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Arbitration and Award

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T H E S I S.
A R B I T R A T I O N And A W A R D.
by
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1893.

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INTRODUCTION.

The inauguration of the City of London Chamber of Commerce under the joint auspices of the Corporation and the London Chamber of Commerce is a striking and significant fact. It is the outcome of a long growing dissatisfaction on the part of the commercial world with our legal system. To go further and say that it is an emphatic condemnation of that system would perhaps be wrong, but Englishmen are a much enduring race and it must be a profound and well grounded dissatisfaction which has led to what is nothing more than a repudiation by business men of justice as administered by our courts of law. The Chamber is to have all the virtues which the law lacks. It is to be expeditious where the law is slow, cheap where the law is costly, simple where the law is technical, a peace maker instead of a stirrer up of strife.

All these are admirable things and much to be desired, and their developement will be watched with great interest. Nearly every nation of Europe has an analogous institution, witnessing the usefulness of a domestic tribunal for the prompt and practical settlement of the every day disputes of commerce, and wit-

nessing also to the desire of business men for self regulation and self-government. The Law Merchant, which we ascribe to the genius of Lord Mansfield, consisted in recognizing the excellence of this mercantile custom and giving legal effect to it. He knew, as all jurists must, that law to be living must grow out of the actual necessities of society. This was the origin of the Mercantile law. It was the origin of the whole common law of England. Severed from such vitalizing contact law becomes a dry dead husk, which must inevitably drop off and perish.

But is the tendency to arbitrate which is fast permeating all classes of society a thing to be desired? Will such a scheme of commercial arbitration as that proposed to be inaugurated be the most satisfactory means of settling every day disputes, and also prepare the way for a more enlightened jurisprudence in the future?

The objections to such a mode of settling disputes are many, and for the most part well founded, but there are also many virtues attaching to a speedy and comparatively cheap ^{method} of settling the constant petty conflicts of the business centres of the country. Defeat is perhaps better than prolonged conflicts. A rough irregular justice, or even injustice, which is administered promptly, is better in the eyes of most practical men, than the most exact and perfect adjustment of equities embodied in a decree which comes lagging in at the end of a long contest, when some of the parties are dead, others moved away, and the remainder acquired new interests. Life and business of this age change like a kal-

eidoscope, and matters of great import today may become of little moment tomorrow.

But it is not the purpose of the writer to discuss the future of financial arbitration, but rather to look at the law as it is already laid down, and set forth as clearly as possible the relation such a mode of procedure bears to our legal system. To ascertain what part it plays in the great drama of our national jurisprudence, and the rights and privileges of parties who submit themselves to the justice, or injustice, of its awards.

CHAPTER FIRST.

Arbitration in general, and capacity of parties
to submit to.

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Arbitration may be defined as the investigation and determination of matters of difference between two parties by one or more unofficial parties called arbitrators or referees. The judgment of the arbitrators and the paper on which it is written is called the award. At common law the matter of arbitration is entirely voluntary with the parties to the matter in dispute; but most states have enacted statutes to regulate certain forms to be followed in submitting matters to arbitration, and enforcing awards made thereon by special proceedings in the courts. In some of the states, as in Pennsylvania, arbitration has been made compulsory on one party if the other elects to settle the matter in this manner. Generally however in states where statutes exist regulating the matter it is left optional with the parties to submit to arbitration according to common law or statutory rules.

(77 Ill. 115 -- 74 N. H. 38 -- 1 Metc. 117 -- 21 N. Y. 115--
98 Penn. 400 -- but see 29 N. Y. 291.)

Any person of legal capacity to contract may be a party to an arbitration. But he must have such a control over the subject matter of the arbitration that he can carry out any orders embodied in a legal award, and free from duress. (23 Barb. 327.) So may parties who are competent to transfer real estate or exercise acts of ownership over it refer their disputes concerning it to arbitration. (14 Am. Dec. 522) The submission to an arbitration by an infant is treated as contracts of an infant in general. It has been held to be void, but is generally considered voidable. (6 Moore 488 -- 44 Miss. 699) The decision will depend much however on the merits of the case. Thus where an infant submitted a claim for damages for assault and battery to arbitration and received an award of fifty dollars and brought suit afterwards, the jury were instructed by the court to give only nominal damages if they should find that the infant had received adequate compensation for the injury; but to give a verdict for such additional sum as with the fifty dollars already received would form a reasonable satisfaction if they found the original award to be inadequate. (6 Mass. 78) Bankrupts cannot submit to arbitration without the consent of their assignees; and assignees in submitting matters of the bankrupt will be held personally liable for loss occasioned by the award unless they are protected by statute or are exempted by the terms of the submission.

Whether a feme covert has a right to bind herself by a submission independent of her husband or whether a husband has the

right to submit matters concerning his wife's estate independent of his wife are matters largely regulated by statutes. It ought to be safe to lay down the rule substantially as follows:- the wife may bind herself by her own sole submission in respect to any property in regard to which she has the absolute power of disposal and conveyance by her own independent and individual act; but she may not bind herself otherwise than in respect to such property. The husband may bind the wife to any undertaking provided he has the power to carry out the possible terms of the award without her joinder or acquiescence; or provided the law would enforce joinder if it were legally indispensable to the due performance of the award. / Morse on Arb. 26)

A corporation like an individual may submit matters in dispute to arbitration. (5 How. 83 -- 3 Ind. 377 -- 5 Greenl 38)

As a general proposition municipal corporations have the same power to liquidate claims and indebtedness that natural persons have, and from this proceeds power to adjust all disputed claims, and when the amount is ascertained to pay the same as any other indebtedness. A municipal corporation therefore unless disabled by positive law, can submit to arbitration all unsettled claims, with the same liability to perform the award as would rest upon a natural person, but such power must be exercised by ordinance or resolution of the corporate authorities. (83 Ill 563 -- 1 Barb 584 -- 40 Wis. 495)

One of the earliest decided cases concerning the right of a municipal corporation to submit to the settlement of disputed questions by arbitration is the case of the Magistrates of Edinburg. After the occurrence of a great fire in Edinburg it was regarded as an important object of public policy that the new tenements to be erected on the site of the conflagration should be of stone work, and should be otherwise constructed with a due regard for the safety of the city, as well as to improve its appearance. With this in view an arrangement was made to submit the whole matter to the magistrates in council, to which the privy council interposed an act of ratification, and under which powers were given the arbitrators to regulate as to the building of the new tenements. An attempt was made by one of the citizens to evade his obligations under the contract of submission, which refutation the courts sternly refused to allow. (1 Suppt. 733)

A matter cannot be submitted on behalf of the United States without a special act of Congress authorizing such submission. The United States had machinery in operation on land which had been sold to them by a citizen of Massachusetts. A owned mills above and below them on the same stream, and the dams of each party flowed back so as to obstruct the other. A submission of the matters in dispute was entered into by A on the one part and by the district attorney authorized by the Solicitor General of the Treasury department on the other part. An award was made thereon

describing the height of the dams which should be maintained by both parties. The United States afterwards brought an action for trespass against A for flowing their lands. He pleaded the special bar of the award, alleging that he had complied with its requirements. On general demurrer it was held that the special demurrer could not be sustained. Held also that no officer of the United States has authority to enter into a submission on their behalf which shall be binding on them, unless authorised by a special act of Congress. (1 W & M 76)

One partner has no right to submit the partnership affairs to arbitration without the express consent of the other partners. All the partners must also be made parties to a submission. (5 Cal. 345 -- 54 Mich. 652 -- 10 Am. Dec. 200) In Pennsylvania, Kentucky, Ohio, and Illinois however one partner can bind his co-partners by a submission not under seal in partnership matters. (89 Penn. 453 -- 3 T. B. Monroe 453 -- 25 Ill 48 -- Wright 420) The consent of the other partners may be implied but must always be rendered before the award is rendered. (54 Mich. 652 -- 9 John 255) Although the partner who submits to an arbitration without the consent of his co-partners is individually bound by the award. (19 John 137 -- 5 Cal 343 -- 1 Peters 222)

Without express authority an agent cannot submit the matters of his principal to arbitration; not even where he has instruction

to settle out of court if possible. (12 Ala. 446 -- 86 N. Y. 472
19 Am. Dec. 638) But executors and administrators have power by
virtue of their office to submit to arbitration matters regarding
the estate under their administration, as a result of their power
to bring and defend suits. (74 N. Y. 38 -- 14 Tex. 677 -- but
see 52 Ill. 427) This power is confined strictly to the matters
which they have directly under their control. (33 Me. 174)

Guardians have also power to submit matters concerning
their wards, and such an award duly performed will bind the ward
on coming of age. 11 Me. 326 -- 3 Cai. 253) But overseers of the
poor have no authority as such to control the property of paupers,
and to submit their claims to arbitration. (8 Me. 315)

CHAPTER SECOND.

Form and contents of Submission.

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Submissions to arbitration under statutory regulations must in form comply with the requirements of the statutes. (57 Ga. 176 29 Mich. 476 -- 59 Penn. 331) Where submission requires a seal to be attached it must be done by some person having authority. (27 Hun 336 -- 3 Ind. 277) When required to be in writing a verbal submission will be void, and where a specification of the demand is to be attached the statute must be carefully followed. (54 Mich 652 -- 33 Me. 113 -- 3 Mass. 398) In many of the states however the strictness of the statutory rules has been relaxed. The courts as a rule will uphold a submission according to the obvious intent of the parties, and seem to be inclined to a presumption favorable to the instrument. (13 Penn. 90 -- 2 Mich 359 -- 29 Conn 270) But where the submission is clearly contrary to the statute in a material point, it will be considered that it has not been the intent of the parties to be governed by the statute. (28 Ga. 398 -- 73 Am. Dec. 778) At common law a submission may be either oral, in writing, or under seal. It depends on the subject matter of the arbitration. So if writing is necessary to pass the title

to the thing in controversy, a valid award, disposing of such title, must be under a written submission; and if the award is to decide upon the validity of a sealed instrument the submission must be under seal. (75 Ill. 90 -- 2 Barb. Ch. 230 -- 14 Am. Dec. 76) A parol submission must be clearly established to make the award effective, and such a submission cannot pass title to real estate. And in most jurisdictions where the title to real estate is effected the submission is required to be under seal. (97 Ill. 90 -- 5 Cow. 583 - 13 Ind. 393)

A SUBmission at common law can be in any form of words. It is sufficient if an intention is expressed to abide by the award of the arbitrators. (1 Barb 584 -- 57 Penn. 266) But it has also been held that the intention to abide by the award need not be expressed in words. (16 Vt. 663 -- 27 West Va. 663) A submission should be definite in its terms and mutual, and should be made by all the parties to it. But in cases of uncertainty the courts will always endeavor to supply the omission if it can be easily done. (20 Vt. 132 -- 2 Cal 320) Where a submission is in writing it cannot be varied by parol evidence, and all documents and paper must be taken into consideration in construing the submission. (7 Mass. 399) Where a verbal submission has been made, or a submission to two arbitrators, a subsequent or even a simultaneous submission in writing and to three arbitrators will supercede the parol submission. (10 Cush. 39 -- 3 Metc. 576 -- 6 Binn. 576)

It is not necessary that a suit should be pending to authorise

the parties to make a submission. Not even a controversy between them is essential - a mere difference of opinion or a simple matter of doubt is all that is required. (4 Blackf 488 --17 Conn. 345 --2 P&W 531)

All matters of a civil character which are in dispute, difference or doubt between the parties may be submitted by them to arbitration; but matters of an illegal nature or criminal proceedings instituted by one party at the instigation of the other cannot be submitted. (9 Allen 579 -- 120 Mass. 403 -- 70 Mo. 417) Also an award on an illegal contract is void, but the courts will not open an award apparently good, on the ground of an illegal item in the account. (6 Taunt. 250)

It must however be a matter of doubt at least which is submitted. An uncertainty which may be removed by measurement, calculation, or investigation is not such a matter of doubt. And therefore when parties employ engineers, accountants, or other experts to remove the uncertainty the result of their investigation is not generally regarded as an award. (5 Wall. 785 -- 16 N. Y. 354 -- 32 Me. 518) There is a controversy however on this point and some authorities hold that such persons are to be considered as arbitrators, and that their decision is final to the extent of their employment. (13 Ill. 147 - 129 Mass. 145) The same variance has been expressed in regard to appraisals. Some authorities hold appraisers as arbitrators, while others take a contrary view. (39 Mo. 389 -- 14 Me. 468 -- 17 John. 405)

But it has been held that claims for dower; a single item of a long account; question of pure law; questions in deciding cases of nuisances; and other like matters are all fit subjects for arbitration. But debts which are termed certain, such as bonds, arrears of rent, and so forth are not such matters as can be settled by arbitration. (2 Mod. 203)

It is not clearly settled that all matters regarding real estate may be settled by arbitration, although formerly a different view was held; and a general submission of all matters in dispute will include questions relating to real property as well as those relating to personalty. (13 Wect. 382 -- 15 John 197 -- 12 Pac.15) These include questions as to boundary and those relating to right of flowage. (71 N. Y. 190 -- 44 Mich. 74) Even in New York where by statute all matters relating to real estate are void, the courts hold that the statute refers only to cases where a claim to a legal title is involved, but does not operate when an equitable title is claimed. (26 N.Y. 42 -- 14 N. Y. 32)

A submission is general when it submits to arbitration all actions and all causes of actions, all quarrels, controversies, trespasses, damages and demands whatsoever, and contains no reservations or limitations upon the authority conferred. It is immaterial what terms are used to make the submission general, as long as the intention of the parties is evident to submit all matters of dispute or controversy. Under such a general submission the arbitrators have the right to decide upon all questions of

dispute or controversy, and also all questions concerning the civil rights of the parties, whether legal or equitable, relating to personal or real property; and the courts will construe the submission as liberally as possible, so as to determine all controversies, and to dispose of all rights of action. (71 N.Y. 208 -- 104 Penn. 440 -- 61 Iowa 529) Where two partners submitted to arbitration all the differences between them in respect to their partnership affairs in general terms, the arbitrators were authorized to adjust every question of dispute arising out of the partnership affairs. (69 Ill. 179)

Only such matters are rightly included as concern the parties directly and which are in dispute at the time of the submission. Matters formerly disposed of or matters not in dispute are excluded. (50 N. H. 62 -- 29 Vt. 404) Thus a submission of all unsettled accounts does not include a division of personal property owned in common by the partners. (22 Pick. 417) And under a general submission of partnership matters an individual debt owing by one partner to another was held to be included in the submission. (86 N. C. 170) But if two parties on one side and one on the other submit to arbitration all their claims and differences not only the joint matters of the two but also their individual matters, are submitted, and an award on an individual matter will form a bar to any subsequent action. (19 Wend. 285 -- 10 Mass. 442)

Claims barred by the statute of limitations are excluded from a general submission, and require a special submission in order to be effectually settled. (8 N. H. 82) But in cases of doubt the presumption is that all matters should be decided. (71 N.Y. 208)

Submissions with a condition attached are valid but the condition must be fulfilled before the award can take effect. (11 Mass 447 -- 27 N.Y. 225) A case pending in court may be submitted to arbitration, either by rule of court under statutory regulations, or by voluntary agreement of the parties. If done under the rule of the court it is of course only a continuance of the regular court proceedings under a different form; but if done under voluntary agreement without regard for statutory provisions, the submission will act as a discontinuance of the case in court, according to the weight of authority. (12 Wend. 503 -- 41 Me. 355 -- 5 Wis. 421 1 Mich. 463) But some hold directly the reverse - that such a submission is not a bar to the legal proceedings in court, and that either party has the right to push his suit, leaving the other party to have recourse to an action for the breach of the agreement. (38 N. J. L. 488 compare 65 Penn. 300) And in cases where the submission does not work as a discontinuance of the suit, the power of the court over the case is entirely suspended from the time the arbitrators are chosen until the rendering of the award, or until the expiration of the time fixed for rendering the award. (62 How. Prac. 123 -- 11 Paige 529)

According to the same principles an action brought while an arbitration is pending, covering the same subject matter will be suspended until award has been rendered, but a mere agreement to submit without an actual submission will not bar such an action. (3 Story 800 -- 20 Barb 262) When a case pending in court is submitted to arbitration the submission included all the questions of law and fact connected with it; all amendments which have been made or which might have been allowed are included, so as to make the question before the arbitrators as nearly as possible like the subject matter of the suit, without regard to form. (38 Me. 452 -- 98 N.Y. 388) A submission of a pending cause operates as a release of all errors, or estoppel against any assignment of errors, in the proceedings anterior to the submission, and as a waiver to all exceptions to the form of process. (1 Cush. 457 -- 34 Me. 161) A general submission made pending an action includes all matters in dispute at the time of submission, not at the time of the initiation of the suit. (37 Vt. 252)

Independent of some statutory provision an agreement to submit to arbitration is generally revokable by either party, at any time before an award has been made. No stipulation in the agreement in the agreement will be sustained either at law or in equity so as to prevent the parties having recourse to the courts. (28 Pa. St. 221 -- 16 John. 205 -- 27 Ga. 368) A submission entered into by the attorneys of the parties may be revoked by either one of the principals. (23 Pa. St. 393) It has been held that a submis-

sion to arbitrate is revokable before an award even if based on a valuable consideration. (59 Miss. 214) But the contrary has been held where proceedings in chancery have been discontinued and in consideration thereof submission to a final reference was made. (43 Am. Dec. 768 -- 75 Pa. St. 161)

No special form for a revocation is necessary to make it valid, as long as the intention of the parties can be entertained. The courts will give a liberal construction to the whole instrument to discover what the intention is, often supplying or rejecting words. (1 Cow. 335) A revocation however must conform to the submission, and hence a written submission must be revoked in writing; a submission under seal by a sealed revocation. (57 Ind. 349 -- 42 Vt. 159) A revocation must be absolute but may be made by a specially authorised agent. (3 Ind. 377) Notice of the revocation must be given to the arbitrators, and a revocation of a submission is considered to be waived when the revoking party appears before the arbitrators and enters into the trial. (63 Ill. 101) Although there is no direct revocation of the submission by the parties interested, there may be a revocation by the parties interested either through circumstances or by an act of one of the parties. (60 N. H. 54 but see 10.Vt. 91 -- 38 Me. 99) Death of one of the parties to a submission generally revokes it unless ~~unless~~ saved by an express stipulation that it shall be saved. But if the submission be by rule of court in a pending case the rule will be different. (15 Pick. 79)

Also death of a member of a partnership, members of a submission, does not act as revocation. (80 Vt. 357)

Where one party revokes his submission to the arbitration without the consent of the other, he will be liable in damages to the nonconsenting party, on the arbitration bond, if there is one, or on an action for damages for breach of contract. (26 Me. 251) The measure of damages where there is a bond is not the penalty named but the actual damages proved. (14 N.H. 78) Such damages may include the costs of the discontinued suit, and the expenses incurred by reason of the submission; but not the damages sought to be recovered by the original suit, unless the proceedings have become such that it will be impossible to recover in a fresh suit. (113 Mass. 114) If a submission for any reason ceases to be binding on one of the parties, it releases all the rest. (7 Watts 205)

Agreements to submit to arbitration are not specifically enforceable. Whether they were the result of a voluntary act of the parties or were embodied in a contract makes no difference. (3 Story 800 -- 39 N.Y. 377) Conditions in contracts whereby all disputes under the same are to be settled by arbitration will not be enforced by the courts. (56 Cal 307 -- 38 How. Pr. 170 -- 27 N. W. 718) Also all provisions in insurance policies that all disputes arising under the policy should be settled by arbitration are not enforceable. (14 Am Dec. 289) Also similar provisions in leases where rent is to be decreed. (14 Abb. Pr. 145)

Where a contract provides for the appointment of arbitrators as a condition precedent to the right of action, such a condition must be fulfilled before an action can be brought; as where the price of materials to be purchased, or the value of work to be done, is to be settled by arbitration, no fixed price being stated in the contract. Parties to a contract may fix on any mode they see fit to liquidate damages, in their own nature unliquidated; and in such a case no recovery can be had until the prescribed method has been pursued, or some valid excuse exists for not pursuing it. (5 Pac. 232 -- 16 Fed. 513 -- 50 N. Y. 250)

Such provision must be complete in itself, and prescribe the number of arbitrators and the mode of their appointment. (24 Hun 565)

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CHAPTER THREE.

Arbitrators and Their Powers.

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An arbitrator is a person selected by mutual ^{consent} of the parties to determine the matters in controversy between them, whether they be matters of law or of fact. Neither natural or legal disabilities hinders a person from being an arbitrator. It has indeed been laid down in works to which great respect is due that idiots, lunatics, married women, infants, and persons attainted or excommunicated are disqualified for the office; but the better opinion is that they may be arbitrators, since every person is at liberty to choose whom he will to be his judge, and he cannot afterwards object to those whom he has himself elected. (Russell 115 - Morse 99 -- 7 West Va. 390)

An arbitrator should have no interest in the claim to be decided, and where facts exist which could interest him in the favor of either party, such as relationship, joint interest or preconceived opinion, he is incompetent. This refers, however, only to secret interests. If such facts are known to the contesting parties and they do not object, they will be considered to have waived their objections. (10 Pick. 275 -- 14 Conn. 26)

The interest must be of such a character that it is probable that it will effect the interest of the parties to the suit. If far remote or trifling the courts will not interfere. (39 Iowa 192 -- 28 Mich 186) Family relationship between one of the parties and an arbitrator unknown to one of the parties will be a cause for removal. (26 Me. 251) Where an arbitrator after his appointment and before a hearing of the parties expresses an adverse opinion to the claim submitted, which fact was unknown to the parties, he is held to be disqualified and his claim set aside. (55 N.H. 428) If a party to an arbitration objects to one of the arbitrators on the ground of his incompetency, he must make his objection known as soon as he receives knowledge of the facts making the arbitrator incompetent. If he goes on with the proceedings he will be considered to have waived his objection. (10 Pick. 275 -- 26 MC.251) Arbitrators are agents of both parties. Hence their acts are considered as acts of the parties themselves, and a balance struck by the arbitrators is considered as a balance found by the parties themselves. (23 Wend. 363)

At common law it is not necessary that arbitrators should be sworn unless specially required by the submission. (4 N. Y. 157) The statutes of the various states almost universally require that the arbitrators should be sworn before commencing the proceedings. In some of the states the oath is compulsory. (6 N. J. L. 388 -- 1 Metc. 165) In others it may be waived by the parties either impliedly or directly. (3 Cal. 400 - 15 Mich 361)

The power of the arbitrators when not defined by statute is derived wholly from the submission. But every part of the submission should be taken into consideration in determining their power. (6 Metc. 131 -- 69 N. C. 532) In a general submission in which matters of law are not excepted, the arbitrators are sole of the law and the facts, and the courts will not set aside an award ~~resting~~ on a mistake of law. (52 How. Pr. 415 -- 26 Vt. 61)

The parties may in their submission so restrict the power of the arbitrators that al though their award will be final in regard to matters of fact, it will be open to an investigation of the court, if it appears by the award they have mistaken the law. (13 N.H. 286 -- 14 Allen 114) An arbitrator may either directly or indirectly waive his right to decide matters of law, and give the courts authority to inquire into the correctness of his award. He does so impliedly by giving reasons for his decission, from which it may be implied that he intended to decide according to the law. In such a case if he has mistaken the law the award will be set aside. (104 Penn. 440 -- 6 Metc. 131) Where questions of pure law are decided, which have been properly submitted the decission of the arbitrators is final. (14 John. 96)

Matters of fact are peculiarly within the scope of the authority of the arbitrators under the submission, and their award in regard to such matters is always final. (11 Cush. 547)

An arbitrator cannot legally exceed the power given him by the submission. And any award given in excess of this power so conferred will be void. (7 Humph. 28) But it must be clearly shown that an arbitrator has exceeded his authority. The presumption of the court will always be that he has acted within his powers and the contrary must be proved with certainty. (34 Mich. 190 -- 21 Cal. 317 -- 5 Wend. 268)

Arbitrators have no authority to delegate their power, or to appoint a substitute for any one of their number who may be unwilling or unable to serve. Even where the submission provides that in such a case "another or others are to be chosen in their place" it was held that the right to choose did not rest in the other arbitrators but in the parties. (24 Penn. 411 - 99 Mass. 459) They may not delegate their authority to each other, nor vest it in the court which appointed them. (9 Dowl. 437 -- 4 Dall. 71) But they may call in the assistance of accountants, appraisers or experts, but cannot leave the decision to such. (17 Ind. 349 -- 5 Ves. Jr. 846)

Acts of a purely ministerial character may as a rule be delegated. Measurement of land by a surveyor or making up accounts by an expert accountant are acts of this nature. (7 Beav. 455.)

At common law arbitrators have no power to administer oaths to witnesses, but in most of the states statutes have been passed giving them this power. (3 Story 800 -- 5 How. 315)

Where the submission requires that the arbitrators or some one else shall swear the witnesses, and the arbitrators have no such power, they must call in the assistance of an officer, unless the parties consent to the omission of the oath. (16 C. B. 562 -- 76 Mo. 156) Where the power to compel the attendance of witnesses has not been given by statute the arbitrators have no such power. The same is true as to requiring them to produce books and documents or other written evidence. (41 Mich. 726 -- 2 Wend. 257) The parties may however expressly or impliedly waive the obligation of swearing witnesses. (7 Otto 581 -- 7 Cush. 247)

Together with the power of an arbitrator to decide all questions of fact, he has also all power to decide all questions as to the admission and rejection of evidence, as well as to credit due to evidence and the inferences of fact to be drawn from it. (6 Metc. 131) But where an arbitrator is to be regarded as an officer of the court, and the arbitration is to be conducted on legal principles, he will generally not be allowed to admit incompetent evidence. (18 N. H. 327 -- 7 Barb. 585) In the United States he is not bound by the strict rules of law as to the admission of evidence. He may even receive evidence from a legally incompetent witness, if in his judgment the justice of the case requires it. (Russell 207 -- 3 Paige 124)

The arbitrator has the right to leave the question of the admissibility of evidence to the court. He may decide conditionly upon the decision of the court as regards evidence. So where a

interested person was allowed to testify against the objection of one of the parties, the arbitrators rendered a verdict for the plaintiff, " on condition that the interested party shall be adjudged by the judges of the supreme court to have been legally admitted to testify". (10 Pick. 135 -- 39 Me. 224)

The same liberty which an arbitrator has in the admission of evidence is extended as to witnesses. Parties who in a court of law could not be allowed to testify are admissible before arbitrators; as witnesses interested in the result of the arbitration. (1 Dall. 161) The arbitrator should hear all the evidence which the parties choose to lay before him. He may perhaps exercise some discretion as to the quantity of evidence he will hear, but declining to receive evidence is under all circumstances a delicate step to take. For the refusal to receive proof where proof is necessary is fatal to the award. (6 Q. B. 615 -- 62 N. Y. 392 82 N.Y. 27 -- 43 Ind. 324) The arbitrator has the power to open the case which has been closed to receive new evidence, even after he has drawn up his award, as long as it has not been admitted or delivered. The use of this power is entirely optional with the arbitrators and the courts will not interfere if he refuses to open the case even for no apparent reason. (20 N.Y. 58 -- 5 Minn. 201) Against the objection of a party evidence cannot be received conditionally, the arbitrator reserving the right to disregard it in making up his award; neither can he receive it absolutely and afterwards throw it out. The objecting party must, however, make his objection before the closing of the case. (47

Greenl. 19) The mode in which the reference is to be conducted depends entirely on the arbitrators, the courts will not review their discretion provided they have acted within their proper authority according to the principles of justice, and behaved fairly towards each party. (Russell 126 -- Morse 115) The arbitrators have also the right to adjourn the proceedings from time to time as they see fit. They may adjourn from time to time on motion of the parties or at their own will. But the courts may inquire into the matter to see that the power is not used oppressively, and that no unreasonable delay takes place. (109 Mass. 44) It seems in all cases the arbitrators have the power to decline to hear counsel of the parties, but in many cases this power is almost denied them. (109 Mass. 44)

Unless the submission provided differently each one of the arbitrators must act personally in the performance of his office as if he were a sole judge; for as the office is joint, if one refuses or omits to act the others can make no valid award. (28 Ill. 26 -- 29 N. Y. 291) Where private matters are submitted to a common law arbitration all the arbitrators must act in the award unless the submission authorises a majority to make the award. The rule is different in regard to public matters. In the latter a majority may make an award but they must all act together. (47 Cal 361 -- 5 Ohio St. 485)

It is not necessary that the arbitrators should agree on every question presented to them, if they agree on the final award it is sufficient. (3 Paige 124 -- 22 N. H. 582)

It is imperative that the arbitrators should hear each other in the presence of all. Any ex-parte testimony received by them will invalidate the award. The hearing of one party even before accepting the office is sufficient, if an opinion is afterwards expressed. (1 John. 101 -- 30 Hun 29)

Notice need be given to the parties of only those meetings at which evidence is going to be received. Where a meeting was held solely to view the premises under dispute, but where the arbitrators made several inquiries of persons present and only one party attended, it was held that due notice of such meeting ought to have been given. (29 Barb. 465 -- 40 Md. 483) But meetings held simply for consultation by the arbitrators need not be noticed. (76 N. C. 302) This obligation to give notice applies to parties only, no notice need be given to sureties under a submission. (2 N. H. 97 -- 47 Barb. 624) The want of notice of the time and place of meeting is no objection to the award if the party appeared and was heard by them. (71 Ga. 860)

Arbitrators are not entitled to any compensation before they are organized unless they are prevented from organizing by one of the parties or one of them. (1 Miles 357) It was formerly held that arbitrators under a common law submission have no power to award the costs of the arbitration unless given by the terms of the submission, because they are something which has

arisen since the time of the institution of submissions, and in some states this view is still held, although it may be different in these states under a statutory submission. (16 Mass. 396 -- 38 Conn. 271) In other states it is now held that the power of awarding costs is a necessary incident to the power given by the general submission. (14 John. 161 -- 23 Cal. 365) It is still a mooted question however. It has been held in North Carolina (93 N. C. 108) that arbitrators have implied authority to determine costs of the cause submitted to them, while in New York (4 Denio 249) that under the statute of that state no such power is conferred, although they may award their own fees and expenses. This opinion also obtains in Vermont. (32 Vt. 288) Even where the submission does not provide for it the arbitrator is entitled to a reasonable compensation for his services, and it is not error for him to award the fees himself. (54 How. Pr. 68 -- 50 Vt. 449)

As the power of the arbitrator is defined by the submission so is his duration of authority limited by the same authority. Where the stipulation is made in the submission at what time the award is to be rendered, the power of the arbitrators is determined at that time. (3 Abb. Pr. 54 -- 9 Q. B. 779) HE has a lien on the award for the amount of his fees, and may retain it until they are paid. (2 Mich. 359)

As soon as the award is made, the authority of the arbitrators, having once been completely exercised according to the terms of the reference, is at an end. He is not at liberty after delivering the award to exercise any fresh judgment on the case, or alter the award in any particular. If he actually does so the alteration will be simply nugatory, and the award, as originally written, will stand good. He is so entirely functus officio that he cannot even correct an error in the calculation of figures, or make a new award identical with the old one, except, that he may insert words omitted by mistake in drawing the award from the original draft. (16 Hun. 266 -- 23 Cal. 365 -- 15 Pa. St. 116)

CHAPTER FOURTH.

The Award and its operation.

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Where the submission requires the award to be under seal, the stipulations of the award must be complied with. But where the submission is silent on the subject a verbal award will be sufficient, unless disposing of property which can only be passed by a written instrument, or a instrument under seal. (35 Me. 281 - 23 Barb. 187) Awards given under statutory regulations must comply in form with the statutory regulations, although, if the conditions are not complied with, the award may stand as an award at common law, if this was the intention of the parties. (16 Wis. 644 -- 5 N. Y. 482)

No special form of words is necessary to make a formal award, whether it be verbal or in writing, but it must express an actual decision. The words "to meet the circumstances in a liberal manner, I propose that A should pay B, ect." do not express a dis-

cission, and form no valid award. (89 N. C. 343 -- 13 Grey 365)
The award must be coextensive with the submission. All matters submitted must be decided upon by the arbitrators; and an award which disposes of only part of the subject matter will be void. (11 Wheat. 446 -- 71 N. Y. 208) The matters must have been actually submitted in order to vitiate the award for omission. (12 Cal. 331) The parties to an arbitration have the right at any time during the arbitration to withdraw part of the matters submitted; and such matters of course need not be decided upon. (71 N. Y. 208 -- 4 Ill. 453)

There should be no uncertainty in the manner in which the award is to be executed. (50 N. Y. 228 -- 74 N. Y. 108 -- 31 Penn. 498) An award is considered final and certain until the contrary is proved. (14 John. 109 -- 105 Ill. 194) Under a submission of several matters, an award is not uncertain because it does not pass upon each one separately, but embodies them all in one general award, unless the submission specially or impliedly required a separate award for each of them. (1 Peters 122 -- 8 N. Y. 160) Where an award decides upon the title to real estate it is sufficient if it decides to whom it belongs. It need not order a conveyance to make it certain. (8 Ga. 8 -- 63 N. C. 65) An award is not void for uncertainty because it is in the alternative or contingent, nor because one of the alternatives requires one of the parties to do an act in conjunction with others not

parties to the submission, and over whom the award has no control. (68 N. Y. 300 -- 2 Mich. 259) But an award to be valid must describe the things awarded with sufficient certainty to allow them to be definitely identified. (2 Cai. 235 -- 3 Ohio 266 -- 48 N. Y. Supp Ct. 470)

In general it has been said that an award concerning the title to real estate or boundary lines is sufficiently certain only where it would enable an officer to give possession of the premises, and to designate the limits by meets and bounds. But it need not indicate them by name. (1Dall. 173 -- 26 N. J. L. 175) An award must also be certain as to the time of its performance. Where arbitrators in their award decree that a certain sum should by A be placed to the credit of B, provided B should give or cause to be given a clear, unencumbered, and satisfactory title of certain lands to A, without limiting the time in which such title should be given, the award was held to be final and therefore void. (11Wheat.446 -- 18 Iowa 108)

The amount awarded must also be certain to make the award valid. (75 Ill 204 -- 34 Mich. 190) In making the award the arbitrator cannot reserve to himself the authority to decide upon some matter after he has delivered his award, or to delegate in his award the decision of some delicate question to another, much less to one of the parties. Such an award is not final.(4 Dall. 71) Awards must be mutual, and must be prosecuted for the benefit of both parties. And although these instruments are construed more liberally now than formerly, they must be conducted as much

for the benefit of the defendants as the plaintiffs. (31 Am. Dec. 671) To be mutual an award need not require the same things from both parties which may be enforced by the same legal process. One may be required to pay a sum of money which may be enforced by execution, and the other to execute a certain conveyance which can be enforced by attachment; but if the court cannot enforce both things it will enforce neither. The mutuality must also rest on the award itself and not on circumstances outside of the award. (1 Dall. 364 -- 22 Wend. 125)

According to the English rule an award must be entire in itself; but this rule has been relaxed in the United States. (Russell 369 et seq. -- 2 Moore 273) An award must be possible. If the arbitrators award a thing impossible in itself, as to do something in the past or to change the course of a river, the award will be void. Impossibility must appear on the face of the award. (99 Mass. 585) If the submission requires it the award must be published before it becomes effective. (22 Ill. 300) Delivery is not necessary unless required by the submission. It will be sufficient if it is ready for delivery on the day set by the submission. (6 Allen 480) As a general rule the courts are very liberal in the construction of awards. All reasonable presumptions will be made in their aid. (72 Ill. 758 -- 44 Mich. 94)

Fraud or wilfull misconduct on the part of the arbitrators

are causes for which an award can be set aside. And in such a case the arbitrators cannot recover any payment for services rendered. (13 N. H. 72 -- 33 Mich. 127) In states where it is required that an arbitrator be sworn before entering into his duties, an omission to do so will invalidate the award. (4 N. J. E. 310) Also any excess of the power of the arbitrator over adjournments will avoid the award. (1 John. 432)

A valid award has the same effect as a judgment, and precludes the parties from litigating the same matter anew. (53 Mich. 299 -- 41 N. Y. 518) The decisions in the various states do not agree upon the question whether under a general submission actions upon matters not brought before the arbitrators, and consequently not decided upon, are barred by the award. (11 Mass. 445 -- 75 Me. 256)

