 App. Div. 505, 145 N.Y.S.2d 206 (1955)] relied upon Matter of Delmar Box Co., 309 N.Y. 60, 127 N.E.2d 808 (1955). "The first cause of action," said the court, "which prays for a direction requiring the companies to determine the amount of the loss by appraisal, pursuant to the policy provisions, must be dismissed on the authority of Matter of Delmar Box Co., 309 N.Y. 60, 127 N.E.2d 808." This case is reviewed in notes *infra*. It is difficult to appreciate its relevancy to the foregoing ruling in the *Happy Hank Auction Co.* case.

14. 159 Ohio St. 237, 112 N.E.2d 1 (1953).

15. An action brought by the insured to collect the award had been removed to a United States District Court.

16. Two of the seven judges dissented and each rendered a separate opinion. Matthias, J., (dissenting) commented that "diligence of counsel has failed to disclose a decision of any court of last resort on the question clearly presented in the instant case." Hart, J., (dissenting) said that he had made a search of the authorities "and is unable to find any case in which the procedure adopted in this case, namely, the appointment of an umpire before the two appraisers were appointed, has been attempted or remotely followed."

tention on the ground that the insured by paying his premiums for the policy had bought and paid for the right to appraisal as set out in the appraisal provision; that it was a valuable right; and he should have the enforcement which the probate court granted. Said the court:

> This [defendants' contention] is equivalent to telling the plaintiff that, although he paid a premium for policies containing the advantage of the appraisal provisions, he in fact received nothing therefor, and that the sole result of the insertion of the appraisal provisions in the policies was that the defendants gave themselves the advantageous right to compel the plaintiff to select an appraiser before he could sue on the policies. Hence, under this theory the appraisal provisions were a detriment instead of a benefit to the plaintiff, inasmuch as even without the appraisal provisions he, of course, had the right to sue. The plaintiff was led to believe that he was purchasing policies giving him the right to an appraisal and a prompt settlement of his loss so he would have the insurance money with which to reconstruct his building without the expense and delay incident to litigation. Obviously this is a valuable right which he should not be denied.

Apparently in order to meet an argument by the insurers that there was no authority in the appraisal provision for any court to appoint an "umpire" when only one of the two appraisers had been selected, the chief justice took this position:

> The failure and refusal of the defendants to select an appraiser as required by the provisions of the policies constituted a failure to agree on an umpire just as effectively as if they had selected an appraiser and instructed him not to agree on an umpire. Under these circumstances the plaintiff was authorized to request the court to select such impire.

The chief justice concluded:

> Like the lower courts, this court can discover no reason for holding the plaintiff to the agreement but excusing the defendants from their obligations under the plain, inescapable language they themselves chose to use when they sold the policies to the plaintiff.[17]

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17. Matthias J., seemed to base his dissent upon the ground that, notwithstanding the mandatory language of the appraisal provision relied upon by the chief justice, the court below just could not do what it had done for the insured under the provision; that the provision bound the insured but not the insurer.

Hart J., contended that the remedy as accorded the insured by the majority was not "legally available to him." After considerable review of seemingly remote propositions re *common law arbitration* agreements it was concluded that "there was no authority whatever for the appointment of an umpire until each party had appointed his or its appraiser. These two were first charged with the appointment of the umpire," also that "the insurer's failure to appoint an appraiser will not warrant a court in appointing an umpire to act solely with the appraiser appointed by the insured." (In this connection the judge relied upon National Fire Ins. Co. v. Shuman, 44 Ga. App. 819; 163 S.S. 306 (1932) reviewed in notes *infra*. Compare the Minnesota cases reviewed *infra*.

In Palma v. Watson Surplus Lines Agency, 148 Cal. App. 2d 879, 307 P.2d 689 (1957) the trial judge, in a declaratory judgment proceeding, ordered insurers to

It seems quite clear that the chief justice and majority of the court in the *Saba* case gave much more careful consideration to the question at hand than appears in connection with the unanimous action of the New York Court of Appeals in the *Happy Hank Auction Co.* case. The unanimity in the Ohio *Saba* case of the trial court, the intermediate court and supreme court majority in finding good reason for enforcing the provision and in finding no substantial reason for not doing so is impressive. The *Saba* decision gives a new judicial leadership within traditional equity jurisdiction in the judicial enforcement of these irrevocable appraisal provisions.

3. *Enforcement at Common Law (i.e., Non-Statutory)—By Action for Damages.*

No American decision has been discovered determining whether or not an action for damages will lie for breach of one of these irrevocable appraisal provisions.[18] Speculation upon the feasibility of having any such indirect enforcement probably should be reckoned of little practical value.[19]

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select an appraiser on condition that if they neglected to do so for 10 days he (the judge) would make the appraisal after hearing the parties. The insurers did not select an appraiser during the time; the judge, after such hearing, made the "appraisal." The judge's award was sustained; and it was sustained although the judge did not comply with the appraisal provision, at least as to its requirement of itemization. Referring to the *Saba* case, the court commented "In the Saba case the court appointed an umpire to work with the appraiser appointed by the insured. In the instant case the court substituted itself for both the appraisers and the umpire. Either procedure was proper, *under the general equity powers of the court.*" (Emphasis added.)

Concerning the itemization prescribed in the provision which was held not applicable to the judge's appraisal and award, the court observed as follows: "A trial court generally is not required to make minute evidentiary findings, and no reason exists why such court, when making an appraisal, should depart from customary procedures. Because the insurers have made it necessary to adopt a substitute procedure, they must accept it with its burdens as well as its benefits."

18. It has been stated that "it is recognized that the non-breaching party may institute an action for damages for the breach of the agreement." 44 A.L.R.2d 851 (1935). See also Hart, J., dissenting in the *Saba* case, citing annot., 47 L.R.A. (n.s.) 409,410. None of the authorities cited seems so to decide.

19. It is difficult to imagine just how a cause of action for damages might be deemed to accrue to either the insured or insurer in connection with these irrevocable appraisal provisions.

Clearly the insurer is provileged to invoke the provision (*i.e.*, plead it to defeat insurer's action to collect on the policy); it would incur no liability as for breach of the appraisal provision or insurance policy in so doing and, equally obvious, it seems, the insurer should incur no liability for waiving the provision and right to appraisal.

It also seems that the insured should not be held in damages for bringing his action in disregard of the provision to collect on the policy. This is true because under the present posture of the law of the cases on irrevocability by action the efficacy and validity of the plea of the provision is not finally determined until the adjudication of no "waiver" by the insurer. The action by the insured looks to a declaratory judgment of either "waiver" or continuing vitality of the provision. Protanto, it seems the insured is privileged to sue. Conceivably, of course, when there is the adjudication of no "waiver" the insured could be made liable in damages for wrong done the insurers by initiating the action—but with what justice is not apparent.

It seems that a situation would not occur like that wherein a party to a general arbitration provision at common law revokes by instituting an action or by

Of course, under the view as advanced by the majority in the *Saba* case that the insured and insurer bear mutual obligations to go forward with an appraisal, conceivably a cause of action for damages might be accorded to the one party against the other when predicated upon the defendant's neglect or refusal to select an appraiser. It is not readily conceived, however, what might be a practical measure of damages—especially when the provision is ruled specifically enforceable as in the *Saba* case.

4. *Enforcement (Statutory)—By Remedies Provided In Standard Policy Legislation.*

Standard policy legislation gives only very limited enforcement of the appraisal provision.

Thus, the New York standard fire policy and appraisal provision[20] make no pretense of enabling either party (insured or insurer) to obtain in any court a general order against the other to proceed with an appraisal. Nor do they make any pretense of enabling either party to gain court appointment of an *appraiser* upon the failure or refusal of the other party to make his selection pursuant to the provision. The only remedy looking to any such enforcement of the appraisal relates to the selection of the "umpire."

The current New York provision reads that each party (insured and insurer) shall select an appraiser; then, the appraisers so selected "shall first select" an "umpire." Upon the appraisers "failing for fifteen days[21] to agree upon such umpire, then, on request of the insured or this company, such umpire shall be selected by a judge of the court of record in

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notice, or refuses to do his part notwithstanding explicit stipulation to select arbitrators or otherwise abide by the agreement. That the bringing of actions for damages by the aggrieved party for such treatment of *revocable common law arbitration provisions* bring little financial reward, see Livingston v. Rollin, 5 El. & Bl. 131 (1955); Munson v. Straits of Dover S.S. Co., 9 Fed. 787 (D. N.Y. 1900); Cocalis v. Eugene Nazlides, 308 Ill. 152, 139 N.E. 95 (1923).

20. N.Y. INS. LAW. § 168. See also § 173.

21. Concerning the computation of this fifteen day period (from when to when) see Cady Land Co. v. Philadelphia F. & M. Ins. Co., 195 Wis. 509, 218 N.W. 814 (1928); National Fire Ins. Co. v. Shuman, *infra* note 23.

That the Judge's jurisdiction to appoint the umpire is limited to the situation wherein the appraisers have failed or neglected to select one for the fifteen day period, see Camden Fire Ins. Ass'n. v. Cahill, 266 Ky. 362, 98 S.W.2d 462 (1936). See also *In re* 176 and 178 East Main Street, Amsterdam, N. Y., 263 N.Y. 197, 188 N.E. 647 (1934) (judge appointed umpire on application of insured; this, after appraisers had selected an umpire and an award had been returned by insurer's appraiser and the umpire. Insured sought in his application to the judge for appointment of the umpire to challenge the insurer's appraiser for alleged fraud in inducing insured's appraiser to agree upon the umpire. Held, this challenge could be made only by action to set aside the award.)

Concerning the power of appraisers to make a second selection of an umpire see Alliance Ins. Co. v. Williamson, 36 Ga. App. 497, 137 S.E. 277 (1927).

the state in which the property insured is located."[22] The provision then goes on to indicate, in unnecessary ambiguity, the respective roles of the appraisers and the umpire, as follows: "The *appraisers shall then appraise the loss* . . . , stating separately sound value and loss . . . to each item, and *failing to agree shall submit their differences only* to the umpire. An award in writing so itemized of any two, when filed with this company, shall determine the amount of sound value and loss. . . ." (Emphasis added.)

Prior to the foregoing decision in the *Saba* case it had been held by a lower court in Georgia (with a syllabus opinion) under similar legislation, that the judge was not thereby authorized to select the "umpire" to serve as an appraiser or otherwise, although the insurer had refused to select an appraiser. The opinion of the court indicates no serious consideration of what should be deemed the intent of the contract in the light of the insurer's refusal to select an appraiser such as the Ohio court undertook in the *Saba* case. It was held that the legislation authorized court selection of an *umpire* only after (1) insured and insurer had each selected an appraiser and (2) the two so selected had failed for the stated period of time to select an umpire. Said the opinion:

> The mere failure of the insurance company to select an appraiser does not warrant the appointment of an umpire to act solely with the appraiser appointed by the insured. It follows that, where the insurer has selected no appraiser and has not otherwise participated in or consented to an appraisement, a finding or report on the loss, made by an appraiser selected by the insured and an umpire appointed by the court, is not binding upon the insurer.[23]

Why this legislation of so limited scope as to these remedies has been continued is not very clear. Having required the use of the irrevocable appraisal provision by its standard policy legislation is it not clear why the legislature has left it so one-sided. If court appointment of the "umpire" when the two appraisers fail to select him is expedient, why not court appointment also of an *appraiser* when either party neglects or refuses to select one? If court appointment of any personnel to the appraisal board is feasible, why not a court order against the recalcitrant

22. That notice of the application to the adverse party is required, see Caledonian Ins. Co. v. The Superior Court, 140 Cal. App. 2d 458, 295 P.2d 49 (1956); Camden Fire Ins. Ass'n. v. Cahill, 266 Ky. 362, 98 S.W.2d 462 (1936).

Compare Palatine Ins. Co. v. Gilleland, 79 Ga. App. 18, 52 S.E.2d 537 (1949); Ozburn v. National Union Fire Ins. Co., 45 Ga. App. 33, 163 S.E. 321 (1932); Philadelphia Underwriters v. Folds, 156 Ga. 773, 120 S.E. 102 (1923).

23. National Fire Ins. Co. v. Shuman, 44 Ga. App. 819, 163 S.E. 306 (1932). See also O'Rourke v. German Ins. Co., 96 Minn. 154, 104 N.W. 900 (1905). But *see* the subsequent Minnesota view, *infra*, pp. 14-15.

Compare the subsequent decision in Palatine Ins. Co. v. Gilleland, 79 Ga. App. 18, 52 S.E.2d 537 (1949) (Insured and insurer each appointed an appraiser; after these appraisers failed to agree upon the "umpire" for the fifteen days, the judge appointed an "umpire"; insurer's appointee as appraiser refused to convene with the other two for an appraisal and the insurer declared that it would have no more to do with an appraisal. Appraisal and award by insured's appointee and the "umpire" appointed by the court were sustained).

party whenever he neglects or refuses in any other respect duly to perform his part to bring on the appraisal?

Same—The Minnesota Situation.

The Minnesota standard policy legislation relating to appraisals of loss under fire policies varies considerably from the foregoing New York law. Most of the cases relating to the questions at hand were concerned with this legislation as it was enacted in 1923. It was amended in 1955 as indicated below. In 1923 it provided that when the insured and insurer failed to agree upon the loss "the amount of such loss shall be ascertained by two competent appraisers the insured and this company each selecting one" within fifteen days after a statement of loss had been rendered by the insured to the company, and, if either party failed to select an appraiser within that time, "the other appraiser and the umpire selected as herein provided may act as a board of appraisers, and whatever award they shall find shall be as binding as though the two appraisers had been chosen."[24] Then followed a provision for selection of the "umpire," namely, "the two [appraisers] shall first select" the "umpire"; "provided that if after five days the two appraisers cannot agree on such an umpire,[25] the presiding

24. Under the Minnesota view the parties are entitled to be heard in these appraisals, Dufresne v. Marine Ins. Co., 157 Minn. 390, 196 N.W. 560 (1923); American Cent. Ins. Co. v. District Court, 125 Minn. 374, 174 N.W. 242 (1914). An ex parte appraisal and award by the appraiser selected by the one party and the umpire appointed by the judge after due notice of the appraisal have been sustained. Itasca Paper Co. v. Niagara Fire Ins. Co., 175 Minn. 73, 220 N.W. 425 (1928); Abramovitz v. Continental Ins. Co., 170 Minn. 215, 212 N.W. 449 (1927). See also Orient Ins. Co. v. Skillet Co., 28 F.2d 968 (8th Cir. 1928); Glidden Co. v. Retail Hardware Mutual Fire Ins. Co., 181 Minn. 518, 233 N.W. 310 (1930); Astell v. American Cent. Ins. Co., 114 Minn. 206, 130 N.W. 1002 (1911).

It has also been ruled that the insured may gain appointment of the "umpire" to serve with his appointee as appraiser in carrying out the appraisal and rendering an award even though the insurer denies liability on the policy. Such denial does not defeat insured's right to appraisal. Abramowitz v. Continental Ins. Co., *supra*; Itasca Paper Co. v. Niagara Fire Ins. Co., *supra*; Orient Ins. Co. v. Skillet Co., *supra*; and see Sturges & Sturges, *supra* note 2, at 341.

25. Unless the appraisers named the umpire within the five days, the judge, it has been held, was authorized to do so on application—and this was true "regardless of whether the inability [of the appraisers to name one] is due to failure to agree after attempting to do so or to failure to attempt to agree at all." Kavli v. Eagle Star Ins. Co., 206 Minn. 360, 288 N.W. 723 (1939).

It also has been held adequate that the appraisers agree orally upon the umpire; they need not name him by any writing. Astell v. American Cent. Ins. Co., 114 Minn. 206, 130 N.W. 1002 (1911). It also seems clear that they may effectively name one without any prior disagreement as to who should be named—and before expiration of the five days. See Gouin v. Northwestern Nat. Ins. Co., 145 Wash. 199, 259 Pac. 387 (1927); Chandos v. American Fire Ins. Co. of Philadelphia, 84 Wis. 184, 54 N.W. 390 (1893).

Appointment by the judge of the umpire *before* the parties had disagreed over the amount of loss was held premature and invalid; also that there could be no disagreement over the amount of loss until the statement of loss had been submitted by insured to insurer and the fifteen days thereafter had elapsed. "The appointment of the umpire prior to the rendition of the statement of the insured to the insurer and the expiration of the fifteen days thereafter within which either party may demand appraisement is premature and void." Boston Ins. Co. v. A. H. Jacobson Co., 226 Minn. 479, 33 N.W.2d 602 (1948).

judge[26] of the district court of the county wherein the loss occurs may appoint such an umpire upon application of either party."[27]

The Minnesota Supreme Court first ruled upon this legislation concerning the appointment of the umpire by the judge in *Abromowitz v. Continental Ins. Co.*,[28] as follows:

> It [the statute] means that, in case either party fails to select an appraiser, the other may have an umpire appointed in the manner provided in case two appraisers fail to agree upon one. The statute has been so amended since the decision in O'Rourke v. German Insurance Co. of Freeport, 96 Minn. 154, 104 N.W. 900, as to make inapplicable the comment there made that the statute 'has no application to a case where a referee nominated by one of the parties refuses to act as such; for the court is only authorized to appoint a third referee.' Since that time and by chapter 421, G.L. 1913, there has been put into the statute the provision for the selection of an umpire and an award, even though one party does not nominate an appraiser.

Same—The Saba Ruling in Ohio and Minnesota Situation Compared.

Clearly enough the chief justice and majority of the Ohio court in the foregoing *Saba* case took liberties with the text of the provision relating to the appraisal board as set down in the New York standard appraisal provision. But the awkwardness of the text in this connection invited, indeed required, judicial aid ("construction") to resolve various ambiguities especially as to the respective roles of the appraisers and the umpire. According to the appraisal provision as indicated above if the insured and insurer fail to agree upon the amount of loss each party "shall select" an "appraiser" then, these appraisers "shall first select" an umpire; then the *appraisers* are to "appraise the loss stating separately actual cash value and loss to each item; and, failing to agree, shall submit *"their differences only"* to the umpire. On the other hand, "an award in writing *of any two*" shall determine the amount.

The "umpire" appointed by the Ohio court was not, of course, selected by the two appraisers; the loss was never appraised by the two appraisers; nor did such appraisers ever fail to agree upon an umpire; nor was the "umpire," as appointed by the court, to decide "differences only" arising between the two appraisers. There was an award in writing *of two*—but not *"of any two"* according to the text.

Under the foregoing Minnesota standard policy legislation of 1923, it was provided that when the insured and insurer failed to agree upon

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26. The Maine and Massachusetts standard policy legislation differ from that of New York and Minnesota by providing that the appointment is to be made by the insurance commissioner. See Sturges & Sturges, *supra* note 2, at 363.

27. The statute of 1923 is set out in Abramowitz v. Continental Ins. Co., 170 Minn. 215, 212 N.W. 449 (1927).

28. See note 24 *supra*.

the amount of loss "the amount of such loss shall be ascertained by two competent appraisers, the insured and this company each selecting one." If all went well with this selection of the two appraisers, they should "first select" the umpire. As distinguished from the New York provision it was not declared that the submission to the umpire by the appraisers should be of "their differences only," (they were, however, to submit to him "their differences"). Furthermore the Minnesota legislation expressly provided (while that of New York did not) that if a party failed to select his appraiser within the stated time the appraiser selected by the other party and umpire appointed by the judge "may act as a board of appraisers" and that their award should be "as binding as though the two appraisers had been chosen." In other words, in such a case under the Minnesota provision the one appraiser and "umpire" were to act as "appraisers"—with no "umpire."

In short, the Ohio court in the *Saba* case accomplished under the New York appraisal provision what was provided in the Minnesota statute and ruled by the Minnesota court, namely, the translation of the "umpire" appointed by the judge into an "appraiser" for the purpose of the given appraisal and award. Under both views the "umpire" appointed by the judge in case of *default of a party in selecting an appraiser* is not the "umpire" contemplated when all goes well to the point that the two appraisers are appointed and they duly name the "umpire"; nor is the "umpire" appointed in case of such default the one contemplated when the two appraisers appointed by the parties fail to agree upon the "umpire" and the judge appoints the "umpire."

More significant, perhaps, is the following frailty of the appraisal board derived by following the foregoing Ohio and Minnesota rulings: If the single "appraiser" and "umpire" fail to agree upon an award and all of the constituent details going to its make-up their endeavors may come to naught. In short, the appraisal and award are contingent upon these two persons being in accord throughout.[29]

Same—1955 Amendments of Minnesota Standard Policy Legislation.

In 1955 the Minnesota Legislature revised its standard policy legislation, including substantial amendment of the appraisal provision.[30] By these revisions if the parties fail to agree upon the amount of loss, then, "on the written demand of either, each shall select a competent and disinterested appraiser." If either party fails to select an appraiser within twenty days of

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29. Unanimity there was, as it happened, in the *Saba* case, *supra* note 14 and in the Minnesota cases, *supra* note 24.

30. MINN. STAT. ANN. § 65.011 (1953).

the demand,[31] then a presiding judge of the district court of the county wherein the loss occurs may appoint *such appraiser* for such party upon application therefor by the other party and five days notice in writing. Then the two appraisers "shall first select a competent and disinterested umpire." If they fail for fifteen days to agree upon an umpire, the judge, upon application of a party may, after five days notice in writing, appoint. Whereupon, the appraisers shall appraise the loss, "and, failing to agree, shall submit their differences, only, to the umpire." An award, duly itemized, "of any two" when filed with the insurer shall determine the amount.

In short, the judge is to appoint an *appraiser* when a party fails to appoint one; and he is to appoint an "umpire" if the two appraisers fail to agree upon one.[32] The umpire, in any case is to decide "differences only" arising between the appraisers,—but, as the text has it an award "of any two" shall determine the amount. No other standard policy legislation has been discovered in the American jurisdictions going so far to assure an appraisal. Clearly it is superior to the provision for appointment of an umpire (only) as under the New York statute, and overcomes the significant frailty pointed out above with respect to both the earlier (1923) Minnesota legislation and the situation under the ruling of the Ohio court in the *Saba* case, namely, of leaving the appraisal and award to the hazard of the appraiser and "umpire" appointed by the judge reaching a unanimous award.[33]

5. *Enforcement—Under Arbitration Statutes*

We turn now to an inquiry into the applicability of the modern American arbitration statutes of the pattern of the 1920 New York arbitration law to the irrevocable appraisal provision like that in the New York standard fire insurance policy. Are the remedies provided by those statutes

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31. Under the earlier act each party was to select his appraiser within fifteen days after a statement of loss had been rendered by the insured to the insurer; Sturges & Sturges, *supra* note 2, at 349. It was held sufficient if the selection were made within that fifteen day period although notice thereof to the other party came later. And the appraiser having been duly selected within the fifteen days an application to the court to appoint an umpire was premature; Minnesota Farmers Mut. Ins. Co. v. Smart, 204 Minn. 101, 282 N.W. 658 (1938). The fifteen days did not begin to run until the statement of loss had been rendered by the insured so that an appointment by the court of an umpire prior to that time was premature; Boston Ins. Co. v. Jacobson Co., 226 Minn. 479, 33 N.W.2d 602 (1948).

32. Under the earlier act the appraisers were to agree upon an umpire within five days; Sturges & Sturges, *supra* note 2, at 361. If the appraisers selected by the parties failed to name an umpire within the five days the district court could do so regardless of why the two failed to name one or that they did not try to agree on one; Kavli v. Eagle Star Ins. Cr., 206 Minn. 360, 288 N.W. 723 (1939).

33. The 1955 statute also dropped the over-all time limitation in the earlier legislation for demanding appraisal. The earlier act provided for waiver of the right of appraisal unless, within fifteen days after statement of loss, "either party, the assured or the company, shall have notified the other in writing that such party demands an appraisal;" Sturges and Sturges, *supra* note 2, at 348.

for the more direct enforcement[34] of arbitration provisions qualifying thereunder or for the more indirect enforcement[35] thereof by enforcement of an award rendered thereunder available for the standard appraisal provision? This general question has been considered more frequently in the New York courts than elsewhere.[36] Even so, less than one-half dozen cases involving it have come before the appellate division or court of appeals since the enactment of the New York Arbitration Law in 1920.[37] Only one of them has been determined by the court of appeals.[38]

In a number of New York cases prior to 1920, in common with legal lore in some other American opinions and in text books, various commentaries upon differences between insurance appraisement and statutory or common law arbitration were composed. They consisted either of quite abstract generalizations, or of bald pronouncements that one is not the other, or of both. The court of appeals appears in its recent opinions to have relied upon at least some of these generalizations and pronouncements.[39]

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34. Reference is here made to applications under the statutes for a general order to proceed with arbitration and applications thereunder for court appointment of arbitrators.

We have indicated above how the application under the statutes by a defendant in an action on a cause covered by an arbitration agreement to stay the trial thereof pending arbitration effects the enforcement (irrevocability) of the agreement.

35. Reference is here made to applications under the statutes to confirm the award and enter judgment thereon. Chief Judge Cardozo explained this proceeding as one *to enforce the arbitration agreement* under which the arbitration was had in these words: "The motion to confirm is equivalent to a suit in equity to carry into effect the terms of the agreement and the arbitration had thereunder." Finsilver, Still & Moss v. Goldberg, M. & Co., 253 N.Y. 382, 171 N.E. 579 (1930).

36. In Saba v. Homeland Ins. Co. of America, 159 Ohio St. 237, 112 N.E.2d 1 (1953) the majority of the Supreme Court of Ohio sustained the probate court in appointing an "umpire" on application of the insured, the insurer having refused to appoint an appraiser. The chief justice made the point in the course of the opinion that enforcement of the standard appraisal provision by appointing the umpire as the probate court did was consistent with the policy of the Ohio arbitration statute. He cited particularly the section thereof providing for court appointment of arbitrators when necessary to fill an arbitration board.

37. They are, (chronologically listed): Williams v. Hamilton Fire Ins. Co., 118 Misc. 799, 194 N.Y. Supp. 798 (Sup. Ct. 1922); Petition of Am. Ins. Co., 208 App. Div. 168, 203 N.Y. Supp. 206 (1924); Fitzgerald v. Continental Ins. Co., 275 App. Div. 453, 90 N.Y.S.2d 430 (1949); Sigelman v. Travelers Fire Ins. Co., 279 App. Div. 771, 109 N.Y.S.2d 115 (1951); *In re* Delmar Box Co., 285 App. Div. 398, 137 N.Y.S.2d 491 (1955); 309 N.Y. 60, 127 N.E.2d 808 (1955). See also United Boat Serv. Corp. v. The Fulton Fire Ins. Co. 137 N.Y.S.2d 670 (Sup. Ct. 1955).

38. *In re* Delmar Box Co., *supra* note 37.

39. The earlier New York cases which appear by citation or quotation in subsequent cases are (chronologically listed): Harris v. Bradshaw, 18 Johns. R. 26 (N.Y. Sup. Ct. 1820); Elmendorf v. Harris, 5 Wend. 516 (N.Y. Sup. Ct. 1830) per Savage, C. J., and reporter's note at end of case; *reversed*, 23 Wend. 628 (N.Y. Ct. Err. 1840); Garr v. Gomez, 6 Wend. 583 (N.Y. Sup. Ct. 1831); *reversed*, 9 Wend. 649 (N.Y. Ct. Err. 1832) (see opinion of Senator Seward at 661); Bulson v. Lohnes, 29 N.Y. 291 (1864); Morton v. Cameron, 3 Rob. 189 (N.Y. Sup. Ct. 1865); DeGroot v. Fulton Fire Ins. Co., 4 Rob. 504, 27 N.Y. 104 (N.Y. Sup. Ct. 1867); Brink v. New Amsterdam Fire Ins. Co., 5 Rob. 104 (Sup. Ct. 1867); Linde v. Republic Fire Ins. Co., 50 N.Y. 362 (Sup. Ct. 1884); Enright v. Montauck Fire Ins. Co., 15 N.Y.S. 893 (Sup. Ct. 1891); Bradshaw v. Agricultural Ins. Co. of Watertown, 137 N.Y. 137, 32 N.E. 1055 (1893); Fleming v. Assur. Co., 75 Hun. 530, 27 N.Y.S. 488 (Sup. Ct. 1894); Remington Paper Co. v. London Assur Corp., 12 App. Div. 218, 43 N.Y.S. 431 (Sup. Ct. 1896);

In view of the prestige and influence of that court and its usual alertness to dogma and disposition to challenge it when it comes up in legal lore, we are prompted to emphasize a critical view of the court's contribution on the general question at hand.

Noticeable is the want of any declared purpose by the court of appeals in the course of its pertinent opinions and decisions to further the appraisal process under the standard appraisal provision. And the court has been quick to deny "any specific enforcement" of the provision unless and until the Legislature provides *"a statute clearly and specifically drawn for the purpose."* (Emphasis added.) In *Matter of Delmar Box Co.*, in 1955,[40] the court expressly ruled out the use of the enforcement remedies of the arbitration statute in connection with the appraisal provision and awards thereunder.[41] The insured made application under the arbitration statute for a general order against the insurer to proceed with appraisal. Special term granted the application; appellate division reversed; the court of appeals sustained the reversal. It took the broad position that the standard appraisal provision in the standard fire policy of that state does not constitute a provision *for arbitration* under the New York arbitration statute. It cited what it considered as being "basic distinctions" between insurance appraisement and arbitration and observed that they "have long prevailed."

We critically examine below each of these distinctions, as enunciated by the court in *Matter of Delmar Box Co.*, and the authorities which were marshalled to confirm each declared distinction. In this latter connection, it will be noted at the outset that *all* of the court's citations of its case authorities for its declared distinctions are of "see" or "see also," quality.

1. *Provision for appraisal as distinguished from provision for arbitration.* The court laid down its first distinction between arbitration and insurance appraisal by declaring a distinction between the *agreement* for arbitration and the *agreement* for appraisal. Said the court *an agreement for arbitration* "ordinarily encompasses the disposition of *the entire controversy* between

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Strome v. London Assur. Co., 20 App. Div. 571, 47 N.Y.S. 481 (1897), *aff'd. without opinion*, 172 N.Y. 627, 57 N.E. 1125 (1900); Kaiser v. Hamburg-Bremen Fire Ins. Co., 59 App. Div. 525,69 N.Y.S. 344 (1901), *aff'd. without opinion*, 172 N.Y. 663, 65 N.E. 1118 (1902); Wurster v. Armfield, 175 N.Y. 256, 67 N.E. 584 (1903); Townsend v. Greenwich Ins. Co. of the City of New York, 86 App. Div. 323, 83 N.Y.S. 909 (1903), *aff'd. without opinion*, 178 N.Y. 634, 71 N.E. 1140 (1904); Steinberg v. Boston Ins. Co., 144 App. Div. 110, 128 N.Y.S. 994 (1911); Turner v. N.Y. Cent. & H.R.R.R. Co., 74 Misc. 524, 132 N.Y.S. 418 (Sup. Ct. 1911); American Steel Co v. German-American Fire Ins. Co., 187 Fed. 730 (3d Cir. 1911); Freeman v. Ralph Realty Corp., 198 App. Div. 788, 181 N.Y.S. 72 (1921); Williams v. Hamilton Fire Ins. Co., 118 Misc. 799, 194 N.Y.S. 798 (Sup. Ct. 1922). Matter of Fletcher, 237 N.Y. 440, 143 N.E. 248 (1924) also was cited by the appellate division and by the court of appeals in *In re Delmar Box Co.*, *infra* note 40.

40. 285 App. Div. 398, 137 N.Y.S.2d 491 (1955).

41. As heretofore pointed out, the court also has since ruled out any specific enforcement of the provision by any plenary action for an equitable decree: Happy Hank Auction Co. v. American Eagle Fire Ins. Co., 1 N.Y.2d 534, 136 N.E.2d 842, 154 N.Y.S.2d 870 (1956) reviewed *supra* p. 6.

the parties, *upon which judgment may be entered after judicial confirmation of the award*, CPA 1464." (Emphasis added.) But an *agreement for appraisal* "extends *merely to the resolution of the specific issues of actual cash value and the amount of loss*, all other issues being reserved for determination in a plenary action."[42] To this statement of basic distinction is appended the citation—"See Matter of American Ins. Co., 208 App. Div. 168, 170-171, 203 N.Y.S. 206, 207-208 [1924]." (Emphasis added.)

Other distinctions were set down by the court. They relate more particularly to "*the nature*" *of appraisal as differing from "the nature" of arbitration* and how *appraisers and arbitrators, or their respective roles, differ*. Out of those distinctions, the court derived further bases for concluding that the two *agreements* are substantially different — at least in the absence of precise statutory provisions overcoming regard for those distinctions. These further differences as advanced by the court are reviewed below.

After listing and summarizing these further distinctions, the court concluded that: "Accordingly, it was well settled, at least until 1941,[43] that the

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42. It will be noted at this point that the court has made no distinction between the provision for appraisal of loss and damage to property insured and one for the determination of business loss. The court has treated them, as if they were the same on the questions at hand.

Certainly the foregoing generalization by the court that the *agreement of appraisal* "extends merely to the resolution of the specific issues of the *actual cash value and the amount of loss*," does not fit the agreement for appraisal of loss resulting from business interruption. Fitzgerald v. Continental Ins. Co., 275 App. Div. 453, 90 N.Y.S.2d 430 (1949), illustrates this. (The case is summarized, note 48 *infra*). See also American Ins. Co. v. Pickering Lumber Corp. 87 F.Supp. 512 (N.D. Cal. 1949); *aff'd* 183 F.2d 587 (9th Cir, 1950); Hawkinson Tire Serv. Co. v. Indiana Lumbermens Mut. Ins. Co., 362 Mo. 823, 245 S.W.2d 24 (1952).

43. This reference is to the 1941 amendment of the arbitration statute—(N.Y. Civ. Prac. Act § 1448. This section, the first section of the statute, was amended by adding thereto the following: "Such submission or contract [for arbitration] *may include questions* arising out of valuations, appraisals or other controversies which may be collateral, incidental, precedent or subsequent to or independent of any issue between the parties." (The clause "*or independent of*" was added in 1952). The New York Legislative Council has declared that these amendments of the New York statute (they appear in no other arbitration statutes of the New York type) were designed to bring appraisals and valuations under the arbitration law. New York State Legislative Manual (1953) p. 401.

Obviously the amendment was unnecessarily awkward. It being desired to bring the standard appraisal provision under the arbitration statute it was easy enough to do so in precise language. It was unnecessary to leave the matter in the air by declaring that an *a provision for arbitration* it was unnecessarily confusing to pose the provision for appraisal as a provision for arbitration and then to say that it may *include questions rising out of appraisals*. Given any tradition as to the *provision for appraisal* being different from a *provision for arbitration* it was unnecessarily confusing to pose the provision for appraisal, as a provision for arbitration and then to say that it may *include* questions rising *out of appraisals*. On the other hand, the amendment was found not to be beyond the wit of judicial construction and adaptation. In 1949 the amendment was held by the appellate division to bring the standard appraisal provision under the arbitration statute and subject to the enforcement remedies. (The case involved business loss interruption—not loss or damage to physical property—; but the court made no point of this difference in connection with its decision). Fitzgerald v. Continental Ins. Co., 275 App. Div. 453, 90 N.Y.S.2d 430 (1949). We note below that this case was overruled later—in 1955. The court of appeals in the *In re Delmar Box* case cited the decision in the *Fitzgerald* case as having been "short lived."

standard provision in a fire insurance policy for appraisal did not constitute an agreement for arbitration and was not specifically enforceable under the statutory procedure applicable to contracts for arbitration." (Emphasis added.) The court documented this conclusion with a citation of cases as follows: "See Matter of American Ins. Co., *supra*, 208 App. Div. 168, 203 N.Y.S. 206 (1924); See also, Wurster v. Armsfield, *supra*, 175 N.Y. 256, 264, 67 N.E. 584, 586 (1903); Strome v. London Assur. Co., *supra*, 20 App. Div. 571, 572, 47 N.Y.S. 481, 482 (1897), *affirmed without opinion*, 162 N.Y. 627, 57 N.E. 1125 (1900); Townsend v. Greenwich Ins. Co., *supra*, 86 App. Div. 323, 326-327, 83 N.Y.S. 909, 911-912 (1903), *affirmed without opinion* 178 N.Y. 634, 71 N. E. 1140 (1904)."

All of the foregoing cases, with the exception of *Matter of American Ins. Co., supra*, were decided prior to 1920. So it is manifest that *neither the decisions in those cases nor the utterances of the judges in the opinions therein were considerate of any issue as to the availability of the remedies of the 1920 arbitration statute to the standard appraisal provision* or to *proceedings or awards thereunder.* Also, none of these cases, not even *Matter of American Ins. Co.*, concerned the same standard appraisal provision as was written in the statutes at the time the court of appeals was making its ruling in *Matter of Delmar Box Co.* in 1955.[44]

We now proceed to a summary of *Matter of American Ins. Co.*, as twice cited above and approved by the court of appeals. Its position in the jurisprudence of the State of New York on the general question at hand seems significant indeed. It was the prototype, in 1924, of the opinion and decision of the New York Court of Appeals in the *Delmar Box* case 31 years later, in 1955. It appears to have influenced the court of appeals to adhere to it in 1955 notwithstanding the 1941 and 1952 amendments of the arbitration statute. And it appears to have influenced the New York courts (appellate division and court of appeals) to adhere to it to the point of overruling the decision of the appellate division in 1949 in *Fitzgerald v. Continental Ins. Co.*[45]

As will appear below its high persuasion and enduring force in New York jurisprudence appear to rest upon its *doctrinal generalizations of high abstraction* upon differences between insurance appraisal and arbitration.

Matter of American Ins. Co. involved an application under the arbitration statute by the insurer for a general order against the insured to proceed with appraisal under the then existing standard appraisal provision. The application was opposed chiefly — to quote the report of the case — "because there is reserved to the insurer the right to contest its liability for the loss on all other grounds of relief from liability."

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44. Concerning the history of this provision in the New York standard fire policy legislation, see Sturges & Sturges, *supra* note 2, at n. 24.

45. See note 48 *infra.*

The insurer claimed that the only matter in dispute between the parties was the amount of damages and that the appraisal provision qualified for enforcement under the arbitration statute. The application was granted by the court below but was reversed by the appellate division on this appeal.

According to the appellate division, appraisal and arbitration had been distinguished *for a long time*; that the Arbitration Law of 1920 did not make "agreements *to determine certain facts* by appraisal arbitrations, if they had not *such nature* anterior to its enactment"; and that "the rule perists that an agreement for the appointment of appraisers under the provisions of a policy of insurance, . . . does not constitute an arbitration *since the appraisers are not authorized to pass on the question of the whole liability, but are restricted* to the question of damages arising from the loss." (Emphasis added.)

It was further reiterated why the arbitration law was unavailable to the petitioner as follows:

> The Arbitration Law itself does not extend the *hitherto recognized type of arbitration, so as to include within its embracement appraisals of incidental matters* which are at times *provided for in* contracts, and since, prior to the adoption of the Arbitration Law, appraisals of the character provided for in insurance policies *were never considered as arbitrations, and were had quite informally without the procedure of oaths, witnesses, notices of trial, and formal awards, there is no reason indicated for a change thereunder.* (Emphasis added.)

Said the court further: "If an *appraisal* under the fire policy *were equivalent to an arbitration in legal effect,* the right of the petitioner would be complete." (Emphasis added.) *But*:

> A distinction, however, *has invariably been observed* between the reference *of a collateral or incidental matter of appraisement and calculation,* the decision of which is not conclusive as to the *ultimate right* of the parties, *except the mere matter of amount due,* and the submission of *all the matters* that are in controversy between the parties for final determination upon the *whole issue.* The distinction has been preserved, because the submission of a *collateral fact or of a particular question, without making the whole controversy the subject of the determination of arbitrators, is not deemed a coercive means, designed to put an end to the controversy between the contentious parties.* The fulcrum of this ruling is that such an *incidental reference of an amount due merely substituted the judgment of the appraisers for evidence of value on a collateral matter, and left the rest of the controversy open for adjudication in the legal form.* In such circumstances it has hitherto been considered that a decision on such a subject was not award, nor was the referring of such a matter to appraisers a submission to arbitration. (Emphasis added.)

And, concluded the court:

> *The doctrine thus formulated has been frequently reiterated* in this state, and it would be quixotic now to argue that the agreement for an appointment of appraisers to determine *merely the amount of damage* is a contract for submission to arbitration. Authorities in this state have maintained the rule that the distinction between agreements *for an appraisal of damage and arbitration of the whole dispute should be recognized.* (Emphasis added.)

It will be observed that the foregoing opinion dwells upon differences between appraisal and arbitration alleged to be already established and existing under the law of the state. Such has been and such is the law — with never a word as to *why* the law should be made as it was the first time under the arbitration statute. A doctrine wanting more in meaningfulness is difficult to discover in the reports of American judicial decisions.

Whether or not the court of appeals intended by its foregoing "See" citations of *Matter of American Ins. Co.* to take over, adopt and vouch for all of the doctrinal abstractions voiced in the opinion in that case, it certainly seems to have intended to take over some of them. As is more fully indicated below, it seems to have accepted the doctrines that arbitration covers the "entire controversy" while appraisal covers *merely* the specific issues of loss and damage; that appraisal covers *merely* "incidental matters"; that appraisers are not arbitrators; that appraisal covers the submission of a "collateral fact or of a particular question" — and is not designed "to put an end to *the controversy* between the contentious parties." And apparently the opinion in the *American Ins. Co.* case to the effect that since appraisal and arbitration had been different *for a long time*, the Arbitration Law of 1920 did not make "agreements to *determine certain facts* by appraisal arbitration *if* they had not *such nature* anterior to its enactment," impressed the court of appeals. And this persuasion prevailed with the court of appeals notwithstanding the foregoing 1941 and 1952 amendments of the arbitration statute.[45a]

The court of appeals brought its opinion in the *Delmar Box* case to a close as follows:

> *It may, perhaps*, be desirable to provide a procedure whereby the insured may obtain specific enforcement, as against the insurance company, of the agreement for appraisal.[46] If such be its aim, the legislature may accomplish it by a *statute clearly and specfically*

45a. The court cited some earlier New York cases; they are covered later in this article.

46. The court had pointed out that, by making the appraisal provision irrevocable by action, a one-sided specific enforcement was accorded to the insurer. "The appraisal provisions," to quote the court in this connection, "were recognized and enforced by the courts only to the extent that the insured was prevented from maintaining an action on the policy in the event of his failure to comply therewith. . . . The insured, however, had no remedy available to compel the insurance company specifically to comply with the appraisal provisions."

The court's decisions in the *Delmar Box* case and in the *Happy Hank Auction Co.* case, perpetuate this situation in New York.

> *drawn for that purpose.* A court cannot, however, read that design into the statute here involved, particularly when the result would be, *not merely to permit the enforcement of such appraisal provisions,* but *to effect the wholesale importation, into appraisement practice, of the entirely different procedure governing arbitration.* (Emphasis added.)

So much upon the background and derivation of the first "basic distinction" by the court of appeals between arbitration and insurance appraisal. Before touching more directly upon the distinction as it rests upon alleged distinction of the *arbitration agreement* from the *appraisal agreement*, we will first criticize the views of the appellate division in the *American Ins. Co.* case and of the court of appeals in the *Delmar Box* case that their basic distinctions *"have long prevailed."* In the *Delmar Box* case the court of appeals, in commenting upon the process generally required in order properly to construe the 1941 amendment of the arbitration statute, observed as follows: "It is a cardinal principle of statutory interpretation that the intention to change a *long established rule or principle* is not to be imputed to the legislature in the absence of a clear manifestation."[47] (Emphasis added.)

It is to be noted that when this was uttered in 1955 the issue as to the availability of remedies under the arbitration statute for the enforcement of the standard appraisal provision had been decided in the lower New York courts only twice *after* the foregoing 1941 amendment of the arbitration statute and only once *before* that amendment. In *Fitzgerald v. Continental Ins. Co.* decided in 1949,[48] the appellate division had sustained the insured's

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47. Compare the judicial attitudes advanced and the decisions made in Matter of Berkovitz v. Arbib & Houlberg, 320 N.Y. 261, 130 N.E. 288 (1921); Finsilver, Still & Moss v. Goldberg, M & Co., 253 N.Y. 382, 171 N.E. 579 (1930); Gilbert v. Burnstine, 255 N.Y. 348, 174 N.E. 706 (1931). Cases cited in chronological order for emphasis.)

48. 275 App. Div. 453, 90 N.Y.S.2d 430 (1949). As noted above, the court of appeals, in the course of its opinion in the *Delmar Box* case, cited the decision as having been "short-lived."

The insured made application for a general order against the insurer to proceed with appraisal.

The appraisal provision was in a rider *covering loss by reason of total or partial suspension of business due to fire* and it required that if the parties were *"unable to agree as to the value of the subject matter of this insurance or the amount of loss thereunder . . . the same shall be determined by appraisal in the manner provided by this policy."* The controversy which arose between the parties related only to insured's claim to this loss; there was no controversy over the validity of the policy; and the amount of loss to physical property had been agreed upon by the parties and that amount had been paid by the insurer. Insured was claiming $12,000 business-interruption loss; insurer claimed that insured had no loss on that account.

The court expressed the view that prior to 1941 this provision would not be considered an arbitration agreement under the Arbitration Law. It cited *Matter of American Insurance Co., supra.* The citation is, it seems, quite unsupported by any of the rationale of the appellate division in that case which concerned only loss and damage to physical property, not loss from business interruption.

In the *Fitzgerald* case, however, the court sustained the order of the court below directing the insurer to proceed with petitioner to an arbitration under the arbitration statute. The court appears to have relied in full measure upon the 1941 amendment of the arbitration statute (N.Y. CIV. PRAC. ACT § 1448) whereby, as pointed out before,

application for a general order against the insurer to proceed with appraisal. That decision remained on the books during the next six years and until the foregoing decisions in the *Delmar Box* case by the appellate division and court of appeals in 1955. On the other hand, in *Sigelman v. Travelers Fire Ins. Co.*[49] decided by the appellate division in 1951 (and, of course, also *after* the 1941 amendment) the court had sustained the denial of a motion by the insured under the arbitration statute to confirm an appraisers' award for the amount of loss and enter judgment thereon. The court disclaimed any power to grant the motion notwithstanding the 1941 amendment relying chiefly, it is believed, upon views expressed by the court of appeals in the *Syracuse Sav. Bank* case of 1950.

In short, *prior* to the 1941 amendment of the arbitration statute the appellate division had in 1924 denied the availability of the enforcement remedies under the arbitration statute for enforcement of the standard appraisal provision, *(Matter of American Insur. Co., supra)*; *after* the 1941

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parties to an arbitration contract qualifying under the statute "may include questions arising out of valuations, appraisals or other controversies which may be collateral, incidental, precedent or subsequent to any issue between the parties." See further upon the amendment of this section, *supra* note 43.

But what if such questions, or any of them, arise under the standard *appraisal provision* in the standard fire policy, or under the suspension-of-business-loss rider to such policy? (In other words, the parties have not used the very word *arbitration* in their agreement for appraisal). The court seems to have put this question in order to frame its answer as if there were by its terms a provision (contract) *for arbitration* qualifying as such under the arbitration statute. Said the court: "Does the aforesaid amendment granting a permission or allowance of such 'inclusion' embrace a case or situation where the *contract to arbitrate includes* only *the subject matter stated in the amendment?*" (Emphasis added.)

How could this be under the abstract doctrines declared in *Matter of American Insurance Co., supra?*

Said the court: "Unless the aforesaid 1941 amendment be construed so as to make affirmative answer to this question, then it [the amendment] *accomplished nothing.* It made no innovation upon existing law *unless it permits the questions it describes,* one or more of them, *to constitute the subject matter of an enforceable agreement for the settlement of a controversy arising therefrom by arbitration.*" (Emphasis added.) "The amendment," continued the court, "is remedial in character and *should be liberally* construed . . . and be interpreted workably. It is presumed to have been intended to serve some useful purpose . . . *A construction which thus vitalizes it constitutes the appraisal agreement in the policies within its reach as a valid and enforceable contract to settle the instant controversy by arbitration.*" (Emphasis added.) In other words, the text of the standard appraisal provision (at least when adapted to business interruption loss) should be spelled out as a provision *for arbitration* by virtue of the 1941 amendment.

Such was the standing of the decision in the *Fitzgerald* case until it was declared outmoded in 1955 by the same court which had uttered it. It was overruled in deference to the intervening opinion in 1950 of the court of appeals in Syracuse Sav. Bank v. Yorkshire Ins. Co., 301 N.Y. 403, 94 N.E.2d 73 (1950) *reargt., denied,* 301 N.Y. 731, 95 N.E.2d 48 (1950). All of this about the demise of the decision in the *Fitzgerald* case is written in *In re* Delmar Box Co., 285 App. Div. 398, 137 N.Y.S.2d 491 (1955). The *Syracuse Bank* case is considered *infra.*

Enough is said upon the *Fitzgerald* case to indicate that the appellate division genuinely undertook to honor the 1941 amendment of the arbitration statute and to put it to work to balance out the rights and remedies of insured and insurer under the standard appraisal provision. That court found no substantial difficulty in doing so. It was overruled by the court of appeals.

49. 279 App. Div. 771, 109 N.Y.S.2d 115 (1951).

amendment and relying upon it the appellate division had ruled in 1949 the availability of those remedies (*Fitzgerald v. Continental Ins. Co.*); in 1951 it had denied the availability of those remedies to confirm an appraisers' award and enter judgment thereon (*Sigelman v. Travelers Fire Ins. Co.*) The *Fitzgerald* ruling continued on the books until it was overruled by the decisions in the *Delmar Box* case in 1955.

Thus far this resumé indicates how little basis there was for the view of the court of appeals that its first "basic distinction" had "*long prevailed.*"

It is clear, of course, from the court's listing and enumeration in the *Delmar Box* case of its "basic distinctions" — all cited as having "long prevailed" — comprehended additional instances beyond the alleged distinctions of the two *agreements*. Differences as to the nature, procedure and practice in proceedings under the respective agreements also are indicated as having "long prevailed." The opinion speaks of a "settled practice" in appraisal under the standard appraisal provision different from that in arbitration. The court's opinion concludes, as quoted heretofore, that to apply the arbitration statute to insurance appraisals "would entail, *not only radical alteration of the settled practice in appraisal proceedings*, but actual abrogation of the greater informality which has *long prevailed therein*." (Emphasis added.)

This "settled practice" is not apparent in modern usage. For reasons heretofore indicated, the insurer rarely invokes the appraisal provision; generally it will settle or litigate.[50] Accordingly, it is concluded that, notwithstanding the wide spread use of New York standard fire insurance policy and the large number of losses covered thereby, there is relatively little practice in appraisal proceedings thereunder — even less any "settled practice" therein.[51]

We also doubt that it is judicial cricket for the court of appeals to draw any kind of "settled practice" upon the general question at hand from doctrinal generalizations in the opinions of lower courts of the state in cases decided prior to the 1920 arbitration statute. The judges therein had neither familiarity with nor concern for the issues to which the court of appeals seems disposed in the *Delmar Box* case to commit them. Even the court of appeals' "See" or "See also" citations of those ancient cases do not overcome the reality that the judges in the earlier cases did not know about and had no purpose to pass upon the matters of practice in appraisals for purpose of the issues involved in the *Delmar Box* case.[52]

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50. See Sturges & Sturges, *supra* note 2, at 324.

51. We also note *infra*, the uncertainties and confusion generated in some of the opinions of the New York courts including the court of appeals as to precisely what is required in certain important aspects of appraisal proceedings.

52. A reading of the "see also" cases as cited by the court of appeals, namely, the *Wurster, Strome and Townsend* cases will, we believe, confirm our views in this connection.

We now return to consider more precisely the court's declared "basic distinction" between an *agreement for arbitration* under the arbitration statute and the standard *appraisal provision.*

We have pointed out in an earlier article of this series that, in the British and American cases first ruling provisions for appraisal of loss and damage in insurance policies irrevocable when properly drafted, the provisions were identified, regarded and talked about by counsel and the judges as *provisions for arbitration.*[53] The report of *Scott v. Avery* (1856)[54] in the House of Lords is illustrative; so is the unanimous opinion of the Supreme Court of the United States as rendered by Justice Stone in *Hardware Dealers' Mut. Fire Ins. Co. v. Glidden and Co.* (1931).[55]

It also is of very doubtful validity, we submit, to predicate a "basic distinction" between the agreement for arbitration and the standard appraisal provision upon the proposition as declared by the court of appeals in the *Delmar Box* case that an agreement for arbitration "ordinarily encompasses the disposition of *the entire controversy* between the parties" whereas the provision for appraisal extends *merely* to the resolution of "the specific issues of actual cash value and the amount of loss, all other issues being reserved for determination in a plenary action." It appears to be more accurate and more universally applicable to consider than an agreement for arbitration (whether under the statute or at common law) ordinarily encompasses whatever controversy or controversies the parties may agree to arbitrate — no more, no less.[56] And the use of "the entire controversy" in the foregoing context seems to be of little meaning. If the parties' controversy centers upon and embraces the amount of loss or damage, and no more, it is not apparent why that controversy should not be counted as "the entire controversy" — if there is any reason at all to identify "the entire controversy." And parties may, of course, come into controversy over matters "A," "B," and "C" and agree to submit only "A." There is no reason to translate this submission or agreement therefore away from a submission to *arbitration* because of any doctrine requiring "the entire controversy" to be embraced. Of course, in the opinion of the appellate division in the *American Ins. Co.* case,[57] which the court of appeals incorporated by its "See" citation upon its foregoing "basic

53. And this identification in those cases was no innovation in legal lore. See Sturges & Sturges, *supra* note 2, at 5, 6.

54. 5 H.L. 811, 10 Eng. Rep. 1121 (1856).

55. 284 U.S. 151 (1931). See also Hamilton v. Liverpool & London & Globe Ins. Co., 136 U.S. 242 (1890); Hamilton v. Home Ins. Co., 137 U.S. 370 (1890); Shamferoke Coal & Supply Corp. v. Westchester Serv. Corp. as quoted *infra*, pp. 26-27.

56. See, *e.g.*, International Ass'n of Machinists v. Cutler-Hammer, Inc., 271 App. Div. 917, 67 N.Y.S.2d 317 (1947), *aff'd*, 297 N.Y. 519, 74 N.E.2d 464 (1947); *In re* American News Co., 130 N.Y.S.2d 544 (Sup. Ct. 1954); Robinson v. Robinson, 186 Misc. 859, 61 N.Y.S.2d 859 (Sup. Ct. 1945), *aff'd*, 296 N.Y. 778, 71 N.E.2d 214 (1947); In the matter of Hub Indus., Inc., 183 Misc. 767, 54 N.Y.S.2d 206 (Sup. Ct. 1944), *modified*, 269 App. Div. 177, 54 N.Y.S.2d 741 (1945), *aff'd as modified*, 294 N.Y. 897, 63 N.E.2d 28 (1945); Canuso v. Philadelphia, 326 Pa. 302, Atl. 133 (1937).

57. See *supra* p. 19.

distinction" between appraisal and arbitration agreements, it was said that "appraisers are not authorized to pass on the question of the *whole liability*, but are restricted to the *question of damages* from a loss." (Emphasis added.) It is inferred, of course, that the court of appeals intended to adopt much the same idea in its opinion last quoted above as to the "entire controversy." Clearly enough the submission under the appraisal provision of a dispute over the amount of loss and damage is a submission of dispute over the *amount of liability* and no other aspect of "liability" of the insurer to the insured or other parties in interest. That amount may be realized in a sum stated or it may be determined that "nothing is owed."[58] When attention is centered upon the appraisal provision and its identification and classification, there is little reason to ascertain whether or not there may be any other and different controversy outside the provision arising between the parties. In the *Delmar Box* case the insurers denied liability on the policies, but the court of appeals does not appear to have counted that as any matter of importance in ruling out the qualification and enforceability of the appraisal provision under the arbitration statute. When there is no such denial of liability on the policy, it has been aptly pointed out how irrelevant are the unknowns — namely, "the entire controvery," the "whole liability."[59]

It also will be noted that there appears to be consensus of judicial rulings that a *provision for arbitration* qualifying under the arbitration statute does not cease to be effective as such when the dispute arising thereunder embraces *only* a controverted claim over the amount of loss or damage ("damages") for default under the container contract. The provision and the proceedings and award thereunder continue in the arbitration category.[60] In *Shanferoke Coal & Supply Corp. v. Westchester Serv. Corp.*[61] decided in 1934 the United States Court of Appeals for the Second Circuit covered the matter as follows:

> It is quite true that before any of the modern statutes, provisions in contracts for the *arbitration of incidental issues* [sic] were treated as valid and as conditions precedent. At times it has been thought that the statutes do not cover *such arbitrations* [sic] (In re American Insurance Co., 208 App. Div. 168, 203 N.Y.S. 206); though the question is perhaps open in New York (In re 176 and 178 E. Main Street, 238 App. Div. 248, 264 N.Y.S. 717). But even if this be

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58. See F. M. Skirt Co. v. Rhode Island Ins. Co., 316 Mass. 314, 55 N.E.2d 461 (1944) cited and quoted in Sturges & Sturges, *supra* note 2, at 12.

59. Dworkin v. Caledonian Ins. Co., 285 Mo. 342, 226 S.W. 846 (1920).

60. See Marine Transit Corp. v. Dreyfus, 284 U.S. 263 (1931). And it seems clear that the controverted claim between insured and insurer over the amount of loss under the insurance policy bears no substantial difference, for the purpose at hand, from the controverted claim of a shipper, for example, against shipowner for damages sustained from loss of cargo as in the *Dreyfus* case. The insurer's refusal to pay the *amount* claimed by the insured seems to bear no substantial difference from the ship owner's refusal to pay the *amount* claimed by the shipper. See also in this connection Trainor v. Phoenix Assur. Co., 65 L.T.R. 825 (QBD 1892).

61. 70 F.2d 297 (2d Cir. 1934). See also Madawick Contracting Co. v. Travelers Ins. Co., 307 N.Y. 111, 120 N.E.2d 520 (1954).

> true, a clause of general arbitration does not cease to be one within the statute when the dispute narrows down to damages alone. General Footwear Co. v. A. C. Lawrence Leather Co., 252 N.Y. 577, 170 N.E. 149; Marchant v. Mead-Morrison Co., 252 N.Y. 284, 298, 299, 169 N.E. 386. *If the clause is general in form, it makes no* difference what may come up under it. (Emphasis added.)

It is equally clear that in order to make a provision for arbitration that will qualify under the arbitration statute the use therein of the very word "arbitration" is not necessary. Also it does not appear to be determinative against a provision being one for *arbitration* under the arbitration statute that part of the text of the standard appraisal provision is used which calls upon each party to select an "appraiser" and directs that "the appraisers shall then appraise the loss."[62]

Perhaps it should be understood from the opinion of the appellate division in *Sigelman v. Travelers Fire Ins. Co.*[63] that the standard appraisal provision would not qualify under the arbitration statute because the provision carries no stipulation of entry of judgment upon the award. If such were intended it appears to want validity because it has been held that this stipulation is not required by the statute.[64]

We now turn from the court's identification of the *agreement for arbitration* in furtherance of its foregoing distinction, to its views more particularly upon the *agreement for appraisal*. The provision for appraisal, to quote the court again, "extends *merely*[65] to the resolution of the specific issues of actual cash value and the amount of loss, all other issues being reserved for determination in a plenary action."

As we have pointed out above, this generalization is not accurate enough to be inclusive of, and account for, the disagreement of insured and insurer over the amount of business loss.[66] But, even with respect to the narrower coverage of the amount of loss to property, the generalization is not meaningful. As we have indicated before, there may be no "other issues" in the given case which are "reserved for determination in a plenary action." The insurer may admit (or at least not deny) "liability." In such case the *amount of liability* would be the *sole* issue. In such cases, at least, it is difficult to push the provision aside as involving only a "collateral," "particular" or "incidental" issue. But, suppose that the insurer denies all liability on the

62. *In re* Hub Indus. Inc., 183 Misc. 767, 54 N.Y.S.2d 106 (Sup. Ct. 1944), *modified*, 269 App. Div. 177, 54 N.Y.S.2d 741 (1945), *aff'd as modified*, 294 N.Y. 897, 63 N.E.2d 28 (1945); *In re* American News Co. Inc., 130 N.Y.2d 554 (Sup. Ct. 1954). Compare Baltimore Contractors Inc. v. Bodinger, 348 U.S. 176 (1955).

63. 279 App. Div. 71, 19 N.Y.S.2d 115 (1951). (It was not included by the court of appeals in its above cited "See also" cases).

64. Matter of Resolute Paper Prod. Corp., 160 Misc. 722, 290 N.Y.S. 87 (Sup. Ct. 1936); Steinberg v. Goldstein, 116 N.Y.S.2d 6 (Sup. Ct. 1952).

65. This use of "merely" to dwarf the agreement for appraisal and appraisals thereunder is a quite prevalent handi maiden in the judicial process of distinguishing them from arbitration agreements and arbitrations. For the purposes at hand it does not seem very meaningful.

66. See note 48 *supra* and discussion therein of the *Fitzgerald* case.

policy. A party to a contract containing *an arbitration provision* qualifying under the arbitration statute may do likewise. *Such denial does not foreclose the qualification of the provision under the arbitration statute.* It does not displace the enforcement remedies for the other party to the arbitration provision under the arbitration statute unless and until the issue or issues as to the validity of the container contract are duly heard by the court and determined against validity. Thus, if the appraisal provision were under the arbitration statute, and insurer denied all liability on the policy on the ground, for example, of insured's fraudulent inducement of the making and issue of this policy, or upon, for example, insured's non-compliance with or breach of terms of the policy after valid issuance thereof, the court having jurisdiction under the arbitration statute should try the issues as to "the making" and the issues as to the invalidation (validity) of the policy.[67] And certainly, in view of the limited scope of the appraisal provision in case of its coverage of loss and damage to property, quite as much as, if not more, perhaps, than in case of coverage of business loss, there could be no difficulty in determining that issues as to "liability" (validity) should be heard and determined by the court.[68]

Conclusion: It seems regettable that the standard appraisal provision in the New York standard fire policy which is in so wide usage throughout so much of this country should be denied "any specfic performance" upon any such insubstantial doctrinal generalizations as to the "basic distinction" between the *agreement for arbitration* and the *agreement for appraisal* as are relied upon in the *Delmar Box* case.[69]

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67. Arbitration provisions are made valid, enforceable and irrevocable by the statute "*save upon such grounds* as exist at law or in equity for the revocation of any contract." N.Y. Civ. Prac. Act § 1448. See Harold Levinsohn Corp. v. Joint Board, 273 App. Div. 469, 78 N.Y.S.2d 171 (1948); Application of Mfrs. Chem. Co., 259 App. Div. 321, 19 N.Y.S.2d 171 (1940); Metro Place, Inc. v. Miscione, 257 App. Div. 652, 15 N.Y.S.2d 35 (1939); Application of Cheyney Bros., 218 App. Div. 652, 219 N.Y.S. 96 (1926).

See also, the rulings in the Minnesota cases wherein enforcement is accorded under the Minnesota standard appraisal provision notwithstanding insurer's denial of liability; Sturges and Sturges, *supra* note 2, at 340-341.

In case of general arbitration provisions, some uncertainties have developed as to whether or not a party should be allowed to put in issue any other matters than those relating to initial "making" of the agreement, leaving it to the arbitrators to pass upon claims of invalidation accruing after the initial making of the agreement. See, e.g., Matter of Lipman (Houser Shellac Co.) 289 N.Y. 76, 43 N.E.2d 817 (1942); Matter of Kramer, 288 N.Y. 467, 43 N.E.2d 493 (1942); *In re* Utility Oil Co., 69 Fed. 524 (2d Cir. 1939); *In re* Pahlberg Petition 131 F.2d 968 (2d Cir. 1942); Note, 24 N.Y.U.L. Rev. 429 (1949).

In view of the limited scope of the appraisal provision, on the other hand, it seems that the court should try the issues of subsequent invalidation quite as much as those relating to initial "making." See in this connection the *F. M. Skirt Co.* case, 316 Mass. 314, 55 N.E.2d 461 (1944).

68. Consult in this connection F. M. Skirt Co. v. Rhode Island Ins. Co., *supra* note 67.

69. Another instance of difference between a provision for arbitration qualifying under the arbitration statute and the standard appraisal provision also was cited in the *Delmar* Box case. In doing so the court confirmed its earlier ruling in Gervant v. New

2. *Concerning the appraisal and arbitration proceedings.* As a second instance of "basic distinction" — this time comparing appraisal and arbitration *proceedings* — the court of appeals declared that appraisal proceedings are *attended by a larger measure of informality*, citing "See" — *Strome v. London Assur. Co.*, 20 App. Div. 571, 47 N.Y.S. 481 (1897) aff'd., without opinion, 172 N.E. 627, 57 N.E. 1125 (1900); "and," said the court further, "appraisers were 'not bound to the *strict judicial investigation of an arbitration*' "—citing "See" *Matter of American Ins. Co. supra.*

It is difficult to find the pertinency of the *Strome* case as cited by the court of appeals to the foregoing "basic distinction." The insured sued in that case to set aside an award of the amount of loss rendered in an appraisal under the standard appraisal provision then in effect. The trial court set aside the award relying upon two grounds, namely, that it was grossly inadequate in amount and for misconduct of the umpire.

There was no issue involving the declared "basic distinction"; more important still, perhaps, the approach and decision of the appellate division involved, *not the differentiation* but instead *the ruling together* of insurance appraisement and arbitration and how the appraisers' award should be considered of the same force and effect as the arbitrators' award. On the other hand, the court (appellate division) did generalize upon a distinction between appraisal and arbitration and award as quoted below — not specifying any particulars.

The parties had been unable to agree upon the amount of loss to physical property; insured selected one Beatty as appraiser; insurer selected one Friedman; and the two appraisers selected one Wechsler as "umpire." The appraiser selected by insurer and the umpire in an award; the appraiser selected by insured refused to join.

England Fire Ins. Co., 306 N.Y. 393, 118 N.E.2d 574 (1954). (The *Gervant* case is reviewed *infra*). The court had ruled, in accord with authorities in some other jurisdictions that, after one "good faith" try at an appraisal which fails, the provision is no longer irrevocable. Sturges & Sturges, *supra* note 2, at 363. In case of an arbitration provision qualifying under the arbitration statute the failure of one arbitration or award does not lift the provision. [Concerning the repeat-process in action under the arbitration provision see, for example, Finsilver, Still & Moss v. Goldberg, M. & Co., 253 N.Y. 382, 171 N.E. 579 (1930)].

The opinion in the *Delmar Box* case covered all this by saying that "the vacatur of an arbitration award invariably results in a new arbitration, N.Y. Civ. Prac. Act § 1462, see *Matter of Fletcher*, whereas after an appraisal award hs been set aside without any fault on the part of the insured, he is not required to submit to any further appraisement *but is free to litigate the issues in an action on the policy*. See Gervant v. New England Fire Ins. Co., 306 N.Y. 393, 400, 118 N.E.2d 574, 577." (Emphasis added.) The irony of the insured being "free to litigate the issues" has been indicated heretofore, see Sturges & Sturges, *supra* note 2, at 337-341.

It seems clear that when the remedies for enforcement of the appraisal provision as provided in the arbitration statute are accorded the insured and insurer alike there would be no basis for further acceptance of the ruling in the *Gervant* case any more than in case of irrevocable arbitration provisions. And certainly that ruling can be no plausible basis for denying remedies for enforcement of the appraisal provision on behalf of the insured and insurer alike as contemplated in the arbitration statute.

On this appeal the appellate division reversed the lower court which had set aside the award for inadequacy of the amount. The court's preface in its opinion concerned some undesignated distinction between common law arbitration and appraisement under the standard policy but it reasoned that, notwithstanding, the appraisers' award on the issue at hand should be held to be of the same finality and conclusiveness as an arbitrators' award, as follows: "The appraisement and estimate under the New York standard policy of fire insurance is not the same proceeding as an arbitration and award at common law or under the Code." . . .[70] "Hence," to continue

70. The court cited Fleming v. Phoenix Assur. Co., 75 Hun. 530, 27 N.Y. Supp. 488 (Sup. Ct. 1894) and Enright v. Montauk Fire Ins. Co., 15 N.Y. Supp. 893 (Sup. Ct. 1891). In the *Fleming* case the supreme court (general term) sustained an award of the two appraisers (without the umpire). The insured sued to collect on the policy disregarding the award. Said the court: "It seems to be the theory of the plaintiffs [insured] that an action may be maintained upon the policy independent of the award of the appraisers; that the appraisement may be ignored, and the whole question opened and litigated as if no valuation of the loss had been made. It must be observed that although some attack is made upon the appraisers and their mode of procedure yet it is not sought to avoid the award. We think the appraisal was conclusive and binding upon both parties."

So, the appraisers' award in this case as in the *Strome* case was final and conclusive like any award.

The court also declared the appraisement to be much more than an idle ceremony—*"It was a judicious method of composing a controversy in a cheap and expeditious manner."* (Emphasis added.)

But the court felt called upon later—for no apparent reason—to observe that such appraisers "are appraisers, and not arbitrators. Their function is to *'estimate and appraise the loss' by personal examination and observation. They have no power or authority to take testimony, and their doing so is not contemplated.*" (Emphasis added.) The court cited no authority for these observations and no case has been found in New York or elsewhere sustaining that part of the last quoted sentence of the opinion that the appraisers have no power or authority to take testimony.

We consider below the parties' right of hearing in appraisements under the standard provision and under an arbitration provision.

In the *Enright* case, appraisal was had under a submission entered into by insured and insurer after loss. The submission was to one P and one W named in the submission agreement "together with a *third person* to be appointed by them if necessary, shall appraise and estimate at the true cash value the damage by the fire to the property belonging to John Enright, which appraisement and estimate by them, or any two of them, in writing, as to the amount of such loss or damage, shall be binding on both parties." P and W selected a third person, T, but they proceeded, as in the *Fleming* case, to an award without participation by T, *i.e.*, the two fell into no disagreement so they did not call upon T to act. Was the award by P and W valid? The insured challenged the validity of the award for want of T's participation; that he was a "third arbitrator" and as such under the arbitration statute he must be notified of the time and place of the appraisement, and should have been invited into the deliberations of the other arbitrators. In overruling the objection the court declared that the "proceeding *was not an arbitration, under the Code of Civil Procedure*, and therefore the requirements of section 2367 of the Code did not apply." (Emphasis added.) The court sustained the award on the ground that "under the terms of the submission agreement it is quite evident *that his* [T's] *position was rather that of an umpire who* should act only when the arbitrators [*sic*] differed; and the fact that the arbitrators [*sic*] chose him before differences had arisen did not, we think, deprive them of their power to act without him, or vest in him all their authority, as is urged by the learned counsel for the appellant." (Emphasis added.) Clearly enough the court found it natural to refer to the appraisers as *arbitrators*. Equally clear is it that once T was identified as he was, *i.e.*, as an "umpire" to decide only differences arising between the two appraisers. It was of no consequence on the issue involved whether the proceding was or was not an arbitration under the statute. And clearly the arbitration statute

with the opinion, "the decisions in cases of arbitration and award are *not always applicable* to the solution of questions arising under a fire insurance appraisement. *But* even in arbitrations, *strictly speaking*, the courts do not exercise the power of annulling the determination *simply because the amount awarded seems to be inadequate* (Masury v. Whiton, 111 N.Y. 679, 18 N.E. 638); *and we are of the opinion that no more stringent rule should be applied to insurance appraisements, which are proceedings of a far less formal character.* (DeGroot v. Insurance Co., 4 Rob. [N.Y.] 504)."[71] (Emphasis added.)

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contemplates an "umpire" as well as arbitrators and a "third arbitrator." See N.Y. Civ. Prac. Act § 1453. The validity of the award in the foregoing case would be sustained in arbitration and appraisal alike against the challenge made against it.

As it is difficult to find what aid the *Strome* case brought to the above "basic distinction" cited by the court of appeals in the *Delmar Box* case, so is it difficult to see how the *Fleming* and *Enright* cases aid the pronouncement declared in the *Strome* case that insurance appraisement "is not the same as an arbitration and award at common law or under the Code." The bald pronouncement that one is not the other is accompanied by no particulars nor by any assignment of reason why.

71. In this case (*DeGroot v. Ins. Co.*) decided by the superior court in 1867, an appraisal was had under a provision in the policy which according to the court stipulated that "the amount of sound value and damage, should be ascertained by the examination and appraisal of each article by disinterested appraisers mutually agreed upon, and until such appraisal, the loss should not be payable." In the course of his opinion for the majority of the court, it was remarked by Robertson, C.J.: "Such appraisers were at liberty to arrive at a conclusion in regard to the value of the articles they were *called upon to estimate, in such way as they thought proper; they were not bound to the strict judicial investigation of an arbitration.*" (Emphasis added.) The justice did not indulge in any particularzation or elaboration of this statement. He cited to it, however, Elmendorf v. Harris, 5 Wend. 516 (N.Y. 1830) n. 521-522. Garr v. Gomez, 9 Wend. 649, 661 (N.Y. 1832); Harris v. Bradshaw, 18 John. 26 (N.Y. 1820); Morton v. Cameron, 3 Rob. 189 (N.Y. 1865). These cases are reviewed below in this note.

It is not apparent how the foregoing statement had anything to do with the issues before that court. Nor does it appear how it confirms the above citation in the *Strome* case that insurance appraisements are *"proceedings of a far less formal character"* than arbitration. Nor does it appear how the statement in the *Strome* case so citing the *De Groot* case lends any support to the court of appeals' commentary in the *Delmar Box* case that appraisal proceedings under the standard appraisal provision are *"attended by a larger measure of informality."*

The decisions of the court of appeals in the *Gervant* and *Syracuse Bank* cases (reviewed *infra*) seem to belie this "larger measure of informality." See also, the legal requirements attending these appraisals. Bonbright & Katz, *Valuation of Property To Measure Fire Insurance Losses*, 29 COLUM. L. REV. 857 (1929).

It seems clear also that the requirements for the appraisers' award indicate no special measure of "informality." Under the appraisal provision the appraisers shall make an award "in writing," and it shall be itemized to state "separately actual cash value and loss to each item."

And, as we point out below, the foregoing statement by Robertson, C.J., that appraisers were at liberty *"to estimate, in such way as they thought proper"* is no longer law in New York and it is doubted that it was ever the law of that state.

There also is considerable irony in advancing, even in this context, an idea about *"the strict judicial investigation of an arbitration,"* as offered by Robertson, C.J., and by the court of appeals in the *Delmar Box* case. Whether at common law or under the statute, "an arbitration" is quite at odds with any concept of *"strict judicial investigation."* The "law of procedure" and the "substantive law" applicable in civil causes in the courts are mostly displaced unless the parties clearly stipulate that they be followed. Arbitrators are free to decide according to their honest judgment as to

what ought to be unless the parties stipulate otherwise. The arbitrators' oath as written in the statute N.Y. Civ. Prac. Act § 1455 calls upon them "faithfully and fairly to hear and examine the matters in controversy and to make a just award *according to the best of their understanding.*" What "strict judicial investigation" remains is neither apparent nor readily inferred.

A word now as to the cases cited above by Robertson, C.J., to the effect that appraisers are not bound to "*the strict judicial investigation of an arbitration*" upon which the court seems to have relied in the above *Strome* case in declaring that insurance appraisements are proceedings "*of a far less formal character than arbitrations.*" *Elmendorf v. Harris* takes us back to 1830 in the supreme court. No issue in the case related to any appraisal provisions, submission, proceeding or award of loss under a fire insurance policy. In the course of the opinion, however, Savage, C.J., covered the point of *right of hearing in an arbitration* and whether or not want of notice of the arbitral hearing was a good defense *at law.*

In so doing he covered the earlier New York decision in Peters v. New Kirk, 6 Cow. 103 (N.Y. 1823) which had been cited. Said the justice about that case: "*Peters v. New Kirk* was an action on the case for making a distress when no rent was due. The rent had been liquidated at $87.75, and it was agreed that a shearing machine should be received in part payment at the appraisal of one Sturges. He appraised the machine at $85, which left $2.75 of rent due when the distress was made. The court decided that the action brought by Peters did not lie, there being rent due. In the opinion delivered it was said, (though not necessary to the decision of the cause) *that the appraisement was void for want of notice to the person to be charged* with it. *This proposition is certainly consonant to reason and good sense, and is well established as a principle of equity.*" (Emphasis added.) Certainly this part of the opinion by Savage, C.J., seems far removed from being a support for the foregoing view advanced by Robertson, C.J.. Savage, C.J. did observe further, however, that the appraiser's award in the *Peters* case "could hardly be dignified with the name of an award"; and it seemed to him, without going into any particulars, that "there is an essential difference between an award upon matters in controversy between parties and a *bare appraisement of a chattel.*" (Emphasis added.)

The foregoing citation by Robertson, C.J. to p. 522 in the report brings us to an argumentative note by the reporter presenting generalizations in the abstract upon alleged differences between an *arbitration* and "*reference of a collateral fact.*" It concluded nothing germaine to the decision in either the *Elmendorf* case or in *Peters v. New Kirk* as discussed by Savage, C.J. Incidentally, the *Elmendorf* decision was reversed in the court of errors, 23 Wend. 628 (N.Y. 1840) with deference to *Peters v. New Kirk* and it was held that an award is subject to defeat at law as well as in equity when notice of hearing is not accorded a party. The chancellor confirmed the report of Savage, C.J. upon *Peters v. New Kirk* as follows: "There [in *Peters v. New Kirk*] the supreme court of this state distinctly decided, that an appraisement which was to control the rights of the parties, in the nature of an award, was a nullity, the appraisement having been by the arbitrator [*sic*] to whom the parties had agreed to submit the question, on the *ex parte* application of one party only, and without any notice whatever to the other party, who was not present."

Neither *Garr v. Gomez* as decided in 6 Wend. 583 (N.Y. 1831) nor as reversed in the Court of Errors 9 Wend. 649 (N.Y. 1832) embraced in the foregoing citation by Robertson, C.J., involved any question relating to any provision, submission, proceeding or award fixing loss under a fire policy. Senator Seward, however, on the appeal, declared upon the difference between a submission to arbitration and the agreement of reference in the case to one Bolton to ascertain the amount due on certain acceptances. Said the Senator—having read the reporter's note to the *Elmendorf* case (quoted below)— "A distinction is justly made between the *reference of a collateral or incidental matter of appraisement or calculation,* the decision of which is *conclusive of nothing as to the rights of the parties, except the mere appraisal or statement and a submission of matters in controversy for the purpose of final determination.*" [*sic*] (Emphasis added.) This distinction is indirectly suggested in the case of *Elmendorf v. Harris, supra* at 522, and is more plainly stated in a note under the same case by the reporter. What the Senator intended to say beyond "there is a difference" is, of course, not clear.

We find no reference to an appraisement or an arbitration in Harris v. Bradshaw, 18 Johns 26 (N.Y. 1820) as cited above by Robertson, C.J.

Morton v. Cameron, the last of the cases cited by Robertson, C.J., in the *De Groot* case, 3 Rob. (26 Super. Ct.) 189, involved no provision, submission, proceeding or award fixing loss under a fire policy. Robertson, C.J. participated in the opin-

On the insured's second count against the award the court sustained the trial court ruling that the evidence established "an utter refusal and neglect on the part of the umpire properly to perform his duties, and that his neglect and refusal amounted to misconduct, in a legal sense, and requires the court to withhold its sanction from an award made under such circumstances." It seems clear that the misconduct found against the umpire would defeat an award in an arbitration quite as much as an award in an insurance appraisement. The court's story as to the umpire's course of conduct affirms this. The court reported upon the matters as follows:

> The umpire appears to have acted in a hasty and most perfunctory manner in performing his functions under the policy. He went to the plaintiff's residence, where the damaged goods were, with the defendant's appraiser, Mr. Friedman, and was there half an hour before the plaintiff's appraiser, Mr. Beatty arrived. He refused to go over the goods with Mr. Beatty, saying that he had already gone over them with Mr. Friedman. He would not even look at Mr. Beatty's list of the articles and the values put upon them. He said he did not have time, and he scarcely listened to anything that Mr. Beatty said. Such was the account of Mr. Wechsler's conduct given by Mr. Beatty, and, although Mr. Friedman described it differently, the trial judge was authorized to accept the statement of the plaintiff's appraiser. His testimony indicates clearly that the umpire reached a determination in favor of the defendant after hearing the defendant's side of the case only, and practically refused to hear the appraiser for the plaintiff. A decision made in this manner cannot be allowed by a court of equity to stand.

Conclusion: The pronouncements used in the *Delmar Box* case for a second "basic distinction" between insurance appraisement and arbitration seem wanting of substance. The words "larger measure of informality" accorded the appraisal and the "strict judicial investigation of an arbitration"

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ions. But a provision, proceeding and decision of a person designated in a lease to ascertain and determine the amount of damage committed by tenant to house and furniture beyond reasonable use and wear and damages from the elements at end of term were discussed by Robertson, C.J. in terms of being a *"covenant to submit to arbitration,"* the *"arbitrator"* and the *"award,"* and the effect of the evidence as to notice given by *"the arbitrator"* as to the time and place of hearing.

It is suspected that the root of all evil for the declaration of differences between insurance appraisement and arbitration in the New York courts in terms of doctrinal generalities of high abstraction may be found in the reporter's note at page 522 in *Elmendorf v. Harris, supra.* The note reads as follows: "An arbitration is a submission by parties of matters in controversy to the judgment of two or more individuals, who are substituted in the place of a judicatory established law, and who are to *decide the controversy;* it is called a *domestic tribunal,* and the arbitrators *judges* of the parties choosing, and is held in high estimation both by the legislature and by the courts; the legislature having made provision for carrying into effect awards made, and courts of law refusing to hear anything *de hors* the awards invalidating them. A *reference* of a collateral fact, or the submission of a particular question, forming only a link in the chain of evidence, is not calculated to put an end to the controversy; it barely substitutes judgment of the referee in the place of evidence, leaving the controversy open. Such reference or submission, although it has several of the characteristics of an arbitration, falls short of it in its principal feature, the *ending of the controversy;* public policy does not require that it should be considered as an arbitration, nor has it been so treated by the courts." (Emphasis added.)

have some lineage in New York jurisprudence, as indicated in the footnotes, but never have they been made to mean anything in particular nor have we found any reason advanced in the cases to give them any semblance of validity.

3. *Concerning swearing arbitrators and appraisers and right of hearing.* We now turn to thte third "basic distinction" set out by the court of appeals. It embraces swearing the arbitrators under the statute and the parties' right of hearing.

> 'Arbitrators,' said the court, 'are required to take a formal oath, Civ. Prac. Act, §1455, and may act only upon proof adduced at a hearing of which due notice has been given to each of the parties, Civ. Prac. Act, §1454. They may not predicate their award upon evidence garnered through an ex parte investigation of their own, at least unless so authorized by the parties. See Stefano Berizzi Co. v. Krausz, 239 N.Y. 315, 146 N.E. 436. *Appraisers, on the other hand,* are not required to take an oath. See Syracuse Savings Bank v. Yorkshire Ins. Co., 301 N.Y. 403, 411, 94 N.E.2d 73, 78; Wurster v. Armfeld, 175 N.Y. 256, 264, 67 N.E. 584, 586; Williams v. Hamilton Fire Ins. Co., 118 Misc. 799, 194 N.Y.S. 798. *They are likewise 'not obligated to give the claimant any formal notice or to hear* evidence'; and they may *apparently* proceed by ex parte investigation, so long as the parties are *given an opportunity to make statements and explanations* to the appraisers with regard to the matters in issue. See Kaiser v. Hamburg Bremen Fire Ins. Co., 59 App. Div. 525, 530, 69 N.Y.S. 344, 347, *affirmed* [without opinion], 172 N.Y. 663, 65 N.E. 1118. Townsend v. Greenwich Ins. Co., 86 App. Div. 323, 326-327, 83 N.Y.S. 909, 911-012, *affirmed* [without opinion], 178 N.Y. 634, 71 N.E. 1140; Matter of American Ins. Co., supra, 208 App. Div. 168, 171, 203 N.Y.S. 206, 208. (Emphasis added.)

True it is that arbitrators are required by the arbitration statute, Civil Practice Act section 1455 to take an oath.[72] True it is also, that the court of appeals had held that appraisers under the provision in the standard fire policy are not required "to take a formal oath" — indeed, they are not required to take any oath at all.[73]

It will be emphasized in this connection that the taking of the oath is neither a complicated ritual nor is it very time-consuming. Our observations indicate that it is likely to take less than 60 seconds. It should not, of course, prove any more onerous in case of appraisers than of arbitrators. Whether it is required or not required of them seems therefore to be quite inconsequential as measured by these considerations. Furthermore, the requirement

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72. That this section of the arbitration statute requires the swearing of common law as well as statutory arbitrators, see STURGES, COMMERCIAL ARBITRATIONS AND AWARDS § 208 (1930); Hinkle v. Zimmerman, 184 N.Y. 114, 76 N.E. 1080 (1906); Day v. Hammond, 57 N.Y. 479, 15 Am. Rep. 522 (1874).

73. Syracuse Sav. Bank v. Yorkshire Ins. Co., 391 N.Y. 403, 94 N.E.2d 73 (1950).

of the statute (N.Y. Civil Practice Act, section 1945) is lifted when the "oath is waived by the written consent of the parties . . . or their attorneys," or when "the parties have continued with the arbitration without objection to the failure of the arbitrators to take the oath." When the requirement is so lifted presumably *the arbitration* continues *as such*, nothwithstanding, so that the existence or non-existence of the applicability of the oath requirement can hardly be a very subtsantial measure of any "basic distinction" between arbitration and appraisement under the standard appraisal provision. To rely upon the swearing of the arbitrators, but not appraisers, as any reason for denying specific enforcement of the standard appraisal provision seems very dubious.

And why is the oath required? The statute (N.Y. Civil Practice Act, section 1455) answers: "Before hearing any testimony." The make-up of the oath is "*faithfully and fairly to hear and examine the matters in controversy and to make a just award according to the best of their understanding.*" Now why should not appraisers under the standard appraisal provision as much as arbitrators be subject to the requirement of this oath as written in the arbitration statute — which is applicable alike to common law and statutory arbitration?

The court of appeals had explained its view on this question in 1950 in the *Syracuse Savings Bank* case, as follows:

> We see nothing in section 1448 of the Civil Practice Act as amended in 1941, *requiring* the appraisal authorized by section 168 of the Insurance Law, Consol. Laws, c. 28, *to be treated* as an arbitration proceeding . . . .[74] There is nothing in the policy provision relating to appraisal which gives an appraiser the status of an arbitrator *or requires him to sign an oath*. It is well established that the determination of a fire loss is not an arbitration proceeding, Matter of Fletcher (Nicholas), 237 N.Y. 440, 143 N.E. 248;[75] Townsend v. Greenwich Ins. Co., 86 App. Div. 323, 83 N.Y.S. 909, affirmed [without opinion] 178 N.Y. 634, 71 N.E. 1140; Strome v. London Assur. Corp., 20 App. Div. 571, 47 N.Y.S. 481, affirmed [without opinion] 162 N.Y. 627, 57 N.E. 1125; Matter of American Ins. Co. (Wasserman), 208 App. Div. 168, 203 N.Y.S. 206; Williams v. Hamilton Fire Ins. Co., 118 Misc. 799, 194 N.Y.S. 798; 6 Appleman,

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74. In the *Delmar Box* case the court also ruled that the 1952 amendment adding to section 1448 the further words "or independent of" (the text is reported *supra* note 43) had no greater effect than the 1941 amendment. "Neither amendment," said the court, "discloses any design to alter the settled rule that 'the determination of a fire loss [by appraisal] is not an arbitration proceeding.'"

75. It seems reasonably clear that the court of appeals intended in this case to differentiate the standard appraisal provision from the provision for valuation and price fixing therein ruled not to qualify under the arbitration statute then in effect—*i.e.*, 1924. Said the court: "It is to be noted at the outset that *the contract under consideration* does not provide for *a determination of damages for which one of the parties may be liable in law; it does not provide for a determination of any question after disagreement of the parties upon that question: it does not attempt to substitute a tribunal created by contract for a court of justice in a dispute which would otherwise be justiciable by the courts.*" (Emphasis added.)

> Insurance Law and Practice, §3922, p. 321 and that an appraiser's oath is unnecessary, Wurster v. Armfield, 175 N.Y. 256, 264, 67 N.E. 584, 586; Matter of American Ins. Co., supra; Williams v. Hamilton Fire Ins. Co., supra; Turner v. New York Central & H. R.R. Co., 74 Misc. 524, 132 N.Y.S. 418. (Emphasis added.)

Only *Williams v. Hamilton Fire Ins. Co., supra,* of the foregoing cited cases, dealt with the question whether or not appraisers under the standard appraisal provision must be sworn like arbitrators. The court held that they need not be sworn, commenting as follows: "Here but *one matter* was submitted to the appraisers and that was the amount of the damage. They had no authority to pass upon the question of liability. *If there can be any submission which is not an arbitration, it would seem that such a submission as this would be one.*" (Emphasis added.) And the abstract generalities and pronouncements are quoted from earlier cases to conclude that appraisers are to determine "*merely* the amount of damage;" they are not arbitrators; also that the Arbitration Law did not broaden the scope of arbitration beyond the ancient limits excluding appraisals. *Concerning right of hearing.* We leave the foregoing generalizations of the court of appeals in the *Syracuse Bank* case and of the supreme court (appellate term) in the *Williams* case concerning the swearing of appraisers. We fail to find that any substantial reason has been voiced by either court for treating appraisers differently from arbitrators. We are told no more by the court of appeals than that it "sees nothing" in the 1941 amendment "*requiring*" appraisers under the standard appraisal provision "to be treated" as arbitrators and that there is "nothing in the policy provision" which "*requires* him [the appraiser] to sign an oath." These observations, so completely negative, indicate no good reason for the decision. Certainly neither the 1941 amendment, nor the standard appraisal provision, *precluded* the swearing of the appraiser. We also leave once more the court's foregoing dogma that "It is well established that the determination of a fire loss is not an arbitration proceeding."

We come next to the views of the court as set down in the *Delmar Box* case regarding the parties' right of hearing in appraisals under the standard appraisal provision. By "*right of hearing*" we mean the right of each party, as in both common law and statutory arbitrations, unless he waives it by stipulation, or course of conduct, (1) to *reasonable notice* of time and place of hearing before the appraisers in the matters in issue, (2) *hearing by the appraisers in due quorum and* (3) *the right of each party to present evidence therein and to cross-examine opposing evidence.* According to the foregoing opinion of the court of appeals in the *Delmar Box* case: "They [appraisers under the standard appraisal provision] are likewise not obliged to give the claimant any *formal* notice *or to hear evidence*; and they may *apparently* proceed by *ex parte* investigation, *so long as the parties are given an oppor-*

tunity to make statements and explanations to the appraisers with regard to the matters in issue."[76] (Emphasis added.)

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76. Apparently the court gained part of this confusing generalization from the opinions in the three cases which it cited.

In the first of these cases, Kaiser v. Hamburg-Bremen Fire Ins. Co., 59 App. Div. 525, 69 N.Y. Supp. 344 (1901), *aff'd without opinion*, 172 N.Y. 663, 65 N.E. 1118 (1902), it is not clear that the right of hearing was in issue. The appellate division included in its opinion, however, some generalizations like those used in the *Delmar Box* case. It does not appear whether or not the insured, who was suing to set aside the appraisers' award, had notice from the appraisers of a time and place for hearing. The court was however, disposed to indicate that if such notice had not been given that fact *might have a bearing in determining whether or not the appraisers were guilty of misconduct* sufficient to defeat the award.

The court generalized on the right of hearing as follows: "The rule at common law, and under the statute and Code, requiring notice to the parties of the meeting of arbitrators, and an opportunity to present evidence [Halstead v. Seman, 82 N.Y. 27 (1880); Day v. Hammond, 57 N.Y.479 (1874)] *has not been applied with strictness in all cases of insurance appraisals.* Such appraisals are regarded as *still more informal*, and the appraisers are *not obliged to give the claimant any formal notice or to hear evidence,—at least, not in all cases; and yet* it is quite clear that, unless the insured waive it, *he must either* have notice or knowledge of the meeting and an opportunity to draw their attention to the items of his loss, and make *representations and explanations* to them concerning the nature thereof, and thus insure a consideration of his *entire claim* and guard against omissions and misconduct." (Emphasis added.)

No useful purpose in making so complex and uncertain the right of hearing is reported by the court. Fairly clearly, however, it did cut across the declaration of Robertson, C.J., in *DeGroot v. Ins. Co.*, in 1867 (reviewed *supra* note 71) that appraisers "were *at liberty to arrive at a conclusion* in regard to the value of the articles they were called upon to estimate, *in such way as they thought proper*; they were not bound to the strict judicial investigation of an arbitration." (Emphasis added.)

It seems also to have cut across the further statements by Robertson, C.J., in Brink v. New Amsterdam Fire Ins. Co., 28 N.Y. 104 (Super. Ct. 1867) decided in the same year as the *DeGroot* case. In the *Brink* case his opinion reads: "There is scarcely a day in which, in commercial transactions, the valuation of property or estimate of damages is not entrusted to third parties, and *no one has yet dreamed* of looking upon them as arbitrations, and subjected *to all the formalities imposed upon them* by the Revised Statutes [2 R. S. 541, §§ 1-25, Bulson v. Lohnes, 29 N. Y. Rep. 291 (1864)] *with the paraphenalia of oaths, witnesses and notices of trial. It is most frequently confided to the personal skill, knowledge or experience, or even acquired information of appraisers*, and even in case of a statutory delegation of authority as between the public and individuals (Matter of John and Cherry Streets, 19 Wend. 659), *they may rely on their personal inspection and appraisal.*" (Emphasis added.) (Prior to these remarks the justice seems to have indicated in his opinion that whether an arbitration or appraisal were involved the results *would be the same* on the issue before the court.) Compare Remington Paper Co. v. London Assur. Corp., 12 App. Div. 218, 43 N.Y. Supp. 431 (1896); Linde v. Republic Ins. Co., 50 N. Y. Super Ct. 362 (1884).

The *Kaiser* case appears to have disregarded the views expressed by Savage, C.J., and the chancellor in the *Elmendorf* case in the supreme court and court of errors [5 Wend. 521 (N.Y. 1830); 3 Wend. 628 (N.Y. 1840)] (reviewed *supra* note 71) in connection with the earlier New York case of *Peters v. New Kirk* cited therein. It was their view that the *ex parte* appraisal in the *Peters* case without notice to the parties in interest was void at law and in equity alike. See also *Linde v. Republic Fire Ins. Co., supra.*

The opinion in the *Kaiser* case was conciliatory and compromising of the position taken in Fleming v. Phoenix Assur. Co., 27 N.Y. Supp 188 (Sup. Ct. 1894) (reviewed *supra* note 70), that appraisers *"have no power or authority to take testimony*, and their doing so is not contemplated." What the court in the *Kaiser* case intended to do with these views is not clear. It recognized them, but continued that, nevertheless, "it would seem that as to items *wholly destroyed, or otherwise not visible or open to inspection*, the appraisers must act on information or evidence, for otherwise they could not make a just estimate of the loss. We think it is a fact that may be taken judicial notice of that it is usual and customary for the owner or his representative *to make statements* to the appraisers *and their failure in this instance to listen to such statements is some evidence in support of the contention (by the insured)*

that Vonderwef [the appraiser nominated by the insurer about whom insurer made false representations to insured to induce insured to accept him] *was not an unprejudiced and disinterested appraiser.*" (Emphasis added.) (See also *Linde v. Republic Fire Ins. Co., supra.*)

By citing the *Kaiser* case to its statement upon the parties' right of hearing the court of appeals in the *Delmar Box* case did not aid in resolving the confusion among these lower court cases nor make clear when or in what precise particulars the right of hearing in arbitrations is to be cut down in insurance appraisement—nor is any good reason offered in support of the departure.

The court in the *Delmar Box* case also included a citation of Townsend v. Greenwich Ins. Co., 86 App. Div. 323, 83 N.Y. Supp. 909 (1903), *aff'd, without opinion,* 178 N.Y. 634, 71 N.E. 1140 (1904). This case came to the appellate division in 1904, three years after the *Kaiser* case, *supra.*

The insured sued in disregard of a unanimous award of the two appraisers and umpire to collect on the policy. Judgment for the insurer was affirmed on this appeal.

The Court went into the question of the parties' right of hearing as follows: "The plaintiffs insist upon referring to the appraisers as arbitrators, and urge various matters which might be of importance if they were, *in fact* arbitrators; *among them, that the plantiffs never had any notice of the meetings of the appraisers, etc.* The provisions of a standard insurance policy that in event of a disagreement the amount of the loss shall be determined 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,' contemplates that *each party shall have a representative, each having an equal voice in the selection of the umpire,* and that the determination shall fix, *not the liabilities of the parties under the law,* but the amount of the value of the property destroyed. This does not oust the court of any part of its jurisdiction, and, *in the absence of bad faith, the mere fact that the parties are not given notice of the meetings of the appraisers does not affect the validity of their proceedings. The appraiser selected by the plaintiff is his representative.* He is chosen for the purpose of *guarding the rights of the man who selects him; and it must be assumed,* in the absence of evidence to the contrary, *that he has discharged this duty, and that the plaintiff has had opportunity of being heard, if such a hearing was necessary to the preservation of his rights.*" (Emphasis added.)

This casting of each appraiser in the role of advocate for the party who selected him as appraiser seems neither useful nor desirable. The appraisal provision calls for "competent and disinterested" appraisers. It also distorts the function of the umpire as fitted out in the appraisal provision.

One also must question why, if there is to be any semblance of right of hearing, that it may be realized only through the appraiser. Furthermore, under the foregoing opinion, who is to decide that plaintiff had "opportunity of being heard" and to decide "if such a hearing was necessary to the preservation of his rights"?

While the New York Court of Appeals affirmed the foregoing decision (without opinion) that court had long before frowned upon the thesis of the party's selection as appraiser being his advocate. Thus in Bradshaw v. Agricultural Ins. Co. of Watertown, 137 N.Y. 137, 32 N.E. 1055 (1893), the court championed what seemed to be quite the opposite role for the appraiser. Referring to the course of conduct of the appraiser nominated by the insurer, the opinion reports that when he came on the scene "he seems to have taken the leading part. The evidence returned in this record is such that a jury might say that he abandoned his duties as a disinterested appraiser. *Instead of being disinterested, the inference might be drawn that he acted as a sort of counsel for the defendant, and bound, as such, to obtain the best possible award for it that he could; that he did not act on the theory that, although nominated by the defendant, it was nevertheless his duty, as a disinterested appraiser, to make an award that should, so far as he knew, represent the honest and actual loss sustained by the insured by reason of the fire. . . .*" (Emphasis added.)

"While it may be true," the court continued, "that in the appointment of these appraisers each party nominates some one who may be supposed friendly to the side nominating him, yet he should at the same time be disinterested, or, in other words, fair and unprejudiced. The duties of these appraisers are to give a just and fair award, —one which shall honestly and fairly represent the real loss actually sustained by reason of the fire; and *it is not the duty of either appraiser to see how far he can depart from that purpose,* and still obtain the consent or agreement of his associate, or, in case of his refusal, then of the umpire. *It is proper, and to be expected, that all the facts which may be favorable to the party nominating him shall be brought out by the*

The court of appeals also commented upon the quorum requirement in common law and statutory arbitrations, namely, that "all of the arbitrators, if there be more than one, 'must meet together and hear all the allegations and proofs of the parties.' Civil Practice Act §1456," might not apply to appraisal because the standard appraisal provision "specifically recites that the umpire is not to participate in the appraisal in all cases, but is only to pass on such differences as there may be between the appraisers designated by the respective parties." We have observed above that an umpire with the same functions under the parties' *arbitration agreement* as those indicated above by the court may serve an *arbitration* as well as an appraisement. *The designated role of the "umpire" under the standard appraisal provision is no valid ground to foreclose insurance appraisement from arbitration because his role is equally adaptable and useable in one as in the other.*

We also have the concluding summary of the court in the *Delmar Box* case which embraces the right of hearing. After reviewing the 1941 and 1952 amendments of the arbitration statute (N.Y. Civil Practice Act section 1448) it found that there is "no indication whatever that the legislature intended to make applicable to fire insurance appraisals *the more formal practice prevailing* in arbitration with regard to such matters as oaths, *notice and hearing, the sittings of the arbitrators,* the entry of judgment upon confirmation of an award or the consequences following upon the vacatur of an award." (Emphasis added.)

Just what the court of appeals intended by its foregoing text qualifying or limiting the parties' right of hearing is not clear. *Some cut-down in the right of hearing in insurance appraisals from that existing in arbitration is involved* — but *in what particular; and why; is not clear.*

We also will add that the views of the court in the *Gervant* and *Syracuse Bank* cases as set out below upon the right of hearing in appraisal belie the generality of the greater "*informality*" of appraisal over arbitration and the "*more formal practice* prevailing in arbitration."

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appraiser, so that due weight may be given them; but the appraiser is in no sense, for the purpose of the appraisal, the agent of the party appointing or nominating him, and he remains at all times under the duty to be fair and unprejudiced, or, in the language of the policy, disinterested." (Emphasis added.)

This being the role of the appraiser, we repeat that it is not apparent why he also should have the *exclusive power* to present the claims or evidence of the party nominating him as appraiser as to the amount of loss or damage to the appraisal board; nor is it any good reason to exclude both the insured and insurer from the right of cross examination accorded in arbitrations and civil proceedings generally. We again conclude that the citation of the *Townsend* case by the court in the *Delmar Box* case upon its statement concerning the parties' right of hearing clarified neither the particulars of, nor reason for, a lesser right of hearing in insurance appraisement than in arbitrations.

Matter of American Ins. Co. was the third and last case cited to the court's statement on right of hearing in the *Delmar Box* opinion. We have heretofore reviewed the abstractions and dogma as uttered and referred to in the opinion in that case. (*supra* pp. 6, 19). Suffice it to note now that those abstractions do not seem to clarify why there should be some lesser right of hearing in insurance appraisals than in arbitrations.

Certainly the right of hearing as established in arbitration is no less significant to the parties in insurance appraisals. Unless the parties waive the right (by stipulation, or course of conduct) it is not at all clear why there should be, in any respect, a lesser right of hearing in these appraisals than in arbitrations.

It should be recalled in this connection that the standard appraisal provision has been spelled out and prescribed by the legislature. It is doubted that it could constitutionally command the use of that provision and also deny the parties' right of hearing in appraisals thereunder. It seems equally clear that the court of appeals should claim no greater power to alter or deny the right of hearing in such appraisals.[77]

We turn now to the confusion among the cases decided by the court of appeals itself upon the parties' right of hearing. As the court has left intact the confusion upon the right of hearing as voiced in the lower courts in the *Kaiser, Townsend, and American Ins. Co.* cases, as cited by the court to its statement upon the right of hearing in the *Delmar Box* case, so has it created confusion within its own decisions on the same question.

The court's view in the *Delmar Box* case was advanced without reference to that court's opinion and decision on the right of hearing a year earlier (*i.e.* in 1954) in *Gervant v. New England Fire Ins. Co.*[78] The views and decision in that case on the question at hand were ignored although the *Gervant* case was cited in another connection.

In that case the insured sued to vacate an award of loss and damage. The award was rendered by the appraiser selected by the insurer and the umpire. The appraiser selected by insured did not join. The court of appeals sustained the lower court in vacating the award. The court stated the "*principal issue*" as follows: "The principal issue raised by plaintiff at the trial was that the umpire and the appraiser selected by the insurance company

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77. In Hardware Dealers' Mutual Fire Ins. Co. v. Glidden Co., 284 U.S. 151 (1931) the Supreme Court sustained proceedings under the standard policy legislation of the State of Minnesota involving specific enforcement of the appraisal provision. The specific enforcement consisted of court appointment of an "umpire" to serve with insured's appraiser upon refusal of insurer to nominate an appraiser; also the sustaining of an *ex parte* appraisal and award rendered by the two. While sustaining this enforcement under the mandatory standard policy against charges of unconstitutional denial of due process and equal protection of law, Justice Stone pointed out that since the insurer's objections were directed "specifically to the power of the state to substitute the one remedy [appraisal] for the other [civil action], *rather than to the constitutionality of the particular procedure prescribed or followed before the arbitrators*, it suffices to say that the procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control." (Emphasis added.) And again: In the exercise of such power, the state "may choose the remedy best adapted, in the legislative judgment, to protect the interests concerned, *provided* its choice is not unreasonable or arbitrary *and the procedure it adopts satisfies the constitutional requirement of reasonable notice and opportunity to be heard.*" (Emphasis added.)

78. 306 N.Y. 393, 118 N.E.2d 574 (1954). See also, Bonbright & Katz, *Valuation of Property to Measure Fire Insurance Losses*, 29 COLUM. L. REV. 857 (1929).

were guilty of *misconduct, in a legal sense,* in that they only considered evidence of replacement cost less depreciation in making the award and flatly refused to consider other pertinent evidence *presented by plaintiff's appointed appraiser* bearing on the 'actual cash value' of the premises." (Italics by the court.)

After reviewing the evidence the court concluded that the record "amply supports the finding of the appellate division that the amount of the award was reached *by hearing and receiving evidence of the reproduction cost less depreciation only to the intentional exclusion of all other pertinent factors of value.*" (Emphases added.)

The court continued as follows:

> The Appellate Division was also correct in concluding, in view of our decision in McAnarney v. Newark Fire Ins. Co., 247 N.Y. 176, 159 N.E. 902, 903, 56 A.L.R. 1149, that the 'actual cash value' of premises under a standard fire insurance policy in this State cannot be arrived at by receiving evidence of replacement cost less depreciation only. Rather, the trier of fact should listen to all pertinent evidence on the subject. We went on to point out, 247 N.Y. at page 184, 159 N.E. at page 905: 'Where insured buildings have been destroyed, the trier of fact may, and should, *call to its aid, in order to effectuate complete indemnity, every fact and circumstance which would logically tend to the formation of a correct estimate of the loss.* It may consider original cost and cost of reproduction; the opinions upon value *given by qualified witnesses; the declarations against interest which may have been made by the assured; the gainful uses to which the buildings might have been put; as well as any other facts reasonably tending to throw light upon the subject.* (Emphasis added.)

It is observed from the report of the case also that while the insured "said a lot of things" to the umpire about valuing the property, the court centered its attention principally upon the presentations made by the appraiser selected by the insured. "Here the umpire and the company's appraiser," said the court, "*arbitrarily refused to admit evidence of the variety of facts* which enter into the determination of 'actual cash value' despite the fact that evidence of such factors was directly *presented to them by plaintiff's appraiser.*" (Emphasis added.)

"It is manifest," continued the court "that the Appellate Division based its determination on the rule that an umpire and one appraiser *are not free to disregard, arbitrarily,* pertinent evidence presented by the other, and that a *flat refusal* on their part to hear such evidence is condemned by authorities in this State as legal misconduct for which the award will be set aside" citing the *Strome* and *Kaiser* cases. (Italics by the court.)

The court concluded in this connection that: "The right of a party to have appraisers receive all pertinent evidence offered *is a fundamental procedural right to which plaintiff was entitled, and its denial by the umpire and*

the company's appointed appraiser has been characterized as 'misconduct, in a legal sense' which is sufficient under the above authorities to set aside the award in equity." (Emphasis added.)

By the foregoing opinion the court obviously emphasized the "*refusal*" — the "*flat refusal*" — of the umpire and one appraiser to listen to the evidence offered by or on behalf of the plaintiff — insured.

But it seems very difficult to cut down or confine this view of the court to the situation wherein the insured, or the appraiser for the insured, has received the "flat refusal." In other words, it seems that the foregoing views of the court would require that the party have reasonable notice of time and place to wage his evidence before the appraisal board in due quorum in order for it to gain "*every fact and circumstance which would logically tend to the formation of a correct estimate of the loss.*" The scope of the appraisal inquiry as laid out by the court seems clearly to comprehend the right and opportunity to be heard as known to arbitrations. "Flat refusal" can be *sine qua non* to this. And certainly, it is not clear why evidence so admitted should be ruled immune to reasonable cross-examination. The one type of evidence (or testimony) is as competent and pertinent as the other to facilitate "a correct estimate of the loss."

In the light of the foregoing views of the court in the *Gervant* case in 1954 how should the views of the court in the *Delmar Box* case in 1955 be understood when it is said (without citing *Gervant*) that the appraisers are " 'not obliged to give the claimant *any formal notice or to hear evidence*'; and they may *apparently* proceed by ex parte investigation, so long as the parties *are given an opportunity to make statements and explanations to the appraisers* with regard to the matters in issue"? (Emphasis added.)

Is it to be understood that it is for the parties to catch-as-catch-can with respect to the doings of the appraisers and gain "an opportunity" to make "statements and explanations"? It seems difficult to believe that the court of appeals wants any such disorganized way of managing these proceedings. It seems clear that such rule could do nobody any good and could defeat the rights of either party in almost every case.

It remains to evaluate these two cases in the court of appeals by the *Syracuse Bank* case decided in 1950 prior to the *Gervant* and *Delmar Box* cases. That case was not cited in either of the later ones on the general question now under consideration. It was cited in another connection (only) in the *Delmar Box* case.

The *Syracuse Bank* case is, however, significant on the issue at hand. The questions presented in that case may be summarized as follows: (1) whether or not the Bank, as mortgagee, having a mortgage on the premises of mortgagor was concluded under the standard policy and mortgagee clause by an appraisal carried out under the standard appraisal provision by the insured and insurer; (2) whether or not the insured was bound by the appraisal award. The insured was held bound by the award over objections

not pertinent to the question now at hand. The award at the same time was held invalid as to the mortgagee for reasons immediately pertaining to the issue at hand. According to the view of the majority the award was invalid as to the mortgagee because, the standard mortgagee clause "necessarily means that in event of loss he [the mortgagee] *is entitled to notice and the opportunity to participate in an appraisal, if he is to be bound thereby.*" (Emphasis added). Again: "Certainly, then, if the mortgagee must be a party to any settlement between the insured and the company and to any judicial proceeding brought by the insured against the company, *the mortgagee cannot be bound by an appraisal of which it had no notice and in which it had no opportunity to participate.*" (Emphasis added.) And yet again: ""It would be going pretty far to hold that the mortgagee has not only no say in choosing the appraisers *who are to hear and determine the question of the amount to be paid him, but no right to attend the appraisal proceedings and introduce evidence that will have a bearing upon that question. True,* the mortgagor may be intent on procuring the highest possible award, and, it may be urged, *he may be expected to present all available evidence and in the best possible light,*" (Emphasis added.) but that may not, the majority of the court thought, preclude the mortgagee from protecting "the mortgagee's interest in the manner he deems most effective" or "*from participating in the proceeding which will actually decide the amount to be paid to him.*" *The dissenting opinion* indicates that the majority and minority of the court understood precisely that the difference between them centered upon the right of hearing. The dissenting minority expressed the difference as follows: "*The sole question* here is as to the alleged contractual right of the mortgagee (plaintiff Syracuse Savings Bank) *to have notice of, and participate in, the appraisal procedure described in the policy as one of the methods of establishing the amount of the loss.*" (The court supplied the italics for "establishing"; the others are supplied by the present authors.) The dissent continued: "Since the policy contains no language conferring any such right on a mortgagee, *and indeed specifically confers such a right on the owner above,* I cannot find a basis for a holding that the mortgagee has such a right none the less." (Emphasis added.)

Just how the views in the *Syracuse Bank* case are to be reconciled with those voiced by the court of appeals in the *Delmar Box* case is not apparent.

One thing is certain, however, that the court of appeals has advanced no justification for cutting down *in any respect* the right of hearing under the standard appraisal provision from that right existing with respect to both common law and statutory arbitrations in New York. An arbitrary denial of equal protection would seem manifest if it were to deny the right in any particular to insured and insurer while according it to the mortgagee as the court did in the *Syracuse Bank* case.

Conclusion: The court of appeals could do a genuine service to the law of the New York standard appraisal provision and proceedings and awards

thereunder if it were to cast aside the ancient abstractions and bald pronouncements upon the differences between arbitration and appraisal and recognize the common (and identical) function of the two processes including right of hearing therein. We believe that the text opinion of the Supreme Court of Minnesota in *American Ins. Co. v. District Ct.*[79] should prove helpful to this end. In this case, decided in 1914, that court set out the right of hearing in appraisals under the Minnesota standard appraisal provision as follows:

> It has long been common for fire insurance policies to contain a provision that the amount of loss shall be ascertained by an appraisement to be made as provided in the policy. Similar provisions are found in other forms of contract. Notwithstanding the different wording of such agreements as found in different contracts, the appraisements made thereunder have generally been considered as in the nature of common-law arbitrations, and as governed by the rules applying to such arbitrations, except as otherwise expressly provided. This state has always adopted that view of the law. The rules governing arbitrations have been applied to proceedings for determining the amount of loss under insurance policies, and for making appraisements under other forms of contract, irrespective of whether the persons determining such matters were designated 'appraisers', 'referees', 'arbitrators', or otherwise. (Citation of cases omitted.)
>
> In several of the cases cited the persons selected by the parties to determine the matter in dispute were designated as 'appraisers' and the person selected by the appraisers to act with them was designated as 'umpire'. In this respect the terms used were the same as in the case at bar, *yet it has been uniformly held that such boards* whether appointed as 'appraisers', 'referees', or 'arbitrators', *must afford* the parties a *reasonable opportunity to be heard and to present their evidence*, and that, *although they may make a personal examination of the premises and of the property under proper circumstances, they cannot base their award upon their personal knowledge to the exclusion of pertinent evidence offered by the parties.* (Emphasis added.)

6. Recent Recommendations By the Law Revision Commission to the Legislature To Amend New York Insurance Law.

It remains to refer to the most recent Recommendations of the Law Revision Commission of New York to the legislature relating to the standard appraisal provision.[80]

The Commission has reported that it "believes that the result of Matter of Delmar Box Co. *is sound in policy, to the extent that it preserves the*

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79. 125 Minn. 374, 174 N.W. 242 (1914).

80. RECOMMENDATIONS TO THE LEGISLATURE RELATING TO ENFORCEMENT OF AGREEMENTS FOR APPRAISAL OR VALUATION AND TO ARBITRATION OF CERTAIN NON-JUSTIFIABLE ISSUES. (Mimeographed)

simple and informal device of a common-law third party determination and the binding effect of such a determination when made." (Emphasis added.)

We find it truly puzzling to ascertain the basis for this belief, and even more so, how, or to what extent, the decision or opinion rescues or "preserves" the "simple and informal device" referred to. We are not unmindful in this connection of the *Syracuse Bank* and *Gervant* cases last reviewed above.

The Commission has, however, recommended the amendment of sections 168 and 173 of the Insurance Law so as to add authority for court appointment (*i.e.* by the judge) of an *appraiser* is either party fails to do so as provided in the appraisal provision to the present authority to appoint an "umpire" when the appraisers fail to agree.[81] This idea follows generally the 1955 amendment of the Minnesota policy reviewed above. Any such enforcement, however, would be left to the discretion of the judge as follows: "If the judge shall find that it would be inequitable to require appraisal of the loss prior to the determination of other controversies between the parties, he may deny an application for the selection of an appraiser without prejudice to a subsequent application."

One cannot quarrel too much with the Commission over the proposed amendment; it would help to some extent to even up the rights of appraisal as between insured and insurer.

On the other hand, it does not provide the appraisal board with power to subpoena witnesses or evidence as is provided under the arbitration statute (N.Y. Civil Practice Act, section 1456). It does not clarify the parties' right of hearing. It does not facilitate the procedure to confirm and enter judgment upon the award or to vacate, modify or correct the award by the motion practice set out in the arbitration statute. Plenary suits would seem to be required instead.[82]

The vesting of the foregoing discretion in the judge to deny application for the selection of an appraiser if it would be inequitable to require appraisal "prior to the determination of other controversies between the parties," without prejudice to a subsequent application, invites holding up appraisal until "liability" is determined — presumably in some plenary action or proceeding separate from that of the application. As we have indicated above under the arbitration statute, the "liability" issues would be disposed of in the proceeding in which objection to the application is made.

Conclusion: We submit that there is no substantial reason — legal or functional — why insurance appraisement should not be reckoned under the

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81. SEN. INT. 1002; ASSEMBLY INT. 1454. We are advised that the bill passed the Assembly but died in the Senate Insurance Committee.

82. Concededly, however, when summary judgment procedure is readily available, the difference between the two processes of enforcement of the award are not so serious. See Matter of Resolute Paper Prods. Corp., 160 Misc., 722, 290. N.Y. Supp. 87 (Sup. Ct. 1936).

modern arbitration statutes. To do so would even up the rights of appraisal to insured and insurer alike. Since the insured *must* for all practical purposes take the policy and appraisal provision therein, it is difficult to justify the present want of any practical enforcement in his behalf as compared with the enforcement (irrevocability) made available for the insurer.

In view of the foregoing admonition of the court of appeals in the *Delmar Box* case that any legislation to this end must be very clear and concise, it occurs to us that the simplest process of amendment for this purpose would be an addition to the text of the standard policy (i.e. the appraisal provision therein) of words to the effect that said provision and any proceedings and awards thereunder shall be subject to the arbitration statute and the rights and remedies therein provided.