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Judicial Construction of the New York Arbitration Law of 1920

LIONEL S. POPKIN*

This article is a review and analysis of the decisions of the New York courts concerning arbitration since the enactment of the Arbitration Law of 1920.¹

CONTRACT NEED NOT BE ACKNOWLEDGED

Section 2 of that law provides:

"A provision in a written contract to settle by arbitration a controversy thereafter arising between the parties to the contract, or a submission hereafter entered into of an existing controversy to arbitration pursuant to title eight of chapter seventeen of the Code of Civil Procedure, or article eighty-three of the civil practice act, shall be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract."

It will be noted that there is no requirement that the contract be acknowledged. However, section 8 of the Arbitration Law made applicable to arbitration agreements, sections 1410 to 1431 (except sections 1428 to 1430)—now sections 1448 to 1469—of the Civil Practice Act "so far as practicable and consistent * * * and for such purpose the arbitration agreement shall be deemed a submission to arbitration." Section 1449 (as now numbered) requires a submission to be "duly acknowledged or proved, and certified, in like manner as a deed to be recorded."

Contracts between merchants or between others in the business world are seldom acknowledged and it was those contracts primarily which the legislature in passing the Arbitration Law wished to cover. The Appellate Division of the First Department, accordingly recognized that it would be "impracticable" (within the meaning of Section 8) to apply Section 1449 to contracts for arbitration and held that such contracts need not be acknowledged.²

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¹New York Laws of 1920, Ch. 275, effective April 19, 1920.

²Matter of Yeannakopoulos, 195 App. Div. 261, (1921) 186 N. Y. Supp. 457; the court stated at page 263:

"A study of the various provisions of the Code mentioned in Section 8 of the Arbitration Law, read in connection with Section 2 of that law, clearly shows that the provisions in Section 2366 of the Code (now Section 1449 of the Civil Practice Act) requiring the instrument of submission to be acknowledged apply exclusively to a submission, entered into between the parties under the Code of Civil Procedure."

THE WORDING OF ARBITRATION CLAUSE

No specific or formal language is required to cover the arbitration of future disputes. The contract may provide simply for "arbitration under the New York Law."³ It appears that a clause requiring arbitration in the "usual manner" is sufficient and evidence will be received to determine what the "usual manner" is.⁴ The arbitrator or arbitrators need not be named in the contract.⁵

WHEN PROVISION FOR ARBITRATION WILL NOT BE ENFORCED

Arbitration will not be granted in all cases where the contract provides therefor. The provision for arbitration is not self-executory and if one party refuses to proceed with the arbitration, the other cannot do so without court order.⁶

EXPRESS LIMITATIONS UNDER THE CIVIL PRACTICE ACT

Under the Civil Practice Act (Section 1448) arbitration is not permitted in the following cases:

(1) Where either party is an infant, or a person incompetent to manage his affairs by reason of lunacy, idiocy or habitual drunkenness.

And at page 264:

"It is decidedly 'impracticable' to expect written contracts between merchants to be 'duly acknowledged' and it is not likely that the legislature contemplated that the provisions of Section 2366 of the Code should have been intended to apply to such an arbitration."

³Matter of Gerseta Corp. 200 App. Div. 890, (1922) 192 N. Y. Supp. 370, appeal dismissed 233 N. Y. 544. See cases and discussion *infra*, footnote 17. Kelvin Engineering Co. v. Blanco, 210 N. Y. Supp. 10 (1925).

⁴See *Matter of Palmer & Pierce*, 195 App. Div. 523, 186 N. Y. Supp. 369 (1921) where the contract provided: "any dispute arising as to the quality or delivery on this contract to be arbitrated in the usual manner." The court held that a jury trial should have been ordered to determine, among other things, whether the arbitration agreed upon was one to be conducted by the board of arbitration of the Dried Fruit Assn. of New York or pursuant to the laws of this State, it appearing from the affidavit in answer to the petition that that association was generally resorted to by food merchants in the city of New York.

⁵Section 4 of the Arbitration Act provides that

"If no method (for appointing the arbitrator) be provided therein (in the contract) * * * then, upon application by either party to the controversy, the Supreme Court, or a judge thereof shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said contract or submission with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided, the arbitration shall be by a single arbitrator."

⁶Sections 3 and 4 of the Arbitration Law. Nor can one party proceed with the arbitration when the other party and the arbitrator selected by him have withdrawn after the appointment of arbitrators but before evidence is taken. *Bullard v. Grace Co.*, 240 N. Y. 388, 148 N. E. 559, (1925) aff'g 210 App. Div. 476 where the Court of Appeals stated:

"Repudiation by one party of the contract to arbitrate does not, therefore, leave the other party in position to proceed without the sanction of the court. The withdrawing party might still assert that it had made no contract to submit to arbitration the questions contained in the submission, that it was not in default under the contract."

(2) Where the controversy arises respecting a claim to an estate in real property, in fee or for life (with certain exceptions).

JURISDICTION OVER SUBJECT MATTER LACKING

By judicial decision, arbitration has been further restricted. Thus arbitration will be refused where the court would not have jurisdiction over the subject matter if brought before it in an action.⁷

ARBITRATION OUTSIDE THE STATE WILL NOT BE ORDERED

Nor will the court direct parties to arbitrate before arbitrators outside of New York State, even though they have agreed to do so.⁸ Clearly where the parties are before it, the court has the power to so order.^{8a} Moreover the court's refusal to direct arbitration outside the state is not based on the ground that the contract to do so is invalid; on the contrary such an agreement to arbitrate is valid and the party who has refused to arbitrate will, it seems, be stayed from bringing an action on the contract.⁹

DISPUTE MUST COME WITHIN ARBITRATION CLAUSE

Of course, the clause providing for arbitration must cover the dispute which has arisen. The courts have evidenced an intention to construe arbitration clauses strictly in that regard on the ground that a party should not be deprived of his right to a court trial¹⁰ unless he

⁷Matter of Red Cross Line, 233 N. Y. 373, (1922) reversing 199 App. Div. 961. In this case the charter party contained a provision for arbitration in New York. The dispute involved the use of a steamship and transportation of a cargo from New York to Newfoundland. The Court of Appeals held that arbitration should be denied. The United States Supreme Court reversed the Court of Appeals (264 U. S. 109) on the ground that the Court of Appeals was mistaken in holding that the federal constitution prohibited arbitration of maritime disputes to become subject to the jurisdiction of state courts. The Supreme Court, however, made it clear that the Court of Appeals could exclude such disputes, as a matter of statutory construction, if it so desired. The Supreme Court decision does not affect the general conclusion stated by the Court of Appeals, viz: that the court will not grant arbitration where the court has not jurisdiction over the subject matter.

⁸Matter of Inter Ocean Food Products Corp (New York Mercantile Co.) 206 App. Div. 426, 201 N. Y. Supp. 536, (1923) reversing 120 Misc. 840, 200 N. Y. Supp. 775 (1923); Matter of California Packing Corp. 121 Misc. 212, 201 N. Y. Supp. 158 (1923).

^{8a}*Penn. v. Lord Baltimore* (1750) 1 Vesey Sr., 1132; 35 Har. L. Rev. 610.

⁹Matter of Inter Ocean Food Products Corp., 206 App. Div. 426, at page 433, 201 N. Y. Supp. 536, at p. 540 (1923); *Kelvin Engineering Co. v. Blanco*, 210 N. Y. Supp. 10 (1925).

¹⁰*Young v. Crescent*, 240 N. Y. 244 (1925); *Matter of Priore*, 237 N. Y. 16, aff'g 204 App. Div. 332, 198 N. Y. Supp. 57 (1923). *In re Kelly* 240 N. Y. 74 reversing 209 App. Div. 870, 205 N. Y. Supp. 931 (1924). In *Matter of Priore* the court had before it upon a motion to confirm an award, the usual arbitration clause contained in the standard form of building contract which provided:

"In case the owner and contractor fail to agree in relation to matters of payment, allowance or loss referred to in Arts. III or VIII of this con-

has clearly agreed to do so. In *Young and Wright etc. v. Crescent Development Co.*¹¹ the contract provided:

"All questions that may arise under this contract and in the performance of the work thereunder shall be submitted to arbitration at the choice of either of the parties hereto."

A dispute arose, the contractors claiming large sums of money for work and materials and still larger sums as damages because the owner had delayed the contractors in the performance of the work. The court held that the dispute was not covered by the arbitration clause stating at page 248:

"While the question may be close and debatable, I do not think that the arbitration clause in the contract should be interpreted as covering and including such a claim as the one made against appellant for breach of the contract. The arbitration clause provides for the submission of 'all questions that may arise under this contract and in the performance of the work thereunder.' We know by common experience the class of questions to which this language naturally applies. It applies as

tract *** then the matter shall be referred to a Board of Arbitration ***"

The Appellate Division (page 333) interpreting the clause liberally, held that all disputes were covered and should be submitted to arbitration. The Court of Appeals, while affirming the order of the Appellate Division placed its decision (page 18) upon the ground that the method of procedure before the arbitrators amounted to a waiver of the restrictions under the contract and gave the arbitrators jurisdiction to determine all matters in dispute and stated at page 17 of its decision that the arbitration clause must be confined to disputes specifically covered thereby.

In *In re Kelly* the Court of Appeals reversed the Appellate Division which had affirmed the order entered at Special Term denying a motion to compel arbitration, where a contract between partners upon the dissolution of the firm provided that in event "of any difference or dispute of any nature whatsoever in any manner relating to the partnership or liquidation of the partnership as between any of the partners or as between the liquidating partners themselves" it should be submitted to arbitration. A dispute arose as to whether an enterprise conducted by the liquidating partners was an asset of the old partnership or of the liquidating partners alone who were given the right to continue and conduct enterprises in their own right. The Court of Appeals directed that the question be arbitrated, but stated at page 78:

"The contract, however, must be to arbitrate the precise matter as to which arbitration is sought. Upon this depends both the jurisdiction of the arbitrator and the power of the court; *** as to the merits between them (the parties) neither we nor the courts below are concerned."

And at page 79:

"We are told that the arbitrator may not determine whether or not he has jurisdiction. That may or may not be true. It all depends upon the language of the agreement. The intention may be to submit that question to him. Then he may pass upon it."

See also *Matter of Siracusa* 237 N. Y. 572, aff'g 206 App. Div. 756, 200 N. Y. Supp. 949, (1923).

In the light of these decisions it would seem that the tendency of the courts will be to construe the subject matter of the arbitration clause strictly and to limit the arbitration to the "precise" questions stated therein.

¹¹240 N. Y. 244, (1925) Cardozo J. dissenting, Pound and Crane, J.J. concurred in the decision on another ground, viz., that the appellant had waived its right to arbitration.

stated to questions arising under and in the performance of a contract and such questions are those which involve an interpretation of its provisions for the purpose of determining whether work has been done according to the contract, whether work which has been demanded under the contract is really covered by its provisions or constitutes extra work, when payments become due, and so on. All of these questions involve recognition of the contract and not repudiation of it.

"This is not true of the claim under discussion. According to respondent's theory the acts done by appellant were not done under and in performance of the contract, but in violation of it, and in repudiation of its provisions. There is involved no interpretation of its meaning, but a wilful refusal to be bound by it and, as it seems to me, this clause was intended to cover controversies which do not deny, but seek an interpretation of and submission to its provisions, an attitude which seeks action under the contract and not one outside of and in denial of it."

It is difficult to understand the court's distinction in that case. Certainly it is questionable that the court gave due weight to the intent of business men as evidenced in language used in a commercial contract. A determination "whether work has been done according to the contract, etc." necessarily involves a decision as to whether the work has *not* been done according to the contract, *i. e.*, whether there has been a breach of the contract. So too the claims for work and materials and for damages for delay would require the decision of the arbitrators as to whether the contractors furnished the services and materials in performance of the contract and whether the owner acted in conformance with the contract in doing those things which caused the alleged delay. Apparently it was the conjunctive "and" together with the words "in the performance of the work" (contained in the arbitration clause) which were the determining factor with the court. Only four judges of the Court of Appeals placed their decision on that ground (one dissenting and two others concurring on the ground that the right to arbitration had been waived); the court should and probably will confine that decision strictly to apply to clauses of identical wording.

Even though the contract does not cover the particular dispute, where the arbitration has proceeded and embraced questions not included within the clause, and the arbitrators have made their award, the parties are held to have given the arbitrators jurisdiction by failure to object.¹²

¹²Matter of Priore, 237 N. Y. 16 (1923) at page 18: "In other words, the method of procedure before the arbitration amounted to a waiver of the restrictions under the contract and gave the arbitrators jurisdiction to determine all matters in dispute."

Of course, arbitration will not be ordered where the disputed question has become academic and moot.^{12a}

APPRAISAL AND VALUATION CLAUSES ARE NOT WITHIN ARBITRATION LAW

So-called appraisal and valuation clauses, which appear most commonly in contracts of insurance, are not provisions for arbitration. Those clauses generally provide that in the event of loss or damage appraisers shall be appointed in an agreed manner and their decision as to the amount of loss or damage shall be binding. It had been held before the Arbitration Law went into effect that such a provision was not an agreement to arbitrate but was merely a method of fixing an amount similar to an agreement to have accountants examine accounts and strike a balance.¹³ The decisions since the arbitration act went into effect hold that the Arbitration Law did not increase the scope of such appraisal clauses, and that they do not constitute provisions for arbitration.¹⁴

^{12a}*Matter of Checker Cab Corp. v. Heller* 241 N. Y. 148 (1923). In this case, the arbitration was limited by the contract to the question whether there was a relation of the contract by one party for which the other party could rescind arbitration was requested after the contract by its terms expired. The Court of Appeals, in an opinion by Pound, J. held that since the contract had expired, a decision of the arbitrators upon which to base a rescission would be the determination of a moot question and refused arbitration.

¹³*Wurster v. Armfield*, 175 N. Y. 256, 259 (1903); *Strome v. London Corp.* 20 App. Div., 571, 572, 47 N. Y. Supp. 481, aff'd 162 N. Y. 627 (1897); *Toledo S. S. Co. v. Zenith Co.* 184 Fed. 391 (1911).

¹⁴*Matter of Fletcher*, 237 N. Y. 440, reversing 206 App. Div. 778, 200 N. Y. Supp. 922 (1923); *Matter of American Ins. Co.* 208 App. Div. 168 (1924); *Williams v. Hamilton Fire Ins. Co.* 118 Misc. 799, 194 N. Y. Supp. 798 (1922). See 8 CORNELL LAW QUARTERLY 53; 34 Yale L. J. 98, 109.

In *Matter of Fletcher*, *supra*, there was a provision in the contract as follows: "The said fair value * * * shall be determined by an appraisal thereof made by three arbitrators, one to be appointed by Mr. Fletcher * * *, another to be appointed by Mr. Nicholas * * * and a third to be appointed by the other two." The Appellate Division of the Second Department held that this clause constituted a provision for arbitration and ordered the appointment of an arbitrator. The Court of Appeals reversed the Appellate Division, and stated at pages 447-448:

"Since the legislature has expressly confined the application of the Arbitration Law to contracts 'to settle by arbitration a controversy thereafter arising between the parties' and has conferred upon the arbitrators powers appropriate only to the decision of matters otherwise cognizable by the courts, it seems to us that it was the plain intent of the legislature not to include mere valuations, appraisals or other determination of matters which except for the provisions of the contract would be settled not by the courts after a judicial inquiry but by the parties themselves without such inquiry. The present contract is not one to settle a controversy between the parties but is one to avoid a possible controversy by leaving the settlement of a question to third parties; the third parties are not expected to settle the matter in a quasi-judicial manner and it seems to us that it, therefore, does not come within the letter or spirit of the statute."

The court went on to say that if the appraisal were not made, because of either party's default, the other party could bring his action, setting forth the failure of the appraisal, and the court would fix the value.

STAY OF TRIAL WILL BE GRANTED WHERE ONE PARTY
HAS REFUSED TO ARBITRATE

One of the most important sections of the Arbitration Law is that providing for a stay against the defaulting party, of the trial in any suit or proceeding involving a dispute otherwise referable to arbitration.¹⁵ While there have been no decisions so holding, it would seem certain that a party who has refused to arbitrate when called upon to do so cannot procure a stay of the trial in an action subsequently brought by the other party upon the contract, even though the latter has not asked the court to compel arbitration. It is not believed that the courts will compel a party (as a precautionary measure, lest he be met in an action with a motion for a stay) to move for an order directing arbitration rather than bring an action, if he chooses, against the party who has refused to arbitrate

In *Matter of American Ins. Co.*, *supra*, the Special Term granted an order for arbitration upon motion of the insurance company. The Appellate Division reversed the order of the Special Term. The clause was the usual one contained in the standard form of New York fire insurance policy, reading:

"In case the insured and this company shall fail to agree as to the amount of loss or damage, each shall, on the written demand of either, select a competent and disinterested appraiser. The appraiser shall first select a competent and disinterested umpire. * * * The appraisers shall then appraise the loss and damage stating separately sound value and loss or damage to each item. * * * An award in writing, so itemized, of any two when filed with this company shall determine the amount of sound value and loss or damage."

The Appellate Division held that this was not a clause for arbitration, stating at page 170:

"A distinction, however, has invariably been observed between the reference of a collateral or incidental matter of appraisal or calculation, the decision of which is not conclusive as to the ultimate rights 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."

And at page 171 the court added:

"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."

¹⁵Section 5 reads:

"If any suit or proceeding be brought upon any issue otherwise referable to arbitration under a contract or submission described in section two, the Supreme Court, or a judge thereof, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under a contract containing a provision for arbitration or under a submission described in section two, shall stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement."

when called upon to do so. In those cases where the courts will not direct a party to arbitrate because the contract requires the arbitration to take place in another jurisdiction,¹⁶ the court will nevertheless stay the trial of an action brought in this state upon the contract by the party who has refused to arbitrate.¹⁷

RIGHT TO STAY MAY BE WAIVED

One of the parties by his conduct may waive his right to arbitration and to a stay of the trial in an action at law upon the contract.

¹⁶*Supra*, n. 8.

¹⁷See *Matter of Interocean Co.* 206 App. Div. 426, at 433, 201 N. Y. Supp. 536, at 540 (1923) *Kelvin v. Blanco*, 210 N. Y. Supp. 10 (1925).

Very often the courts are confronted with clauses in contracts vesting jurisdiction solely in the courts of some other state or country. In *Kelvin v. Blanco*, *supra*, the contract provided:

"The parties hereto submit themselves to the courts of the City of Santiago de Cuba (where the contract was made) for all questions relating to performance or non-performance of this contract, expressly renouncing their right to litigate in any other place."

The Special Term Justice held this was a provision for arbitration and granted a stay.

In *Slisberg v. N. Y. Life Ins. Co.* 211 N. Y. Supp. 270 (1925) the contract stated:

"Any claims or suits that may arise on the present insurance are acknowledged by both parties as being subject to the jurisdiction of the St. Petersburg courts only."

A motion to stay the action was made but denied without prejudice. While the court's attitude is not clearly expressed, he apparently believed that the clause in question was not a provision for arbitration.

Such clauses are not arbitration agreements. They are merely agreements to litigate in a particular jurisdiction. The learned Justice who rendered the decision in *Kelvin v. Blanco* was right in his conclusion, but was in error, it is submitted, in holding that the clause was an arbitration agreement.

In *Sudbury v. Ambie Verwaltung Inc.* 213 App. Div. 98 (1925) the Appellate Division, First Department, held that a clause in a contract between a citizen of New York (plaintiff) and the defendant (a German corporation) providing that "for the decision of such disputes, exclusive jurisdiction is rested in German courts" was against public policy, null and void. The court indicated (page 169) that its decision would apply only where one of the parties is a resident of this state. The defendant's motion in this case was to dismiss the complaint, but it is evident that the holding would have been the same had defendant moved for a stay. It is submitted that this decision is inconsistent with this court's prior holdings and not in keeping with the intent of the arbitration Law.

The arbitration Law changed the public policy of the state so as to permit parties to a contract, whether residents or non-residents, to oust the court of jurisdiction. The Appellate Division of the First Department in granting in a prior action, a stay where the arbitration was to be before arbitrators in a foreign jurisdiction (see cases cited *supra* footnote 8) held that it was not against public policy to oust the courts of jurisdiction in favor of a foreign arbitrator. Had the court placed in the *Sudbury* case its decision on the ground that the clause was not a provision for arbitration within the meaning of the Arbitration Law there would be a logical basis for its conclusion. However, it is difficult to comprehend how public policy forbids the submission to foreign courts but allows submission to foreign individuals. The English courts have construed the power as arbitration agreements. *Austrian Lloyd Steamship Co. v. Gresham Life Assurance Soc.* [1903] 1 K. B. 249; *The Cap. Blanco* (1913) 109 L. T. R. 672; see 25 *Columbia Law Review* 1066.

In *Matter of Zimmerman v. Cohen*¹⁸ the plaintiff sued at law; defendant answered, served a notice of trial, moved for a commission and took testimony by deposition. Shortly before the trial the defendant moved for an order directing arbitration. The Court of Appeals held that the right to arbitration had been waived. In *Matter of Bauer Co.*¹⁹ the Appellate Division of the First Department held that defendant had waived the right to arbitration where the facts were as follows: The action was for breach of contract; defendant served an amended answer without asking for arbitration or requesting a stay, and then noticed the case for trial. Plaintiff upon the trial found it necessary to amend the complaint and the court granted permission to do so, a juror being withdrawn. Plaintiff then served an amended complaint, substantially the same as the original complaint. Defendant instead of answering the amended complaint moved for arbitration. The court at Special Term granted the motion, but the Appellate Division reversed the lower court's order and refused arbitration.

In *Hill Co. Inc. v. Bischoff*²⁰ the plaintiff sued at law; defendant served his answer containing a counterclaim (meanwhile, as appears from the printed papers on appeal, having signed a stipulation extending his time to answer); the case was noticed for trial by plaintiff

¹⁸236 N. Y. 15 reversing 204 App. Div. 375; 198 N. Y. Supp. 139 (1923); the Appellate Division certified the following question to the Court of Appeals: "Is the right to proceed with an arbitration provided for by agreement absolute down to the time of trial?" The Court of Appeals answered "No," and held that defendant had waived the right to arbitrate. The Court of Appeals also stated that plaintiff had waived the right to arbitrate by suing at law.

¹⁹*Matter of Bauer Co.* 206 App. Div. 423, 201 N. Y. Supp. 438 (1923); the court stated at page 426,

"I am of the opinion that petitioner, by its course of conduct and long silence, had waived its right to arbitrate and elected to have the controversy adjudicated by the courts, and that, therefore, the order requiring arbitration should be reversed * * * and the motion denied."

See also *Samuels v. Samis*, 124 Misc. 35, 207 N. Y. Supp. 249 (1925).

²⁰205 App. Div. 856, 198 N. Y. Supp. 915 (1923) reversing 119 Misc. 572, 197 N. Y. Supp. 617 (1922); *Lewis J.*, at Special Term in denying the motion, stated at page 573:

"One of the objects of the Arbitration Law undoubtedly was to prevent and not to encourage delay. The defendant by the service of his answer and the assertion of his counterclaim has waived his right to arbitration under the agreement and has elected the tribunal and the method by which the action may be tried."

The Appellate Division in a memorandum opinion concurred in by all the justices, held:

"Applied to the present case, there could be no waiver of arbitration before trial by the interposition of an answer. (*Matter of Berkovitz v. Arbib & Houlberg*, 230 N. Y. 273 (1921)).

The case cited by the court is not an authority in point. The Appellate Division lays down a rule that is not fair to the plaintiff, who after waiting perhaps one or two years for his case to be reached for trial is suddenly confronted with the defendant's motion for a stay.

and appeared on the calendar. Defendant then moved for arbitration. The Special Term Justice denied the motion but on appeal the order was reversed and the motion granted.

The *Hill* case may be distinguished from the *Zimmerman* case and *Matter of Bauer* on the ground that in the two last named cases, the defendant had done some affirmative act other than to serve his answer (in the *Zimmerman* case, defendant served a notice of trial and took testimony by deposition; in *Matter of Bauer*, defendant served a notice of trial; in the *Hill* case defendant had merely served his answer containing a counterclaim).

In *In re Young and Wright v. Crescent Development Co.*²¹ the petitioners' motion for arbitration was returnable October 2, 1924. On July 10 or July 11, 1924, the petitioners had filed in the County Clerk's office and served upon the owner pursuant to the Lien Law, copies of notices of mechanics liens covering in the aggregate the amount claimed for work and materials, petitioners also having a claim for damages for delay caused by the owner. On October 17, 1924, the owner served notice pursuant to Sec. 59 of the Lien Law requiring petitioners to commence action within thirty days for the enforcement of the lien. The Court of Appeals held that petitioners had waived their right to arbitration and that by filing the liens, which were not merely security but a method of enforcing the claim they had evidenced a clear intent to elect that remedy.

The English Arbitration Act of 1899 specifically requires the defendant in an action to move for arbitration or for a stay, after appearance but before pleading or taking any other steps in the action.²² Our Arbitration Law has no such requirement and the Court of Appeals has stated that the defendant may serve his answer containing a counterclaim for arbitration without waiving his rights under the Arbitration Law.²³

²¹*Young v. Crescent* 240 N. Y. 244 (1925). The Court of Appeals stated at pp. 248-249:

"But passing this, we come to the second and more important question which has been outlined, and I think that the answer to that question must be that the respondents by filing mechanics liens set out on a course so inconsistent with arbitration that they must be regarded as having decisively elected to waive and abandon their right to that course. We are all agreed that if respondents by filing these liens abandoned their right to arbitration of the claims covered thereby, such waiver would also bar their right to arbitration of the claim for damages for breach of contract. We do not think that a party having two or more claims against the same party springing out of the same contract ought to be allowed to abandon his right to arbitration in respect of some of these while he insists upon it in respect of others."

²²See *Chappell v. North* (1891) 2 Q. B. 252.

²³*Matter of Hosier Mrs. Corp. v. Goldston*, 238 N. Y. 22 at page 27 modified 206 App. Div. 414, 201 N. Y. Supp. 516 (1923).

The better rule would be to require the defendant to move for arbitration before answering or at least to assert his right to arbitration in his answer. In that way the plaintiff would not go to the trouble and expense of continuing the action at law, only to be confronted long after with a stay of further proceedings on his part.

STEPS IN THE ARBITRATION PROCEEDING;
PROCEDURE UPON ONE PARTY'S DEFAULT

If either party refuses to appoint an arbitrator the other party may petition the Supreme Court for an order directing arbitration and appointing an arbitrator. Sections 3 and 4 of the Arbitration Law prescribe in detail the method of procedure. It is worthy of note that the petition must be served "in the manner provided by law for personal service of a summons" viz., by service upon the defendant within the state. Substituted service upon a resident defendant or service by publication upon a non-resident defendant is therefore not permitted, so that if the defendant absents himself from the state the petitioner is helpless to proceed.

If the making of the contract or the default is in issue the question is tried by the court or by a jury if demanded.²⁴ Where the authority of the agent who signed the contract on behalf of the party against whom arbitration is sought, is questioned the court or jury must pass upon that point before arbitration will be directed.²⁵

After the arbitrators are appointed they must give notice to each party of the time and place of the hearing, which they may adjourn from time to time; they are required to take an oath before proceeding to hear testimony, and all must meet together. The award must be in writing and subscribed and acknowledged by the arbitrators; it should be filed in the office of the Clerk of the Supreme Court or delivered to one of the parties. A motion to confirm the award must be made upon notice within one year after the award is made. Judgment is entered upon the award, and such judgment has the same force and may be appealed from in like manner as a judgment in an action.²⁶

Where the arbitrator or arbitrators are named in the contract, they can proceed with the arbitration without court order when the

²⁴Sec. 3 of the Arbitration Law; *Matter of Gresham*, 202 App. Div. 211, 195 N. Y. Supp. 106 (1922); *Matter of Palmer & Pierce* 195 App. Div. 523; 186 N. Y. Supp. 369 (1921); *Matter of Siracusa* 237 N. Y. 572, aff'g. 206 App. Div. 756, 200 N. Y. Supp. 949 (1923).

²⁵*Matter of Gresham* 202 App. Div. 211, 195 N. Y. Supp. 106 (1922). *Matter of Palmer & Pierce*, 195 App. Div. 523, 186 N. Y. Supp. 369 (1922).

²⁶See Sections 1451-1464 of the Civil Practice Act with reference to these and similar questions of procedure, etc.

controversy is presented to them by either party, upon giving notice to both parties. This point of procedure is not covered in the Arbitration Law nor in the Civil Practice Act and there have been no decisions upon it. But it does not seem open to question. There would seem to be no good reason to require a court order until one of the parties questions the making of the contract or raises a jurisdictional question. However, the arbitrators cannot proceed without court order, where one party and the arbitrator appointed by him withdraw from the hearings before testimony is taken. This question was squarely presented to the Court of Appeals in *Bullard v. Grace Co.*²⁷ In that case the parties had submitted to arbitrators the question, "whether or not * * * the cases of butter are a good delivery per terms of said contract." Arbitrators were selected and hearings commenced. At the first hearing the buyer claimed that the quality of the butter was open to decision by the arbitrators even though the contract provided that the certificate of the Argentine government should be final as to quality and such certificates had been issued by the Argentine government attesting that the quality of the butter was in accordance with the contract. The chairman of the arbitrators ruled that the quality of the butter was open to the arbitrators, and thereupon the seller's representatives and one of the arbitrators withdrew. The two remaining arbitrators proceeded and made their award which was confirmed and judgment was entered thereon. The Court of Appeals affirmed the order of the Appellate Division, which set aside the award and vacated the judgment.²⁸

²⁷*Bullard v. Grace Co.* 240 N. Y. 388, 148 N. E. 559 (1925), aff'g. 210 App. Div. 476.

²⁸Sec. 1453 of the Civil Practice Act provides in part:

"All the arbitrators selected as prescribed in this article must meet together and hear all the allegations and proofs of the parties; but an award by a majority of them is valid unless the concurrence of all is expressly required in the submission."

The Court of Appeals in *Bullard v. Grace Co.* *supra* n. 27, stated at pages 393-394:

"When an arbitrator withdraws before the allegations and proofs of the parties have been heard, the filling of the vacancy by appointment of a substitute arbitrator either under the terms of the contract or under the Arbitration Law (Sections 3, 4) becomes a prerequisite to further proceedings under the submission (*Bulson v. Lohnes* 29 N. Y. 291). The purpose of the statute was to change the common-law rule which permitted two arbitrators to hear when the third was notified and refused to attend or was wilfully absent (*Crofoot v. Allen*, 2 Wend. 494) and its plain mandate may not be ignored, whether an arbitrator at this stage of the proceedings withdraws for good cause or arbitrarily (see, however, *Matter of Am. Eagle Fire Ins. Co. v. N. J. Ins. Co.* 240 N. Y. 398 (1925) decided herewith)."

The Court of Appeals continued at page 396:

"Repudiation by one party of the contract to arbitrate does not, therefore, leave the other party in position to proceed without the sanction of the court. The withdrawing party might still assert that it had made no contract to

If a party and an arbitrator may withdraw before testimony is presented to the arbitrators, upon the ground that the arbitrators have not jurisdiction of the question presented, it would seem that they could do so at a later stage of the proceedings when the matter arises, and the remaining arbitrators would be powerless to act without court order. The same conclusion must logically be drawn where one party withdraws, but all the arbitrators continue. To require a court order in each of such instances would disturb the proceeding and perhaps render orderly conduct thereof difficult. The better rule would be to permit the party who deems himself injured to note his objection on the record or to present his objection in written form if no record is being made and to leave *all* questions for the court upon the motion to confirm the award; when that motion is made the party who upon the arbitration disputed the jurisdiction of the arbitrators upon a particular question or raised any other objection could then have the court review his objections. Certainly the courts should limit the decision in *Bullard v. Grace Co.* to cases where the party and an arbitrator withdraw *before evidence is presented*; otherwise if one of the parties wishes to be technical he can delay the arbitration indefinitely by withdrawing with the arbitrator appointed by him (who is generally friendly to him) for the slightest reason and thereby compel the other party to petition the court for an order upon each of such withdrawals.^{28 a}

RIGHTS AND OBLIGATIONS OF ASSIGNEE AND RECEIVER UNDER CONTRACT FOR ARBITRATION

The Court of Appeals has held that the receiver of one of the parties is entitled to an order directing the other party to arbitrate,²⁹

submit to arbitration the questions contained in the submission; that it was not in default under the contract."

It is difficult to understand how the withdrawing party could contend that it had not entered into the submission or that it was not in default, after entering into the submission, and appointing the arbitrator; the submission unlike a contract to arbitrate future disputes, assumes the existence of a controversy.

^{28a}The House of Lords reversing the Court of Appeals has just held that where the arbitration clause provides that "in default of either party appointing any arbitrator within one month of the other party requesting it to do so, the latter shall name both arbitrators and they shall select an umpire" and make an award, the award thus made by arbitrators selected by one party on the other's default is invalid. The House of Lords held that the Court of Appeals of the State of New York had indicated in *Bullard v. Grace* (*supra* n. 27) that where one party refuses to select an arbitrator a court order must be procured pursuant to Section 3 of the New York Arbitration Law before proceeding.

See *Liverpool Maine Ins. Co. v. Bankers & Shippers Ins. Co. of N. Y.*, 24 *Lloyd's List Law Reports*, Feb. 18, 1926, Vol. 24, No. 3, p. 85; *N. Y. Law Jour.* March 4, 1926.

²⁹*Matter of Lowenthal* 233 *N. Y.* 621, *aff'g* 199 *App. Div.* 39, 191 *N. Y. Supp.* 282 (1922) where the following question was certified to the Court of Appeals:

and that the assignee of a contract containing a provision for arbitration is bound thereby and may be compelled to arbitrate.³⁰

THE ARBITRATORS

A summary of the procedure before the arbitrators has already been given and the reader is referred for greater details to the provisions of the Civil Practice Act for guidance with respect to the course to be pursued by the arbitrators and the parties upon the arbitration.³¹

ARBITRATORS NOT BOUND BY LAW UNLESS CONTRACT SO PROVIDES

It was settled law long before the Arbitration Act went into effect, that arbitration awards will not be set aside because of errors of law unless the contract provides that the arbitrators shall be bound to follow the law.³² This rule has been restated by our courts since the passage of the Arbitration Law and is now well established.³³ Thus the arbitrators are not bound by the rule against hearsay evidence, their award will not be disturbed for error of fact not appearing on the face of the award and the court will not review any of their findings of fact or conclusions of law.³⁴

"Is the receiver of one of the parties to a contract entitled to an order directing that arbitration proceed between said party, through such receiver, and the other party to said contract, in accordance with the terms thereof, which provided for arbitration."

The Court of Appeals answered "yes" to this question. The Appellate Division stated at page 44:

"It seems to us that, where a contract is assignable the arbitration clause is an integral part thereof, and may be availed by of either party to the contract or by his legal representatives or assigns. * * * * Such an arbitration agreement (to arbitrate future controversies) should not be confused with an arbitration entered into after a dispute * * * has arisen between the parties. In such a case it might perhaps be argued that it is purely a personal agreement to settle existing differences."

³⁰Matter of Hosiery Mfrs. Corp. v. Goldston 238 N. Y. 22 (1924), modifying 206 App. Div. 414, 201 N. Y. Supp. 516.

The Court of Appeals stated at page 28:

"Arbitration contracts would be of no value if either party thereto could escape the effect of such a clause (for arbitration) by assigning a claim subject to arbitration between the original parties to a third party. (Matter of Lowenthal 199 App. Div. 39, 191 N. Y. Supp. 282, aff'd. 233 N. Y. 621.)"

³¹Sections 1451-1464 of the Civil Practice Act.

³²Fudickar v. Guardian Life Ins. Co. 62 N. Y. 392 (1875), Halstead v. Seaman, 82 N. Y. 27 (1880); Masury v. Whiton 111 N. Y. 679 (1888).

³³Itoh & Co. Ltd v. Boyer Oil Co. 198 App. Div. 881, 191 N. Y. Supp. 290 (1921) Matter of Goff & Sons Inc., and Rheinauer 199 App. Div. 617, 192 N. Y. Supp. 92 (1922); Matter of Wheat Export Co. 185 App. Div. 73, 172 N. Y. Supp. 722, aff'd 227 N. Y. 595, (1919); Everett v. Brown, 120 Misc. 349 (1923); Matter of Anderson Trading Co. Ltd. v. Brimberg 119 Misc. 784 (1922).

³⁴In Itoh Ltd. v. Boyer Oil Co., 198 App. Div. 881, 191 N. Y. Supp. 290, (1921) the court stated at pp. 883-884:

"The proofs in the case amply justify the award of the arbitrator, but aside from that, the courts have uniformly held that any finding of fact or

However, the arbitrators are bound by special provisions of the contract. Thus in *Bullard v. Grace Co.*³⁵ where the contract provided that the certificate of the Argentine government should be final as to quality, etc. of the butter, which was the subject of the contract, and such certificates were issued, it was held that the question of the quality of the butter was not open to decision by the arbitrators, the Appellate Division stating at page 479 of its opinion:

“On the merits, it seems quite apparent that under the contract in question the dispute between the parties arising out of the contract cannot be concerned with any question of the quality of the commodity in view of the inspection certificates of the Argentine government which were contracted to be final as to quality, weight and grade.”

ARBITRATORS' POWER TO COMPEL ATTENDANCE OF WITNESSES

Under Section 1453 of the Civil Practice Act the arbitrators are specifically empowered to “require any person to attend before them as a witness.”

ARBITRATORS' FEES

Section 1454 of the Civil Practice Act provides as follows:

“Unless it is otherwise expressly provided in the submission, the award may require the payment, by either party, of the arbitrators' fees, not exceeding the fees allowed to a like number of referees in the Supreme Court, and also their expenses.”

Where the arbitrators award themselves more than is permitted under the law the award is not thereby invalidated, but may be modified.³⁶ The parties may stipulate for payment to the arbitrator of greater compensation than the statutory fees, but the arbitrator is not entitled under such a stipulation to compensation for legal re-

conclusion of law of an arbitrator will not be reviewed. ‘The courts of this state have adhered with great steadiness to the general rule that awards will not be opened for errors of law or fact on the part of the arbitrator.’ (*Fudickar v. Guardian Life Ins. Co.* 62 N. Y. 392) ‘The merits of an award, however unreasonable or unjust it may be, cannot be reinvestigated, for otherwise the award, instead of being the end of the litigation, would simply be a useless step in its progress.’ (*Sweet v. Morrison* 116 N. Y. 19) (1889).” In *Matter of Goff & Sons Inc. and Rheinauer*, 199 App. Div. 617, 192 N. Y. Supp. 92 (1921) the court stated at page 621:

“But the very purpose of an arbitration is to insure a speedy and conclusive determination of the disputes between parties; and in the absence of fraud, corruption or misconduct of the arbitrators, or for the reasons set forth in Section 2374 of the Code of Civil Procedure, their finding will not be disturbed.”

³⁵210 App. Div. 476, 206 N. Y. Supp. 335, Aff'd. 240 N. Y. 388, 148 N. E. (1925).

³⁶*Matter of Blaikie*, 119 Misc. 791, 198 N. Y. Supp. 291, aff'd 206 App. Div. 740, 199 N. Y. Supp. 911 (1922).

search where he was not bound by the contract to follow the law, and that rule applies even though the arbitrator be a lawyer, and counsel for both sides appear and submit briefs upon the law.³⁷

ARBITRATORS' OATH

Section 1452 of the Civil Practice Act requires that,

"Before hearing any testimony, arbitrators selected either as prescribed in this article or otherwise must be sworn by an officer (authorized by law to administer an oath), faithfully and fairly to hear and examine the matters in controversy and to make a just award according to the best of their understanding, unless the oath is waived by the written consent of the parties to the submission or their attorneys."

It will be noted that the arbitrators "must" be sworn and there is only one exception, i. e., when the oath is waived "by the written consent of the parties * * * or their attorneys."

In *Krauter v. Pacific Trading Corp. of America Inc.*³⁸ the oath was not taken in the proceeding by the arbitrators but a general oath had been taken by them pursuant to the by-laws of the New York Produce Exchange, of which they were members. Defendant did not raise the objection that the arbitrators had not taken the oath until after the award had been confirmed and judgment entered, when a motion was made to vacate and annul the judgment and award. The Appellate Division held at page 676:

"While the objection (that the oath was not taken by the arbitrators) would have been fatal to the proceeding if made at any time before judgment, such objection cannot be urged in an action or other proceeding to vacate or remove the judgment."

The court went on to say that the oath of office pursuant to the by-laws of the New York Produce Exchange met the requirements of the Practice Act.

In *Cohen Iron Works v. Jaffe*³⁹ the Appellate Division affirmed the order of the lower court on the opinion of the Special Term Justice who stated in part (pages 310-311):

"Where it appears that there has been no oath and no proper waiver the objection if taken before judgment is fatal. *** Moreover, I am inclined to the view that the parties properly waived the necessity of an oath being taken by the arbitrators. In the arbitration agreement, which was signed by both parties, they agree 'to waive any provisions as to form, and do hereby further agree that a memorandum in writing, signed by a

³⁷Matter of Morris (Grassi et al) N. Y. L. Jour. Apr. 3, 1925. Special Tenn. Part I, N. Y. Co., per Mullan J.

³⁸194 App. Div. 672, 186 N. Y. Supp. 109 (1921).

³⁹198 App. Div. 309 (1921).

majority of the board of arbitrators, shall be accepted as a decision duly made pursuant to the Arbitration Law.' The waiver of all provisions as to form may not be sufficient to dispense with the taking of an oath, but the further agreement that a written memorandum, signed by a majority of the arbitrators, shall be deemed a decision 'duly made' may well be interpreted as constituting a waiver of the necessity of an oath being administered."

These decisions holding that the arbitrators' failure to take the oath may be waived if not objected to before judgment obviously constitute a judicial modification of the mandatory language used in Section 1452. But there should be no quarrel with those decisions since the objection is a technical one. However, the sounder rule would be to require the objection that no oath was taken to be raised before the award is made (not before judgment is entered) for the reason that with the making of the award the jurisdiction of the arbitrators ceases and they cannot then take the oath and proceed *de novo*.^{39a}

To judge from these decisions the tendency of the courts will be to find a waiver of the technical requirements of the Practice Act wherever possible, and to uphold the award despite harmless procedural defects.

ARBITRATORS NOT REQUIRED IN ALL CASES TO HAVE TESTIMONY
TAKEN DOWN STENOGRAPHICALLY

In *Matter of Andersen Trading Ltd. v. Brimberg*⁴⁰ this question was raised by the losing party upon a motion by the prevailing party to confirm the award. The Special Term Justice held that while in some cases the refusal of the arbitrators to make a record of the hearings might be construed as misconduct, yet in a case such as the one at bar, where the party desired the record to review rulings upon testimony and points of law, there was no basis for a record as those questions are not reviewable. The court stated at page 784:

"The defendant also complains because the arbitrator failed and refused to have the testimony taken down by a stenographer and transcribed. There is no rule, however, which requires this practice in arbitrations. Morse ArB. 536. While a refusal to permit a record to be made might in some cases be evidence of misconduct, prejudice or failure to perform honestly the duties of an arbitrator, no attack is made in this case upon the fairness and honesty of the arbitrator, and it appears affirmative-

^{39a}It should be noted that the last subdivision of section 1457 of the Civil Practice Act provides that where an award is vacated and the time to make the award has not expired, the court in its discretion may direct a rehearing.

⁴⁰119 Misc. 784.

ly that the defendant's insistence for a stenographic record was based upon his desire to review rulings upon testimony and points of law. But such a review, as already stated, is something he would not be entitled to. The refusal to have the testimony taken down by a stenographer cannot, therefore, be deemed misbehavior by which the rights of a party have been prejudiced. Civ. Prac. Act. Sec. 1457. Motion to confirm award granted. Motion to reject denied."

PARTIES NOT ENTITLED AS MATTER OF RIGHT TO
COUNSEL UPON HEARINGS

This was expressly decided at Special Term in *Matter of Kayser (Skulnik)*.⁴¹ The court in that case stated that "counsel fortified with 'that wilderness of single instances' * * * would tend rather to confusion and protraction than prompt decision." The Courts have further evidenced their desire that arbitration proceedings be conducted in an informal manner and that the preliminary steps in an action at law be dispensed with, by refusing to grant motions for the examination before trial of one of the parties, for inspection of books and records⁴² and for a bill of particulars.^{42a}

ARBITRATORS MUST PASS UPON ALL MATTERS
SUBMITTED TO THEM

Section 1457 Subdivision 4 of the Civil Practice Act provides that the award may be vacated:

"Where the arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final and definite award upon the subject matter submitted was not made."

⁴¹Wagner, J. N. Y. Law Journal, January 14, 1925. Special Term Part I, the Court's opinion is as follows:

"The respondent declines to appear as a witness before the arbitrators unless his counsel is permitted to be heard before such arbitrators. This motion is made to compel the respondent to attend with his books and records, unrepresented by counsel. This presents for the first time in the courts of this state, so far as research has been able to enlighten me, the question whether parties to an arbitration may have counsel represent them as a matter of right. My view is that whether counsel may be heard or participate in the arbitration proceedings rests entirely in the sound discretion of the arbitrators. The very purpose of arbitration is to obtain inexpensive, expeditious and final determinations of disputes on the merits, free from technical rules and legal formalities. As a rule arbitrators are laymen, unacquainted with legal principles, and procedure. The presence of counsel fortified with 'that wilderness of single instances' and with legal maxims and some legal anachronisms would tend rather to confusion and protraction than prompt decision. Besides if one side employs counsel a burden is cast on the other to do likewise, with resulting added expense. To permit participation by counsel as a matter of right would be fatal to the efficacy of arbitration. Motion is granted. Settle order on notice."

⁴²*Matter of Schwartz*, New York L. Jour., Dec. 17, 1925, special Term. Part I, N. Y. Co.

^{42a}*Smyth v. Board of Education* N. Y. Law Jour., Sept. 2, 1925. Special Term, Part I, Kings Co.

In *Hoffman v. Greenberg Co. Inc.*⁴³ a dispute involved in an action in the Municipal Court in which the defendant had set up a counterclaim, was submitted to arbitration. The arbitrator made an award as follows: "I have heard the parties to said controversy and decide that the plaintiff * * * is entitled to receive from the defendant the sum of \$457.60." Judgment was entered upon the award and defendant moved to vacate the judgment upon the ground that the award showed upon its face that the arbitrator had failed to decide the issue submitted to him "in that he failed to make any disposition of the counterclaim interposed by the defendant." The Appellate Term vacated the judgment upon that ground holding at page 172:

"Clearly the award in the instant case is defective, in that it is silent as to the counterclaim which was a part of the subject matter submitted. Whether or not the entire 'controversy' was passed upon by the arbitrator cannot be determined by a recourse to the language of the award."

The award should therefore show upon its face that it embraces all matters submitted.

AWARD NEED NOT BE SIGNED BY ALL THE ARBITRATORS

In *Matter of Blaikie*⁴⁴ the losing party moved to vacate the award upon the ground that the award was not made and signed by all the arbitrators. It was held, however, that as the decision of the arbitrators need not be unanimous an award signed by a majority of the arbitrators is valid.

In *Matter of American Eagle Fire Ins. Co. et al*⁴⁵ the Court of Appeals in an opinion by Judge Pound held that where one of three arbitrators resigned after the hearings had been concluded, the two remaining arbitrators could make a valid award; the contract of submission provided that another arbitrator should be appointed in the event of the resignation of the particular arbitrator. The contract also provided that "An award by a majority of the arbitrators shall be valid and binding." The Court of Appeals, in effect held, that the provision for appointment of a substitute arbitrator to fill a vacancy created by resignation, was not operative after all testimony had been taken and the hearings concluded. Crane, J. dissented on the ground that this was a judicial modification of the contract of the parties.

⁴³109 Misc. 170 (1919).

⁴⁴119 Misc. 791, 198 N. Y. Supp. 291, aff'd. 206 App. Div. 740, 199 N. Y. Supp. 911 (1922).

⁴⁵240 N. Y. 398, (1925), 148 N. E. 562; see 25 Col. L. Rev. 1076; 35 Yale L. Jour. 106.

GROUNDS FOR VACATING AWARD

Section 1457 of the Civil Practice Act provides:

"Motion to vacate award. In either of the following cases, the court specified in the submission must make an order vacating the award, upon the application of either party to the submission:

(1) Where the award was procured by corruption, fraud or other undue means.

(2) Where there was evident partiality or corruption in the arbitrators or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final and definite award upon the subject-matter submitted was not made.

Where an award is vacated, and the time within which the submission requires the award to be made has not expired, the court in its discretion, may direct a rehearing by the arbitrators."

The Practice Act obviously makes no attempt to define corruption, partiality, misconduct, etc. but leaves to the courts the construction and definition of those terms.

It has been held that an arbitrator who borrows money from an interested party is disqualified and that the award made or concurred in by him is void.^{44b}

In *Berizzi v. Krauss*⁴⁵ Cardozo J., writing for the Court of Appeals, laid down a rule, which, though specifically limited by the Court to the facts of the case, will have a restricting influence upon the arbitrators by confining them to a consideration of the testimony that has been brought to their attention in the arbitration proceeding. In that case the arbitration was before a single arbitrator. Counsel for both sides had examined and cross-examined the witnesses. After the hearings were closed, the arbitrator proceeded without notice to the parties to make an independent investigation by sending his own salesman out with samples of the merchandise in dispute and by personally making inquiries among merchants in the trade. The award was based on the evidence obtained in this manner as well as upon the evidence presented at the hearings. The losing party moved to vacate the award upon the ground that the independent investigation made by the arbitrator was misbehavior, prejudicial to

^{44b}In *re Friedman*, 213 N. Y. Supp. 369, reversing 123 Misc. 809 (1924).
⁴⁵239 N. Y. 315 (1925) reversing 208 App. Div. 322, 203 N. Y. Supp. 442.

his interests. The Special Term granted the motion, the Appellate Division reversed the Special Term and reinstated the award, and the Court of Appeals reversed the Appellate Division and affirmed the order of the Special Term.⁴⁶ Certainly the holding is a narrow one. Arbitrators are generally chosen because of their familiarity with similar disputes and often act upon information and knowledge which they have acquired in their own business dealings. Obviously there is no way to prevent arbitrators from acting upon information which they have previously acquired. Moreover, arbitrators are not bound by the facts but may disregard the facts and decide the dispute upon so-called elementary principles of justice or equity as they conceive them. In view of that rule and the fact that the arbitration was before a single arbitrator in that case it is difficult to understand how the rights of the losing party were prejudiced. This case may influence the courts to a strict construction of the Arbitration Law generally, and logically will tend to place arbitrators upon the same basis as a jury which may consider only the evidence presented to it upon the trial.^{46a}

⁴⁶The Court of Appeals stated, 239 N. Y. 315 (1925), at page 318:

"True, the arbitrator in this proceeding acted in good faith but misbehavior, though without taint of corruption or fraud, may be born of indiscretion."

The Appellate Division, while conceding that the conduct of the arbitrator would have been sufficient before the Arbitration Law to vacate the award, held (208 App. Div. at page 325) that the Arbitration Law showed the intention of the legislature to require of the arbitrators only "the elementary requirements of honesty, full hearing and impartiality."

The Court of Appeals rejected this statement of the Appellate Division and held (page 318):

"But the only new public policy declared by the present act is the removal of the ban that had been laid by the decisions of the courts upon general and executory agreements for the arbitration of future differences."

And again at page 319:

"There would be little profit in fixing a time and place of hearing, if the arbitrators were at liberty, when the hearing was over to gather evidence *ex parte*, and rest their award upon it."

The Court of Appeals was careful to point out at page 320 of its opinion:

"We do not mean, of course, that an award will be vitiated by investigations in the absence of the parties if directed toward facts of trifling importance or facts of such a nature as to preclude reasonable contest. This may include views or measurements or the ascertainment of physical conditions notorious and permanent. There may be times also when an inference will be permissible that a trial in the proper sense has been waived, and that the arbitrators by tacit, if not express consent, have been authorized by the parties to proceed in their own way. (*Sweet v. Morrison*, 116 N. Y. 19; cf. *Matter of Fletcher*, 237 N. Y. 440.) Such is not the case before us. What was contemplated was a hearing. What ensued was a default."

See also

Matter of East Asiatic Co. Lim. (Gordon, Wolf, Cowen Co. Inc.) N. Y. L. Jour. Sept. 1, 1925, where Walsh, J., held at Special Term Part I, N. Y. Co., that an award should be vacated on two grounds: (1) That one of the arbitrators made an independent investigation and (2) That evidence was received which was not made known to one of the parties.

^{46a}See 34 Yale L. Jour. 905.

WAIVER OF OBJECTIONS TO AWARD

It has already been pointed out that objections to defects in the procedure leading up to the award may be waived by the conduct of the parties. A party may also waive his objections to the award itself by accepting benefits thereunder. In *Matter of Friedman*⁴⁷ an award was made and a check sent pursuant to the award to one of the parties, who cashed the check but later sought to resist confirmation of the award. The court held that the acceptance of the check, a benefit, under the award deprived him of his right to object to confirmation of the award. The court cited by way of analogy the decisions holding that the right of appeal is lost by a party who accepts a benefit arising out of the judgment or order appealed from.

PROVISION IN THE ARBITRATION CLAUSE THAT ARBITRATION
SHALL BE HELD WITHIN SPECIFIED TIME

Very often contracts for arbitration of future disputes, and practically always contracts for submission of existing disputes to arbitration, provide that the arbitration must be demanded or take place, as the case may be, within a specified time. Such stipulations are valid and binding; however, the right to sue at law is not lost if the arbitration is not demanded or held within the required time limit. In *B. Brown Inc. v. Oliver*⁴⁸ the contract provided:

“(The merchandise) to be prime and guaranteed to comply with the United States Government regulations or if inferior a full allowance to be made. The same to be settled by arbitration, such arbitration to be demanded within 28 days and held within six weeks after the arrival of the vessel.”

The parties sought to adjust their differences and failing to do so, plaintiff sued at law for breach of warranty after the lapse of the 28 day period, neither party having demanded arbitration within that time. Defendants contended that plaintiff had lost its right to sue at law by failing to demand arbitration. The Appellate Division held that plaintiff could maintain the action at law, stating (at page 654 of its opinion):

“They (defendants) contend that under the contract plaintiff was required to arbitrate, and having failed to demand arbitration within twenty-eight days after the receipt of the goods, the time to arbitrate has expired, and an action is barred. With that view we do not agree.”

⁴⁷123 Misc. 809, (1924), reversed on appeal upon ground that award was void for other reasons. *Supra* n. 44b.

⁴⁸212 App. Div. 651, 209 N. Y. Supp. 470 (1925).

In *Matter of Smith*⁴⁹ the provision for arbitration contained in the standard form of architect's contract issued by the American Institute of Architects, read as follows:

"Should the party demanding arbitration fail to name an arbitrator within ten days of his demand (for arbitration) his right to arbitration shall lapse."

A dispute arose and the architect demanded arbitration, but failed to name his arbitrator in ten days. He then moved for an order directing arbitration. The court held that the provision just quoted was valid and binding and that by failure to name an arbitrator within the ten day period as required, the right to arbitration was lost, and the motion was accordingly denied.

ARBITRATION NOW A SPECIAL PROCEEDING—RIGHT TO TAKE TESTIMONY BY DEPOSITION IN ARBITRATION PROCEEDING

Prior to May 21, 1923, when the Arbitration Law was amended by the enactment of Section 6-a⁵⁰, an arbitration was neither a special proceeding nor an action and consequently testimony by deposition upon open or closed commission could not be taken in an arbitration proceeding, since under Sections 288 and 308 of the Civil Practice Act depositions may be taken only in an action or special proceeding.⁵¹ Section 6-a made arbitrations special proceedings and therefore, testimony by deposition upon open or closed commission may now be taken in arbitration proceedings.⁵² The order directing the parties to proceed to arbitrate is a final order.⁵³

CONTRACTS FOR ARBITRATION MADE BEFORE ARBITRATION LAW TOOK EFFECT

The Arbitration Law is applicable to contracts for arbitration made before the Arbitration Law took effect. The contracts for

⁴⁹119 Misc. 324 (1922).

⁵⁰Sec. 6-a provides:

"Arbitration a special proceeding. Arbitration of a controversy under a contract or submission described in section two shall be deemed a special proceeding, of which the court specified in the contract or agreement of submission, or if none be specified, the supreme court, shall have the like jurisdiction, for all purposes, as of a submission pursuant to article eighty-four of the civil practice act."

⁵¹See *Matter of InterOcean Corp. (Hoops)* 204 App. Div. 284, 197 N. Y. Supp. 706, aff'd 236 N. Y. 587 (1923); *Matter of InterOcean Corp. (Buell)* 206 App. Div. 658, 199 N. Y. Supp. 929, aff'd 236 N. Y. 586 (1923). These two cases arose before the enactment of Section 6-a of the Arbitration Law.

⁵²*Matter of InterOcean Mercantile Corp.* 207 App. Div. 164, 201 N. Y. Supp. 753 (1923). The court also held that as the witnesses, whose testimony was to be taken, were hostile, an open commission would issue to take the testimony upon oral interrogatories. The court required the moving party to pay expenses and a reasonable counsel fee to the other party.

⁵³*Matter of Hosiery Mfrs. Corp. v. Goldston* 238 N. Y. 22, at page 25, modifying 206 App. Div. 414, 201 N. Y. Supp. 516 (1924).

arbitration were not invalid, they were simply unenforceable before the Arbitration Law, and consequently with the enactment of that law, the barrier was removed, and arbitration will be directed under such contracts; nor does it matter that one of the parties has died before the passage of the Arbitration Law.⁵⁴

LAW OF FORUM GOVERNS ARBITRATION AGREEMENTS

In *Matter of Berkovitz*⁵⁵ Cardozo, J. writing for the Court of Appeals, stated at page 270:

"The common law limitation upon the enforcement of promises to arbitrate is part of the law of remedies. *Meacham v. James-town*, 211 N. Y. 346, 352; 232 Fed. 403, 405; (and other cases). The rule to be applied is the rule of the forum. Both in this court and elsewhere, the law has been so declared. Arbitration is a form of procedure whereby differences may be settled. It is not a definition of the rights and wrongs out of which differences grow. This statute did not attach a new obligation to sales already made. It vindicated by a new "method the obligation then existing."

Under that decision the New York courts should direct arbitration where provided for in a contract made in a jurisdiction where arbitration would not be directed, and should stay proceedings in an action upon the contract without making inquiry respecting the law concerning arbitration in the jurisdiction in which the contract was made.⁵⁶

⁵⁴In *Matter of Scott*, 234 N. Y. 539, aff'g. 200 App. Div. 599, 193 N. Y. Supp. 403 (1922) the Court of Appeals answered "yes" to the following question which was certified to it:

"Is the Arbitration Law applicable to said arbitration agreement made before its passage where one of the parties to such agreement has died before the passage of such law."

In *Matter of Berkovitz*, 230 N. Y. 261, reversing 193 App. Div. 423, 183 N. Y. Supp. 304, and affirming 193 App. Div. 937, 184 N. Y. Supp. 952 (1921) the Court of Appeals answered "yes" to the following question:

"Is the Arbitration Law applicable to contracts made prior to its enactment."

However, the Court of Appeals answered "no" to the question whether a defendant in an action brought prior to the taking effect of the arbitration law was entitled to a stay.

⁵⁵230 N. Y. 261, (1921). See also *U. S. Asphalt Co. v. Trinidad Lake Co.* 222 Fed. 1006 (1915).

⁵⁶*Cf. Austrian Lloyd S. S. Co. v. Gresham Life Assurance Co.* (1903) 1 K. B. 249.