third party rather than upon the enterprise which chose to pay the contractor to assume one of its business costs.15

In making the determination as to whether a particular contractor is an employee of the enterprise or an independent enterpriser, the fundamental question should be whether the community, given knowledge of the terms of the relationship, would look upon the contractor as a part of the enterprise.16 This presumably is the same problem the contracting parties considered when negotiating the terms of hire. In answering the question the court or jury should weigh the factors of control, method of remuneration, and the other traditional tests17 for determining the existence of an independent contractor.18 These factors, however, are not conclusive but merely indicate the details of the relationship. In the present case, for example, the crucial question is whether in the year 1940 a salesman of the type the decedent had been was generally regarded as "being in business for himself" or as "working for some company or companies."

Arbitration and Award—Defective Statutory Proceeding Upheld as Common Law
Arbitration—General Agreements to Arbitrate Not Contrary to Public Policy—[Minnesota].—A construction company's contract to grade a school district's athletic field provided for arbitration of "all questions subject to arbitration . . . at the choice of either party" and set forth the procedure to be followed "unless otherwise provided by the controlling statutes."19 The company demanded arbitration and appointed its arbitrator. The school district appointed its arbitrator but "reserve[d] the right to object to arbitration" on the ground that "there is no foundation laid for arbitration as so demanded" and that "the matters are not proper for arbitration."20 Although the statutory procedure for arbitration was not followed,21 the company brought suit upon

This is analogous to the situation where a creditor deals with an agent of a debtor. If the agent fails to pay over the funds given him by the debtor for that purpose, the creditor may still proceed against the debtor.

Compare this with the problem that arises when the enterprise knowingly engages an independent contractor who is impumicious. Here the enterprise will be liable for the torts of the contractor. Presumably the enterprise paid less for the services of the impumicious contractor than it would have had to pay for the services of a financially sound contractor. The enterprise would thus secure a competitive advantage if it escaped liability for the contractor's torts.

If there is some aspect of the relationship which is peculiar in the sense that it does not resemble any of the accepted patterns of doing business, the jury might be instructed to ignore that aspect. This is tantamount to requiring adherence to the "normal" ways of doing business. If in fact the peculiarities of the relationship are to be overlooked, the crucial question is whether the community, given general knowledge of the basic pattern of the relationship, would look upon the contractor as a part of the enterprise.

15 Note 4 supra.
16 The courts use these tests in both workmen's compensation and respondent superior cases. Reeves v. Muskogee Cotton Oil Co., 187 Okla. 539, 104 P. (2d) 443 (1940); Century Indemnity Co. v. Carnes, 138 S. W. (2d) 555 (Tex. Civ. App. 1940); Williams v. City of Wymore, 292 N. W. 726 (Neb. 1940); Gogoff v. Industrial Com'n of Utah, 77 Utah 355, 296 Pac. 229 (1931); cf. Commercial Casualty Ins. Co. v. Industrial Com'n of Utah, 71 Utah 395, 266 Pac. 721 (1928); Angel v. Industrial Com'n of Utah, 64 Utah 105, 228 Pac. 509 (1924).
17 Record, at 2-4.
18 Ibid., at 7.
19 Minn. Stat. (Mason, 1927) §§ 9513-19; Minn. Stat. (Mason, Supp. 1940) § 9513. The arbitration failed to conform to the statute, chiefly because no submission was made naming
the award and contended that the award was good as a common law award. Upon appeal to the Minnesota Supreme Court from an order sustaining a general demurrer to the complaint, held, that an award failing to comply with the statute may be upheld as a common law award, and that contracts to arbitrate future disputes are not void as contrary to public policy. Order reversed with two judges dissenting. *Park Construction Co. v. Independent School District.*5

Whether an arbitration which is intended to conform to the Minnesota statute will be upheld at common law should depend upon whether a Minnesota common law arbitration is the equivalent of the statutory arbitration. In the common law arbitration, the submission is revocable at any time before the award is made,6 the award is enforced by suit,7 and the courts say they review awards only for “corruption or misbehavior, or for some great or palpable error or gross mistake”8 and do not readily permit attacks upon awards for errors of law or fact.9 In the statutory arbitration, on the other hand, the submission is irrevocable,10 court confirmation makes the award enforceable as a judgment,11 and the court may vacate an award “contrary to law and evidence.”12 In view of these differences, in *Holdridge v. Stowell,*13 where there was “no question that the parties intended . . . an arbitration under the statute” but failed to make the submission required by the statute, the Minnesota Supreme Court refused to uphold the defective award as a common law award because to do so would make a new bargain all the arbitrators. A statutory arbitration must conform to the statute (Barney v. Flower, 27 Minn. 403, 7 N.W. 823 (1881)); in particular, the submission must contain the names of the arbitrators (Holdridge v. Stowell, 39 Minn. 360, 40 N.W. 259 (1888)), and those names must have been inserted before acknowledgment (Northwestern Guaranty Loan Co. v. Channell, 53 Minn. 269, 55 N.W. 121 (1893)).

4 The Minnesota statute expressly preserves the right to arbitrate at common law. Minn. Stat. (Mason, Supp. 1940) § 9513.
5 296 N.W. 475 (Minn. 1941).
6 Minneapolis & St. L. R. Co. v. Cooper, 59 Minn. 290, 61 N.W. 143 (1894); see Holdridge v. Stowell, 39 Minn. 360, 40 N.W. 259 (1888). The principal case may change this rule.
7 See Holdridge v. Stowell, 39 Minn. 360, 40 N.W. 259 (1888).
8 Daniels v. Willis, 7 Minn. 295, 302 (1862); Larson v. Nygaard, 148 Minn. 104, 180 N.W. 1002 (1921); 6 Williston, Contracts § 1923A (rev. ed. 1938). In Mueller v. Chicago & N.W. R. Co., 194 Minn. 83, 259 N.W. 798 (1925), the court indicated that other questions would be examined if the arbitration were under the statute.
13 39 Minn. 360, 40 N.W. 259 (1888).
for the parties. The majority judges say and the dissenting judges assume that the principal case overrules the Holdridge case. But the two cases should be distinguished. The majority speak of the principal case as one "where the initial agreement of the parties contemplated a statutory arbitration" and "the parties themselves have annulled their first agreement for a statutory arbitration" and have "substituted one at common law." But the original arbitration agreement in the principal case might have been interpreted to require either a common law or a statutory arbitration and the only "substituted agreement" was the participation without objection in a common law arbitration. Obviously, if the parties knowingly substitute a common law arbitration for a statutory arbitration or if they make definite an originally ambiguous arbitration agreement by carrying out one or the other type of arbitration, the court's enforcement of the resulting award does not make a new bargain for the parties.

The principal case also presents the problem of the effect on Minnesota arbitration law of the majority's dictum that general agreements to arbitrate future disputes are

14 This is the view in most jurisdictions. Sturges, Commercial Arbitrations and Awards § 5 (1930).
15 Park Construction Co. v. Independent School District, 296 N.W. 475, 477, 490 (Minn. 1941).
16 Ibid., at 477.
17 No satisfactory general criteria have been found to distinguish agreements to arbitrate at common law and agreements to arbitrate under the statute, and it seems that each agreement must be construed in the light of its particular provisions and those of the governing statute. Carey v. Herrick, 146 Wash. 283, 283 Pac. 150 (1928) (provision in agreement inconsistent with statute); Franks v. Battles, 147 Ark. 160, 227 S.W. 32 (1921) (fact that punishment of misdemeanor was left to court indicated statutory arbitration); Thatcher Implement & Mercantile Co. v. Brubaker, 193 Mo. App. 627, 187 S.W. 117 (1916) (character of submission determining); McLaurin v. McLachlin, 215 Fed. 345 (C.C.A. 4th 1914) (plan actually adopted and not the name given determining). It has been suggested that common law rules govern unless the parties manifest an intention to follow the statute. Sturges, Commercial Arbitrations and Awards § 1 (1930).

In the principal case the procedure set forth in the agreement was different from that in the statute, but the agreement stated that if statutes provided "otherwise than as hereinbefore specified, the method of procedure throughout and the legal effect of the award shall be wholly in accordance with the said statutes...." Record, at 4. The contractor argued that this language applied only where local statutes prescribed a procedure for all arbitrations, whether common law or statutory.

18 Cf. Black v. Woodruff, 193 Ala. 327, 331, 69 So. 97, 98 (1915): "By common consent laying their respective contentions before the arbitrators, in the absence of a preliminary order inviting an award as to the matters in dispute, the only rational conclusion is that the parties intended to appeal to the general powers of the court for its enforcement, if necessary [i.e. common law award]."

19 The majority say "there was no revocation" (296 N.W. 475, 476 (Minn. 1941)) and practically admit that the discussion of public policy is dictum (Ibid., at 477). But the minority say, incorrectly it is submitted, that there was "an effective revocation of any agreement to arbitrate at common law" (Ibid., at 479). The reservation of rights seems too vague to constitute a revocation. For the requisites of a revocation, see Sturges, Commercial Arbitrations and Awards § 19 (1930). Furthermore, if the school district had revoked authority to arbitrate at common law and was aware, as its reservation of rights indicates, of the defect fatal to a
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no longer contrary to public policy. This dictum may be limited to the cases expressly
overruled and may merely make enforceable as conditions precedent agreements to
arbitrate questions of liability, as well as questions of fact. 20 But, more probably, the
dictum was intended to overrule the whole of the much criticized public policy against
arbitration 21 and will, as the minority assume, make general agreements to arbitrate
irrevocable and, perhaps, specifically enforceable.

The revocability of agreements to arbitrate has been based upon the public policy
against ousting the courts of jurisdiction 22 and upon the inherent revocability of every
authority or agency not coupled with an interest. 23 That the first ground can no longer
be taken as existing in Minnesota is indicated by the dictum of the principal case. 24
The second ground has not been much relied upon by modern authority 25 and seems in-
applicable because an arbitrator is less like a representative of the parties than like an
impartial lay judge. 26

Whether agreements to arbitrate will be specifically enforceable is, however, more
doubtful. Inability to prove substantial damages for breach of agreements to arbitrate
renders the legal remedies inadequate. 27 But specific relief has been denied because it
is contrary to public policy to force a party to forego his remedies in the courts, 28 be-

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20 Park Construction Co. v. Independent School District, 296 N.W. 475, 478 (Minn. 1941);
6 Williston, Contracts § 1921A (rev. ed. 1938). In Colorado and Washington, where statutes
were construed to remove the policy objection to agreements to arbitrate at common law
(Ezell v. Rocky Mountain Bean & Elevator Co., 76 Colo. 409, 232 Pac. 680 (1923); Zindorf
Construction Co. v. Western American Co., 27 Wash. 31, 67 Pac. 374 (1901)), the only effect
has been to make arbitration clauses good as conditions precedent. But no case has been
found holding that the public policy objection still survives as to revocation and specific per-
formance.

21 Asphalt Refining Co. v. Trinidad Lake Petroleum Co., 222 Fed. 1006 (D.C. N.Y. 1915);
Berkovitz v. Arbib & Houlberg, 230 N.Y. 261, 130 N.E. 288 (1921); Delaware & H. Canal Co.
v. Pennsylvania Coal Co., 50 N.Y. 250, 258 (1872). Compare the Minnesota Supreme Court's
recent overruling of the doctrine that part payment cannot discharge a debt. Rye v. Phillips,
203 Minn. 567, 282 N.W. 459 (1938).

22 Sturges, Commercial Arbitrations and Awards § 15 (1930).

23 Allen v. Watson, 16 Johns. (N.Y.) 205 (1819); Rochester v. Whitehouse, 15 N.H. 468
(1844); see Isaacs, Two Views of Commercial Arbitration, 40 Harv. L. Rev. 929, 932 (1927).

24 By analogy to the Minnesota statutes from which the change in policy toward arbitration
was derived, irrevocability under this dictum, as under the statute, may be limited to

25 Note 22 supra. No Minnesota case has been found which bases revocability upon agency
principles.

26 Sturges, Commercial Arbitrations and Awards 369 (1930); Isaacs, Two Views of Commer-
cial Arbitration, 40 Harv. L. Rev. 929 (1927).

27 Pomeroy, Specific Performance of Contracts § 8 (3d ed. 1926); Simpson, Specific En-
forcement of Arbitration Contracts, 83 U. of Pa. L. Rev. 160 (1934); Chafee and Simpson,
Cases on Equity 537 (1934).

166 (1853).
cause forcing a party to arbitrate when he may later revoke his appointment of arbitrators is futile, and because a court cannot force a party to arbitrate against his will. The majority's dictum may remove the first two grounds for denying specific relief. As to the third, a court could hold a party in contempt for failure to participate, could appoint arbitrators, and could authorize an arbitration ex parte. Unlike enforcement under the statutes, however, specific enforcement in equity would depend upon the discretion of the court. The majority's dictum seems, therefore, to have removed the only obstacle to making general agreements to arbitrate irrevocable and specifically enforceable.

Attorney and Client—Recovery of Counsel Fees in Separate Action—Res Judicata—Illinois.—The defendant had procured land from the plaintiff's deceased husband by means of fraud. Having recovered the property in a prior action against the defendant, the plaintiff brought a separate action to recover counsel fees and other expenses incurred in the first action. On appeal from the trial court's dismissal of the complaint, held, that the plaintiff may recover counsel fees incurred in the prior action if that action was made necessary by the defendant's wilful misconduct. Res judicata does not bar a later suit for counsel's fees since such a suit constitutes a separate cause of action. Judgment reversed. *Ritter v. Ritter.*

The successful party in a law suit is generally not allowed to recover his counsel fees from the loser as an element either of costs or of damages. Many courts make an exception where one party in bad faith engages the other in litigation. Where the wrongdoer has himself brought a groundless suit in bad faith, the courts disagree as to whether the successful defendant should be allowed to recover his counsel fees. State courts

29 Greason v. Keteltas, 17 N.Y. 491 (1858).


31 Cf. order to proceed to arbitration under statutes. N.Y. Civ. Prac. Act. (Gilbert-Bliss, 1939) § 1450; 43 Stat. 883 (1925), 9 U.S.C.A. § 4 (1927). If a court can enforce an order to proceed to arbitration under a statute, it ought equally to be able to enforce such an order at common law.


33 Equity has not deemed enforcement of more complicated agreements impracticable; see, e.g., Union P. R. Co. v. Chicago, K. I. & P. R. Co., 163 U.S. 564 (1896).

34 6 Williston, Contracts §§ 1920, 1922 (rev. ed. 1938).

35 32 N.E. (2d) 185 (Ill. App. 1941).

2 United Power Co. v. Matheny, 81 Ohio St. 204, 90 N.E. 154 (1909); Corinthe Bank and Trust Co. v. Security Nat'l Bank, 148 Tenn. 136, 252 S.W. 1001 (1923); Kolka v. Jones, 6 N.D. 461, 71 N.W. 558 (1897); McCormick, Damages § 61 (1935). See 39 A.L.R. 1218 (1925). In England, on the other hand, the court has discretion to allow a litigant to recover such expenses as part of costs. Several writers, after comprehensively reviewing the policies for and against the English and American "costs" systems, have favored adoption of the English view. Goodhart, Costs, 38 Yale L. J. 849 (1929); McCormick, Damages § 71 (1935).