with the demand for accommodations by the colored passengers.[28] Should the court recognize segregation to be an undue preference, the way would seem to be clear for a federal uniform prohibition of segregation as well as inequality in comfort and convenience.[29]

H. S. H.

CONTRACTS—ARBITRATION AND AWARD—AGREEMENT TO ARBITRATE FUTURE DISPUTES—[Minnesota].—A contract between plaintiff and defendant contained a provision requiring certain questions to be submitted to arbitration according to statute, the decision of the arbitrators to be a condition precedent to any right of legal action. There was an arbitration and an award, but not according to the statutory procedure. Action was brought to recover the award. The plaintiff appealed from a decision for the defendants. *Held:* (two judges dissenting) reversed; since the arbitration statute expressly preserved the right to common law arbitration, the proceedings actually had did not lose their validity. A contention that the defendant had not consented to the common law proceedings was rejected by the court which proceeded to reverse a long line of cases and to announce that an agreement to arbitrate all differences to arise under a contract is not contrary to public policy. The result, as the dissenting opinion points out, is to declare all agreements to arbitrate, including those under common law, to be irrevocable. In reaching this decision the majority stated that public policy is what the legislature declares it to be. The legislature had enacted an arbitration statute. This statute was taken to be the legislative approval of the policy of arbitration, and the court proceeded to give effect to that policy in its broadest sense. *Park Construction Co. v. Independent School District No. 32.*[1]

The view of the court is contrary to the overwhelming weight of authority in this country, which is that provisions for arbitrations of future disputes are revocable.[2] "Such agreements are void—prejudicial to the rights of citizens as guaranteed by the Constitution, to resort to the courts for the determination of their rights;"[3] being an attempt to oust the courts of their jurisdiction, they are held to be contrary to public policy and invalid.[4]

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28. Mitchell v. Chicago, R. I. &. P. Ry. Co. (1938) 229 I. C. C. 703.

29. By such recognition the court would in effect be holding that the federal government has entered the field and as a consequence state laws would not be allowed to be in conflict with the federal rule. It is to be noted that this suggestion is predicated solely on the suggestion that the courts recognize the inequality in segregation.

1. (Minn. 1941) 296 N. W. 475.

2. Sturges, *A Treatise on Commercial Arbitrations and Awards* (1930) 45. However, there is a distinction generally made between an agreement providing for the ascertainment of facts by arbitrators, and one providing for the determination of legal liability. The former are generally upheld. 6 Williston, *Contracts* (rev. ed. 1938) 5371-5373, sec. 1921.

3. Cocalis v. Nazlides (1923) 308 Ill. 152, 139 N. E. 95. "Void" as used here apparently has the meaning which Sturges includes in the term "revocable": "* * * a party to such a clause or provision can maintain an action in court although the action is based upon a cause which is embraced in

It is not at all clear why a general arbitration agreement should be held contrary to public policy. The reason generally given is simply the conclusion that it must be against such policy to oust the courts of jurisdiction.[5] This doctrine appears for the first time in *Kill v. Hollister*,[6] without citation of authority. It has been said that the real origin of the idea is explained by the passing of the Statute of Fines and Penalties, which precluded recovery of the face value of penal bonds where they had become single unless the actual damages justified it.[7] Then, because revocability could no longer be avoided by the use of bonds, the court felt called upon to contribute this reason to bolster the doctrine of revocability, first expounded by Coke in the dictum of *Vynior's Case*,[8] which is still regarded as the controlling authority for revocability. Once applied, however, the public policy doctrine crept into the law on the strength of mere repetition. "Inferior courts may fail to find convincing reasons for it; but the rule must be obeyed * * *" laments Judge Hough, in *United States Asphalt Ref. Co. v. Trinidad Lake Pet. Co.*[9] The customary attitude is that of Judge Cardozo in a concurring opinion in *Meacham v. Jamestown, F. & C. R. R. Co.*[10] "The jurisdiction of our courts is established by law and is not to be diminished, any more than it is to be increased, by the convention of the parties." But, as pointed out in *Metro-Goldwyn-Mayer Distributing Corp. v. Cocke*,[11] a contract for submission of controversies to arbitration before resort to the courts does not attempt to prevent either party from resorting to the courts where the conditions entitle him to do so, nor is the legal effect the ousting of the courts from their jurisdiction. The jurisdiction of which the court is deprived is that of inquiring into and deciding the merits of the case orginally, but the court still has the jurisdiction to entertain an action and pronounce a decree in conformance with the award of the arbitrator; or, if there is discoverable impropriety in the arbitration pro-

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the arbitration agreement, such a clause or provision cannot be pleaded in abatement of or in bar to such an action." Sturges, op. cit. supra, note 2, at 45.

4. The Howick Hall (D. C. E. D. La. 1925) 10 F. (2d) 162; Continental Trust Co. v. United Rys. & Electric Co. (D. C. D. Md. 1934) 7 F. Supp. 265; McCullough v. Clinch-Mitchell Const. Co. (C. C. A. 8, 1934) 71 F. (2d) 17; Blodgett Co. v. Bebe Co. (1923) 190 Cal. 665, 214 P. 38, 26 A. L. R. 1070; Dworkin v. Caledonian Ins. Co. (1920) 285 Mo. 342, 226 S. W. 846; Williams & Bro. v. Branning Mfg. Co. (1911) 154 N. C. 205, 70 70 S. E. 290, 47 L. R. A. (N. S.) 337, and cases cited in Annotation, 348 et seq.

5. United States Asphalt Ref. Co. v. Trinidad Lake Pet. Co. (D. C. S. D. N. Y. 1915) 222 Fed. 1006.

6. (K. B. 1746) 1 Wils. K. B. 129, 95 Eng. Rep. 532.

7. Sayre, Development of Commercial Arbitration Law (1927) 37 Yale L. J. 595, 604.

8. (K. B. 1609) 8 Co. 80a and 81b, 77 Eng. Rep. 595, 597; reported as Wilde v. Vinor (C. P. 1609) 1 Brownl. & Golds. 62, 123 Eng. Rep. 666; also reported as Vivion v. Wilde (C. P. 1609) 2 Brownl. & Golds. 290, 123 Eng. Rep. 948. The case is apparently based upon an agency theory.

9. (D. C. S. D. N. Y. 1915) 222 Fed. 1006.

10. (1914) 211 N. Y. 346, 105 N. E. 653.

11. (Tex. Cic. App. 1933) 56 S. W. (2d) 489.

ceedings, to disregard them and determine the issues on their merits.[12] The court is not ousted any more than it is ousted by a release of all right of action.[13] In fact, a general arbitration agreement could be characterized as a release, conditioned upon the occurrence of an event subsequent.[14]

While it seems that a general arbitration agreement does not "oust" the courts from jurisdiction, nevertheless there is reason for holding in favor of the doctrine of revocability. Althought it has been pointed out that the doctrine originated in the mistaken conception of an arbitrator as an agent,[15] it has support in the practical field of procedure; for under the common law the submission is not necessarily accompanied by procedural safeguards[16] such as invariably are prescribed for statutory arbitration.[17] Retraction of the privilege of revoking common law arbitration agreements is not accompanied by a corresponding extension of the protective provisions. However, this objection is not necessarily fatal, for, as pointed out above, if performance of the award is resisted, a court may inquire into the proceedings on equitable grounds, which should be sufficient to found an inquiry into the character of the proceedings.[18] Nevertheless, it must be conceded that such inquiry by the court may be exceedingly difficult due to the informal character of the common law award.[19]

The lack of procedural protection is particularly objectionable where there is inequality in the bargaining positions of the contracting parties. ". . . when the parties stand upon an equal footing, and intelligently and deliberately, in making their executory contracts, provide for an amicable adjustment of any difference that may arise, either by arbitration or otherwise, it is not easy to assign at this day any good reason why the contract should not stand . . ."[20] But in a great many contracts, especially those of the "take it or leave it" variety,[21] the parties are not upon an equal footing, and the more powerful party can insert unfair provisions or instigate unfair proceedings which under the view of the court in the principal case, would have to be attacked in court in order to be avoided.[22] In such a case,

12. Cohen, *Commercial Arbitration and the Law* (1918) 208, 209.
13. Id. at 160.
14. Id. at 175.
15. Id. at 57.
16. E. g., provision for means of compelling testimony and compelling the attendance of witnesses, and providing that arbitrators and witnesses be sworn.
17. Sayre, op. cit. supra, note 7, at 609.
18. Ward v. Quinlivin (1874) 57 Mo. 425; Crary v. Goodman (1855) 12 N. Y. 266, 64 Am. Dec. 506; Hoppough v. Struble (1875) 60 N. Y. 430; Gunn v. Madigan (1871) 28 Wis. 158.
19. Isaacs, Two Views of Commercial Arbitration (1927) 40 Harv. L. Rev. 929; 6 Williston, *Contracts* (rev. ed. 1938) 5392-5398, sec. 1928.
20. Pres. etc. of Dela. & H. Canal Co. v. Penn. Coal Co. (1872) 50 N. Y. 250.
21. Paramount Famous Lasky Corp. v. United States (1930) 282 U. S. 30; Universal Film Exchanges Inc. v. West (1932) 163 Miss. 272, 141 So. 293. A recent consent decree in a motion picture antitrust case provides for arbitration by the American Arbitration Association. See Note (1941) 50 Yale L. J. 854.
22. Phillips, The Paradox in Arbitration Law: Compulsion as Applied to a Voluntary Proceeding (1933) 46 Harv. L. Rev. 1258, 1274; 6 Williston,

an irrevocable submission to arbitration without procedural devices assuring a fair hearing involves too great a limitation upon the fundamental right of appeal to the courts for protection.[23] The welcome liberal approach of the court in re-examining the bases of a hoary common law doctrine is, however, more important than the minutiae of the new law of arbitration which it opens up. These can be shaped by future legislative and judicial action; for there is nothing in the opinion which precludes the legislature from making a suitably devised statutory method of arbitration exclusive.

M. G.

CRIMINAL CONTEMPT—NEWSPAPER PUBLICATION CONCERNING CLOSED CASE—RIGHT TO JURY TRIAL—[Missouri].—An information was filed against relator, a publishing corporation, and petitioners, the editor and cartoonist, because of the publication of two editorials and a cartoon strongly criticizing a trial judge for suggesting a *nolle prosequi* and dismissing a criminal action. The judge, after a hearing, found all three guilty of contempt, assessed a fine against relator, and imposed sentences of imprisonment upon petitioners. The Supreme Court of Missouri in quashing the judgments and granting release by habeas corpus, *held:* published comment concerning a decided case is not punishable as a contempt of court, even though it scandalizes the court and tends to bring it into disrepute. The court, however, rejected a contention that jury trial in contempt proceedings is essential to procedural due process. *State ex rel. Pulitzer Publishing Co. v. Coleman.*[1]

The court bases its holding that the action of a trial judge in dismissing a case terminates his authority to deal summarily with the publisher of comment concerning it upon the view that a more technical interpretation of pendency would restrict permissible discussion so narrowly as to make it of little practical value in informing the public and serving as a check on judicial maladministration.[2] Technically, a dismissal does not operate to conclude a case until the expiration of the term of court, since a dismissal

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Contracts (rev. ed. 1938) 5377-5380, sec. 1922. An excellent example in point is Illustration 6, Restatement, *Contracts* (1932) sec. 550, comment a: "A, on entering the employment of B * * * deposits $65 with B and signs a contract which provides that B can retain the whole or any part of the deposit as liquidated damages for any breach by A of the rules of B, and that C, the president of B, shall be the sole judge of whether the whole or any part of the deposit is to be retained."

23. Sayre, op. cit. supra, note 7, at 611.

1. Decided with Ex parte Fitzpatrick v. Fitzsimmons and Ex parte Coghlan v. Fitzsimmons. (Mo. 1941) St. Louis Post-Dispatch, June 11, 1941, p. 6A:1.

2. Cf. dissenting opinion of Mr. Justice Holmes in Craig v. Hecht (1923) 263 U. S. 255, 281: "I think * * * that there was no matter pending before the Court in the sense that it must be to make this kind of contempt possible. It is not enough that somebody may hereafter move to have something done. There was nothing then awaiting decision when the petitioner's letter was published."