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AND

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BARRISTER-AT-LAW.

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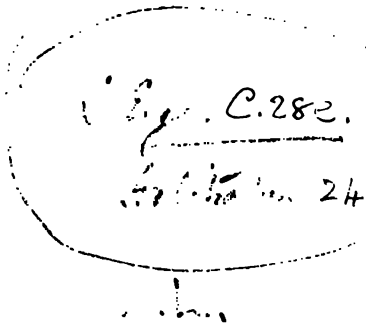

ARBITRATION AND AWARD

LONDON

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THE

LAW AND PRACTICE

OF

ARBITRATION AND AWARD

With Forms

BY

JOHN FREDERICK ARCHBOLD, ESQ.

BARRISTER-AT-LAW

LONDON

WILLIAM HENRY BOND, 8 BELL YARD

1861

PREFACE.

The advantages of arbitration, particularly in the case of disputed accounts, are not thoroughly understood. To those who are acquainted with the law upon the subject, it must appear a complete and most desirable substitute for an action at law or bill in equity. The expense of an action or bill in equity, in comparison with the moderate expense of an arbitration, would in ordinary cases induce parties about to be involved in litigation to choose the latter, if they can agree upon the appointment of an arbitrator well versed in the law or equity applicable to the case, and upon whose honour they may depend that he will act impartially as a judge between them, and not as the partisan of either. This is particularly to to be attended to when each party appoints an arbitrator; for the arbitrator in such a case is apt to think that it is his duty to advocate the case of the party who appointed him. This is a serious and grievous mistake, and leads frequently to

great injustice. Our courts, on the contrary, have in several cases laid down the true rule to be observed by the arbitrators in such cases, namely, that each arbitrator should deem himself appointed by both parties jointly. Arbitrators should, in fact, comport themselves as the judges in our courts of justice, whose unbiassed fairness in their decisions between parties is the admiration of every country in Europe and elsewhere.

The advantages of arbitration are deemed so great that the Legislature has interfered in favour of it, and by the "Common Law Procedure Act, 1854," (*a*) have introduced many valuable improvements. By that Act a court or a judge may actually compel an arbitration in all actions where the matter in dispute, wholly or in part, consists of matters of account (*b*). The same authority is given to the judge at *nisi prius*, where the action appears to involve matters of account (*c*). Where the reference is intended to be to one arbitrator, and the parties do not concur in the choice of him,—or if such arbitrator die or refuse to act,—or if the parties or two arbitrators are to appoint an umpire or third arbitrator, and they neglect to do so,—or if such umpire or third arbitrator die or refuse to act,—in every such case a judge upon application may appoint an arbitrator, umpire, or third arbitrator, in place of the one who died or

(*a*) 17 & 18 Vict. c. 124. (*b*) Id. s. 3. (*c*) Id. s. 6.

refused to act (*a*). So when the reference is to two arbitrators, and one dies or refuses to act, if the party who appointed him do not appoint another in his stead, the other party, after notice, may proceed in the arbitration before his own arbitrator, and the award shall be binding on both (*b*). When two arbitrators are appointed, and there is no mention of an umpire in the reference, the arbitrators may notwithstanding appoint an umpire of their own authority (*c*). These improvements I have stated here concisely, but the reader will find them fully developed in the course of the work. They show clearly the anxiety of the Legislature to render the remedy by arbitration as perfect and complete as possible.

This little work is designed as a pocket companion for all persons engaged in an arbitration, where they will find the law upon any particular subject which may occur, concisely, but truly and efficiently stated. And the arrangement of the work is such as to enable them to find, in the instant, what they want. In the first page the Reader has a comprehensive view of the different parts into which the work is divided; and afterwards, prefixed to each part, he will find a programme of its contents, which will enable him in the instant to place his hand upon any portion of the work he wishes to consult. This facility of re-

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(*a*) 17 & 18 Vict. c. 124, s. 12. (*b*) Id. s. 13. (*c*) Id. s. 14.

ference, I think, will be found particularly useful to parties, their counsel, and attorneys, at the time of their attendance at an arbitration, as well as to the arbitrator himself. I hope, indeed, that it will be found useful at all times, as well before the arbitration, as at or after it. I seek or wish for the work no higher commendation.

J. F. A.

12, King's Bench Walk, Temple.

THE

LAW OF ARBITRATION.

I HAVE arranged the Law of Arbitration and Award under the following heads; in which order I propose to treat of it.

PART I. — The Reference, p. 3.

II. — The Hearing, p. 22.

III. — The Award, p. 32.

IV. — Setting Aside the Award, p. 53.

V. — Enforcing the Award, p. 89.

NOTE. — The Appendix contains stat. 9 & 10 Wm. III. c. 15, — stat. 3 & 4 Wm. IV. c. 42, s. 39, — and stat. 17 & 18 Vict. c. 125, s. 1, and s. 3 to 17.

The Appendix also contains a Schedule of Forms, — those required under a compulsory reference, — and those required under an ordinary reference.

PART I.

THE REFERENCE.

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Action after agreeing to refer, p. 20.
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The Reference generally.

In what cases.

All matters in dispute between parties may be referred by them to arbitration. The Court of Queen's Bench, however, have refused to make a submission a rule of court, where part of the matter agreed to be referred had been made the sub-

ject of an indictment (*a*). And the Court of Exchequer, in one case, held that a poor-rate was not the subject of a reference, and that an award as to its validity, and the extent of liability of one of the parties to it, was therefore bad, and could not be enforced (*b*). But now, by stat. 12 & 13 Vict., c. 45, s. 12, all orders, rates, and other matters, in respect of which notice of appeal to the general or quarter sessions of the peace shall be given, and for which the remedy is by such appeal (not being a summary conviction or order of bastardy, or any proceedings under the Acts relating to the excise, customs, stamps, taxes, or post-office), the parties, by an order of a judge of the Court of Queen's Bench, may refer it to the arbitration or umpirage of any person or persons.

Also upon a trial before the sheriff, upon a writ of trial, a verdict cannot be taken subject to an award; for the sheriff is bound to try the cause, and cannot delegate his authority to another (*c*).

How. A submission to arbitration may be by order of *nisi prius*, or by rule of court, or by judge's order, or by bond or other deed or agreement of submission. These we shall consider presently. In drawing them up, care must be taken to define exactly what matter in difference is intended to be referred. The reference is usually either of all matters in difference between the parties, or of the matters in difference in some particular case, or of some specific matter in difference between them.

(*a*) *Watson* v. *M'Cullum*, 8 T. R. 520; but see *Baker* v. *Townsend*, 7 Taunt. 422. *R.* v. *Cotesbatch*, 2 D. & R. 265. *R.* v. *Hardey*, 19 Law J., 197, qb.

(*b*) *Thorp* v. *Cole et al.*, 2 Cr. M & R. 367; 1 Mees. & W. 531.

(*c*) *Wilson* v. *Thorpe*, 6 Mees. & W. 721.

A submission of all matters in difference between the parties in the cause would be, in fact, a submission, not of the cause only, but of all matters in difference; the words "parties in the cause" being merely a designation of the parties, and not of the subject of reference (*a*). But a reference of all matters in difference in the cause between the parties would be a reference of the cause only (*b*). Where the submission recited a claim by the plaintiff against the defendant for a sum of 201*l.*, and then stated an agreement to refer all matters in difference; in fact, the plaintiff had another claim against the defendant for 120*l.*, which he did not actually demand of him until after the date of the submission, but which he insisted upon before the arbitrator, and the arbitrator awarded upon it in his favour: the Court held that this recital in the submission did not limit the effect of the larger operative words, and that the arbitrator was right in deciding upon this claim of 120*l.*, it being a matter in difference between the parties (*c*). If, by mistake, the submission be drawn up differently from what was intended by one of the parties, so as to preclude him from bringing his case or any material part of it under the consideration of the arbitrator, he should apply to the other party to consent to its being amended; and, if he refuse, a judge upon summons will probably allow him to *revoke* his submission. But the Court, without consent, will not amend it (*d*).

(*a*) *Malcolm* v. *Fullarton*, 2 T. R. 645.

(*b*) Id., and see *Smith* v. *Muller*, 3 T. R. 624.

(*c*) *Charleton et al.* v. *Spencer*, 12 Law J. 23, yb.

(*d*) *Rawtree* v. *King*, 5 Moore, 167. *Pearman* v. *Carter*, 2 Chit. 29.

It may be necessary to mention that if a man agree to refer to arbitration a matter in which he legally has no interest, he will be bound by the award just as much as if he had or claimed a legal interest in it. And therefore, where a trader, after his bankruptcy, had submitted a matter to arbitration which had actually passed to his assignees, and the arbitrator awarded that he should pay the costs of the reference and award: the Court held that he was bound by the submission, and granted a rule requiring him to pay the costs accordingly (*a*). But where two persons, A. and B., joint traders, dissolved partnership, and B. took upon himself all the debts and liabilities; in some time afterwards, B. commenced an action in the partnership name for an alleged debt due to the firm, and the same and all matters in difference between the parties were referred to arbitration, A. however having no knowledge whatever of the action or reference; the arbitrator found that, although the defendant had been indebted to A. and B., yet that the debt had been much more than covered by a set-off, and he awarded that A. and B. should pay a certain sum to the defendant: the Court refused to grant an attachment against A. for the non-payment of this money, saying that the defendant, if entitled, might enforce payment by action (*b*).

It must be observed that parties cannot, in any general agreement amongst themselves, agree to refer all matters in dispute which may arise amongst them to arbitration exclusively, so as to exclude

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(*a*) *Re Milnes & Robertson*, 24 Law J. 29, cp.

(*b*) *Robertson et al.* v. *Hatton*, 26 Law J. 293, ex.

the jurisdiction of the Courts of law or equity. Where in an action of covenant the defendant pleaded that it was agreed by the parties to the deed that if any different question should arise between them touching any covenant, matter, or thing, expressed in the deed, or the meaning thereof, it should be settled by two arbitrators, to be nominated after such difference should arise, with mutual covenants to obey and perform the award, and not to bring any action at law or suit in equity without first submitting all matters to arbitration: the Court, on demurrer, held the plea to be bad, saying that the Courts of law cannot be ousted of their jurisdiction by any agreement of the parties; that is to say, a mere agreement to refer will not prevent a party from resorting to a court of law to enforce his rights or obtain a remedy for wrongs (*a*).

By whom.

Where the submission is by bonds or deed, the bonds or deed must be executed by the parties themselves, or by some persons authorised by them, for that purpose, by some instrument under seal; and the like, if the submission be by parol, or by agreement not under seal, except that the authority need not be by deed. And it has been holden that one of several partners cannot bind his co-partners by a submission to arbitration, even of matters arising out of the business of the firm (*b*). Where the submission is by rule of court or judge's order, it is always obtained by the attorneys of the respective parties; and at *nisi prius*, if the counsel

(*a*) *Horton* v. *Sayer*, 29 Law J. 28, ex. *Adams* v. *Bankart*, 1 Cr. M. & R. 681. And see *Boyd* v. *Emerson*, 4 Nev. & M. 99.

(*b*) *Stead* v. *Salt*, 3 Bing. 101.

or attorneys for parties in a cause consent to a reference, it is deemed binding on the clients, whether they are privy or consenting to it or not (*a*). Even where an attorney authorised to appear for a party consented to a reference, before any further proceedings were taken in the cause, the Court held that the authority to appear for the party was incidentally an authority to refer the action, and that a fresh authority for that purpose was unnecessary (*b*). So where, by a power of attorney, authority was given to a person to bring an action in another's name, and he did so accordingly, it was holden that he had thereby authority to consent to the action being referred to arbitration (*c*).

Reference by consent of Parties.

By bond or agreement.

If no action be pending, or indeed whether there be or not, the parties may submit the matter in difference between them to arbitration, either by mutual bonds of submission, or by deed, or by agreement not under seal, or by parol. In these instruments care should always be taken to introduce the consent clause, under stat. 9 & 10 W. 3, c. 15, which shall be mentioned presently, in order that the submission may be made a rule of court; and formerly this was essentially necessary, for otherwise you could not proceed against the party by attachment or execution for non-performance

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(*a*) *Filmer* v. *Delber*, 3 Taunt. 486. See *Biddell* v. *Dowse*, 6 B. & C 255.

(*b*) *Faviell* v. *Eastern Counties Railway Co.*, 17 Law J. 297, ex.

Smith et al. v. *Troup*, 18 Law J. 209, cp.

(*c*) *Hancock* v. *Reid*, 21 Law J. 78, qb.

of the award. But this is now altered, as we shall presently see.

By stat. 9 & 10 W 3, s. 1, parties wishing to end "any controversy, suit, or quarrel, for which there is no other remedy but by personal action or suit in equity," by arbitration, may agree that their submission shall be made a rule of any of his Majesty's Courts of record, and insert such agreement in their submission; and the same may afterwards, upon affidavit thereof by one of the witnesses thereto, be entered of record in such Court, and a rule be made thereupon; and if any of the parties disobey the award or umpirage to be made in pursuance of such submission, he shall be deemed guilty of a contempt of the said Court, and the Court on motion shall issue process against him.

And now, by stat. 17 & 18 Vict. c. 125, s. 17, every agreement or submission to arbitration by consent, whether by deed or instrument in writing not under seal, may be made a rule of any one of the superior Courts of law or equity at Westminster, on the application of any party thereto, unless such agreement or submission contain words purporting that the parties intend that it should not be made a rule of court; and if in any such agreement or submission it is provided that the same shall or may be made a rule of one in particular of such superior Courts, it may be made a rule of that court only; and if, when there is no such provision, a case be stated in the award for the opinion of one of the superior Courts, and such Court be specified in the award, and the document authorising the reference have not, before the

publication of the award to the parties, been made a rule of court, such document may be made a rule only of the court specified in the award; and when in any case the document authorising the reference is or has been made a rule or order of any one of such superior Courts, no other of such Courts shall have any jurisdiction to entertain any notion respecting the arbitration or award (*a*).

A parol submission is not within these Acts, and cannot therefore be made a rule of court, even with the consent of parties (*b*). Nor are mere criminal matters, which are the subject of indictment, within the stat. 9 & 10 W. 3; the words "Controversies, suits, or quarrels," in that statute, meaning only civil disputes between the parties (*c*). Where three actions in the Exchequer and one in the King's Bench were referred by one agreement, containing a consent that it might be made a rule of the Court of King's Bench or Exchequer; and after the award was made, the submission was accordingly made a rule of the Court of King's Bench; there was also an application to make it a rule of the Exchequer, but that Court refused to do so, saying that the Court of King's Bench, of which the submission was already made a rule, could deal with the whole matter as well as they could (*d*). So, where a cause in the Exchequer was referred by a judge's order, and it was made a part of the order that it should be made a rule of the Court of Queen's Bench: upon application for

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(*a*) 17 & 18 Vict. c. 125, s. 17.
(*b*) *Ansell* v. *Evans*, 7 T. R. 1.
(*c*) Per Ld. Kenyon in *Watson* v. *M'Cullum*, 8 T. R. 520; and see *Lucas* v. *Wilson*, 2 Burr, 701.
(*d*) *Winpenny* v. *Bates*, 1 Dowl. 559.

this purpose to Patteson, J., in the Bail Court, he held there was no objection to it, and it was accordingly done (*a*). Where the consent was, to make the "award" a rule of court, instead of the submission, the Court held it to be sufficient (*b*). Where the agreement of submission contained this consent, and the time for making the award was afterwards enlarged, but the enlargement did not contain it, it was contended that the submission alone could be made a rule of court, but not the enlargement; but the Court, after consulting with the other judges, held that a general consent to enlarge virtually included all the terms of the first submission, and among the rest the consent to make it a rule of court (*c*). The submission may be made a rule of court in vacation, as well as in term (*d*). And it may be made a rule of court, even after it has been revoked (*e*).

Another clause is now very commonly introduced, in all cases where the Court will have cognizance of the award, when made, namely, that if the Court shall be dissatisfied with the award or certificate of the arbitrator, they may refer the matter back to him, and order that the costs thereof shall abide the event (*f*).

The following is the form of an arbitration bond, from which a deed or agreement, if preferred, may readily be framed:—

(*a*) *Milstead* v. *Craufield*, 9 Dowl. 124.

(*b*) *Pedley* v. *Westmacott*, 3 East, 603. *Re Storey et al.*, 7 Ad. & El. 602. See *Soilleux* v. *Herbst*, 2 B. & P. 444. *Re Woodcroft & Jones*, 9 Dowl. 538.

(*c*) *Evans* v. *Thompson*, 5 East, 189.

(*d*) *Re Taylor*, 5 B. & A. 217.

(*e*) *Aston* v. *George*, 2 B. & A. 395. See 5 Taunt. 452, *semb. cont.*

(*f*) See *Webber* v. *Lee*, 1 Dowl. & Lo. 584. And see *post*.

Bond of Submission.

Know all men by these presents, that I, Joseph Styles, of ——, malster, am held and firmly bound to John Nokes, of ——, grocer, in £——, of good and lawful money of Great Britain, to be paid to the said John Nokes, or his certain attorney, executors, administrators, or assigns; for which payment well and truly to be made I bind myself, my heirs, executors, and administrators, firmly by these presents, sealed with my seal. Dated the —— day of ——, in the —— year of the reign of our sovereign Lady Victoria, of the United Kingdom of Great Britain and Ireland Queen Defender of the Faith, and in the year of our Lord 18—.

Whereas certain differences have arisen between the said John Nokes and the said Joseph Styles respecting [certain matters of account now open and unsettled between them], and it is agreed by and between the said John Nokes and the said Joseph Styles to refer to A. B. and C. D. as arbitrators [as well the said differences, as also all and all manner of action and actions, cause and causes of action, suits, bills, bonds, specialties, judgments, executions, extents, quarrels, controversies, trespasses, damages and demands whatsoever, both at law and in equity, at any time or times heretofore had, made, moved, brought, commenced, sued, prosecuted, done, suffered, committed, or depending by and between the said parties], with liberty to the said arbitrators [either before they enter upon the said arbitration, or] at any time pending the said reference, to appoint, choose, and name an umpire, and to make and publish their award or umpirage therein, notwithstanding the happening of my death or the death of the said John Nokes before the same shall be so made and published: Now the condition of this obligation is such, that if the above bounden Joseph Styles, his heirs, executors, or administrators, do and shall, upon his or their part and behalf, in all things well and truly stand to, obey, abide, observe, perform, fulfil, and keep the award, order, arbitrament, final end, and determination of the said arbitrators, so as the said award be made in writing on or before the —— day of ——, now next ensuing; or if the said arbitrators do not make such their award by the time aforesaid, then if the said Joseph Styles, his heirs, executors, or administrators, do and shall, upon his or their part and behalf, in all things well and truly stand to, obey, abide, observe, perform, fulfil, and keep the award, order, arbitrament, umpirage, final end and determination of the person so by the said arbitrators to be appointed, chosen, and named as umpire, as aforesaid, so as the said umpire do make his said award and umpirage in writing, on or before

the —— day of ——, now next ensuing: then this obligation to be void; otherwise to remain in full force and virtue. And the said Joseph Styles doth hereby agree that this his submission to the award and umpirage aforesaid shall be made a rule of Her Majesty's Court of [Queen's Bench, *or* "Common Pleas," *or* "Exchequer of Pleas,"] at Westminster, pursuant to the statute in such case made and provided.

JOSEPH STYLES. (L. S.)

Sealed and delivered (being first duly stamped) in the presence of

J. R.

By rule of court, or judge's order.

It is only in cases where an action is pending that the parties can submit to arbitration by a rule of court or a judge's order. The rule is obtained upon two motion papers, on which the terms of the reference are indorsed shortly, thus: "*Referred to Mr. ——, on the usual terms; award to be made on or before the ——*," adding, if necessary, such other terms not included in the usual printed form of the rule as may be agreed upon. Get these signed by counsel, and take them to the master's office, and the clerk there will thereupon draw up the rule. Or a judge's order may be obtained from his clerk upon a written consent to the like effect, signed by the attorneys on both sides. It may be necessary to mention that a judge's order, referring a cause, may be made a rule of court, even after the submission has been revoked by one of the parties; for it may be necessary, notwithstanding the revocation, to act upon that part of the order which gives costs for wilful delay (*a*).

By order of *nisi prius*.

When a cause is called on at *nisi prius*, it may be referred by an order of *nisi prius*, with the consent of both parties, their counsel or attorneys.

(*a*) *Aston* v. *George*, 2 B. & A. 395.

As soon as this is agreed upon, the counsel engaged in the cause indorse their briefs accordingly, and hand them to the associate, who will thereupon draw up the order. At the same time, it is usual to have the jury sworn, and to take their verdict for the plaintiff for the amount of the damages laid in the declaration, subject to the award; this formerly was necessary in bailable actions, for otherwise the bail would be discharged by the reference (*a*). If the award be at all likely to be under 20*l.*, or likely to be such in other respects as would require the certificate of the judge, if the cause had been tried, to give the parties costs, care should be taken that a power be given to the arbitrator, by the order, to certify in the same manner as the judge might have done (*b*). It is very usual, also, to insert a clause in the order, giving the arbitrator the same power of amendment that a judge has at *nisi prius*. If any mistake be made in drawing up in this order, if it be the mistake of the officer of the court, the court on application will amend it (*c*); but not if it be the mistake of the party (*d*).

arty refusg to apoint, or arrator dying refusing to ct.

By stat. 17 & 18 Vict. c. 125, s. 12, it is enacted that, if in any case of arbitration the document authorising the reference provide that the reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator:—or if any appointed arbitrator refuse to act, or become in-

(*a*) 2 Saund. 72, a.
(*b*) See *Wallen* v. *Smith*, 5 Mees. & W. 159. *Dewar* v. *Swabey*, 10 Law J. 328, qb. *Spain* v. *Cadell*, 9 Dowl. 745; 8 Mees. & W. 129. *Griffiths* v. *Thomas et al.*, 15 Law J. 336, qb.
(*c*) *Price* v. *James*, 2 Dowl. 435.
(*d*) *Wynn* v. *Nicholson*, 18 Law J. 231, cp.

capable of acting, or die, and the terms of such document do not show that it was intended that such vacancy should not be supplied, and the parties do not concur in appointing a new one; — or if when the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator, and such parties or arbitrators do not appoint an umpire or third arbitrator; — or if any appointed umpire and third arbitrator refuse to act, or become incapable of acting or die, and the terms of the document authorising the reference do not show that it was intended that such a vacancy should not be supplied, and the parties or arbitrators respectively do not appoint a new one: — then in every such instance any party may serve the remaining parties or the arbitrators, as the case may be, with a written notice to appoint an arbitrator, umpire or third arbitrator respectively; and if within seven clear days after such notice shall have been served, no arbitrator, umpire or third arbitrator be appointed, it shall be lawful for any judge of any of the superior Courts of law or equity at Westminster, upon summons to be taken out by the party having served such notice as aforesaid, to appoint an arbitrator, umpire or third arbitrator, as the case may be, and such arbitrator, umpire and third arbitrator respectively shall have the like power to act in the reference and make an award, as if he had been appointed by the consent of all parties.

And when the reference is or is intended to be to two arbitrators, one appointed by each party, it shall be lawful for either party, in the case of the death, refusal to act, or incapacity of any arbitrator

appointed by him, to substitute a new arbitrator, unless the document authorising the reference show that it was intended that the vacancy should not be supplied; and if on such a reference one party fail to appoint an arbitrator, either originally or by way of substitution as aforesaid, for seven clear days after the other party shall have appointed an arbitrator, and shall have served the party so failing to appoint with notice in writing to make the appointment, the party who has appointed an arbitrator may appoint such arbitrator to act as sole arbitrator in the reference, and an award made by him shall be binding on both parties, as if the appointment had been by consent; provided, however, that the Court or a judge may revoke such appointment, on such terms as shall seem just (*a*).

Before the above Act, where a verdict for plaintiff was taken at *nisi prius*, subject to the award of a barrister, who afterwards declined to act, as he had previously been consulted by one of the parties; the defendant was therefore required to join in appointing another arbitrator, but he refused to do so, saying that he wished the case to be submitted to a jury: the Court, upon application, ordered that unless he would consent within a time limited to refer the damages to another arbitrator, judgment should be entered up, and execution issue, for the damages given by the verdict (*b*). But where in such a case the arbitrator died, and the parties agreed to substitute another, but the

(*a*) 17 & 18 Vict. c. 125, s. 13.
(*b*) *Woolley* v. *Kelley*, 1 B. & C. 68. See *Kirkus* v. *Hodgson*, 8 Taunt. 733.

defendant afterwards would not join in the appointment; the Court refused to interfere, saying that the death of the arbitrator had the effect of opening the cause, and that they could not therefore order execution to issue on the verdict (*a*). Where the arbitrator thus refuses to act, the Court have no power to compel him (*b*). Nor can the parties, in such a case, where the cause has been referred at *nisi prius* and a verdict taken, regularly go to trial a second time, without the leave of the Court, or until the verdict has been set aside (*c*). Where there was a reference by deed to A. and B., and afterwards by a written memorandum C. was substituted for B.: this was holden to be a good substitution, as amounting to a submission not under seal, incorporating in it all the provisions of the former submission, except perhaps that of making it a rule of court (*d*).

Compulsory Reference.

By the Court or a Judge.

By stat. 17 & 18 Vict. c. 125, s. 3, if it be made appear, at any time after the issuing of the writ, to the satisfaction of the Court or a judge, upon the application of either party, that the matter in dispute consists wholly or in part of matters of mere account, which cannot conveniently be tried in the ordinary way, it shall be lawful for such Court or judge, upon such application, if they or he think fit, to decide such matter in a summary manner, or to order that such matter, either wholly

(*a*) *Harper* v. *Abrahams*, 4 Moore, 3.
(*b*) *Lewin* v. *Holbroke*, 11 Mees. & W. 110.
(*c*) *Evans* v. *Davis*, 1 Gale, 150.
(*d*) *Re Tunno & Bird*, 2 Nev. & M. 328.

or in part, be referred to an arbitrator appointed by the parties,—or to an officer of the Court,—or, in country causes, to the judge of any county court,—upon such terms as to costs and otherwise as such Court or judge shall think reasonable; and the decision or order of such Court or judge, or the award or certificate of such referee, shall be enforceable by the same process as the finding of a jury upon the matter referred (*a*). Where a part only of the matters in dispute consists of matter of account, the Court or a judge may order the whole matters in dispute, or a part only, to be referred to arbitration (*b*). And where a case was referred to the master, under this clause of the Act, it was holden that he was bound to proceed as in an ordinary arbitration, and had no right to refuse to inquire into a question of fraud raised before him as to a part of the accounts in dispute (*c*). Also, where a plaintiff assented to an order being made under this section of the statute, it was holden that he could not, after some delay, apply to rescind the order, on the ground of its not being matter of mere account (*d*).

Where an order refers a cause to a county court, under the above section, it is compulsory upon the judge of the court, and he cannot decline the reference; if he be desirous of having the propriety of referring the cause to him questioned, his proper course is to apply to set aside the order (*e*).

Where a cause has been refused under the above

(*a*) 17 & 18 Vict. c. 125, s. 3.
(*b*) *Brown* v. *Emerson*, 25 Law J. 104, cp.
(*c*) *Howell* v. *Morgan*, 27 L. J. 75, cp.
(*d*) *Rogers* v. *Kearns*, 29 Law J. 328, ex.
(*e*) *Cummins* v. *Birkett*, 27 Law J. 216, ex.

section, the Court have power, at any time before the award, to amend the particulars of the plaintiff's demand (*a*).

And if it shall appear to the Court or a judge that the allowance or disallowance of any particular item or items in such account depends upon a question of law fit to be decided by the Court, or upon a question of fact fit to be decided by a jury, or by a judge upon the consent of both parties as hereinbefore provided, it shall be lawful for such Court or judge to direct a case to be stated, or an issue or issues to be tried; and the decision of the Court upon such case, and the finding of the jury or judge upon such issue or issues, shall be taken and acted upon by the arbitrator as conclusive (*b*).

By a judge at *nisi prius*.

By stat. 17 & 18 Vict. c. 125, s. 6, if upon the trial of any issue of fact by a judge under this Act it shall appear to the judge, that the questions arising thereon involve matter of account which cannot conveniently be tried before him, it shall be lawful for him, at his discretion, to order that such matter of account be referred to an arbitrator appointed by the parties, — or to an officer of the court,— or, in country causes, to a judge of any county court,— upon such terms as to costs, and otherwise, as such judge shall think reasonable; and the award or certificate of such referee shall have the same effect as hereinbefore provided as to the award or certificate of a referee before trial; and it shall be competent for the judge to proceed

(*a*) *Gibbs* v. *Knightley*, 26 Law J. 294, ex.

(*b*) 17 & 18 Vict. c. 125, s. 4.

to try and dispose of any other matters in question not referred, in like manner as if no reference had been made (*a*).

And the proceedings upon any such arbitration as aforesaid shall, except otherwise directed hereby or by the submission or document authorising the reference, be conducted in like manner, and subject to the same rules and enactments, as to the power of the arbitrator and of the Court, the attendance of witnesses, the production of documents, enforcing or setting aside the award, and otherwise, as upon a reference made by consent under a rule of court or judge's order (*b*).

Action after agreeing to refer.

Stay of proceedings.

By stat. 17 & 18 Vict. c. 125, s. 11, whenever the parties to any deed or instrument in writing to be hereafter made or executed, or any of them, shall agree that any then existing or future differences between them or any of them shall be referred to arbitration, and any one or more of the parties so agreeing, or any person or persons claiming through or under him or them, shall nevertheless commence any action at law or suit in equity against the other party or parties, or any of them, or against any person or persons claiming through or under him or them, in respect of the matters so agreed to be referred, or any of them, it shall be lawful for the Court in which such action or suit is brought, or a judge thereof, on application by the defendant or defendants, or any of them, after appearance and

(*a*) 17 & 18 Vict. c. 125, s. 6. (*b*) Id. s. 7.

before plea or answer, upon being satisfied that no sufficient reason exists why such matters cannot be or ought not to be referred to arbitration according to such agreement as aforesaid, and that the defendant was at the time of the bringing of such action or suit and still is ready and willing to join and concur in all acts necessary and proper for causing such matters so to be decided by arbitration, to make a rule or order staying all proceedings in such action or suit, on such terms as to costs and otherwise as to such Court or judge may seem fit: provided always, that any such rule or order may at any time afterwards be discharged or varied as justice may require (*a*). This applies, not only to cases where an action is brought, pending a reference, but to cases where persons bind themselves by deed, &c., to refer to arbitration all disputes which may thereafter arise between them (*b*).

(*a*) 17 & 18 Vict. c. 125, s. 11.

(*b*) See *Wickam* v. *Harding*, 28 Law J. 215, ex. And see *Horton* v. *Sayer*, 29 Law J. 28, ex. *antè*, p. 7.

PART II.

THE HEARING.

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Proceedings before the Arbitrator.

Generally.

After having obtained the submission, and ascertained that the arbitrator will undertake the reference, get a written appointment from the arbitrator, and serve a copy of it on the opposite party. Make out a short statement of your case, and leave it with the arbitrator; or if the cause have been referred at *nisi prius*, leave him one of the briefs. Then attend at the time appointed with your witnesses, and have them called in before the arbitrator, in the order in which you wish them to

be examined. If statements, as above-mentioned, or the briefs, have been delivered to the arbitrator, it is not usual or necessary for even counsel to address him in the first instance, but he at once proceeds to hear the witnesses on both sides; and he then hears the parties by their counsel or attorneys, —for the plaintiff first, then for the defendant, and lastly (if the defendant have called witnesses or given other evidence), for the plaintiff in reply. Some arbitrators, in cases where the defendant has given evidence, allow the counsel or attorney for the defendant to address him first, and then the plaintiff's counsel or attorney in reply. But in this, and in all other matters under the immediate control of the arbitrator, it is impossible to lay down any general rule of practice, each arbitrator usually adopting such a line of practice in this respect as he thinks best. As to the law connected with this part of the subject, independently of the practice, it will be convenient to consider it under the following heads:—

Witnesses.

Where the submission is by rule of court, or judge's order, or order of *nisi prius*, or where it contains a consent that it shall be made a rule of court, the attendance of witnesses before the arbitrator may be compelled, either by rule of court or a judge's order, the party, at the time of making the application, stating the county in which the witness resides, or that he cannot be found; they may also be compelled by such rule or order to produce such documents as they would be bound to produce upon a trial (*a*). The rule in this case

(*a*) 3 & 4 W. 4, c. 42, s. 40.

is a rule absolute in the first instance (*a*). An appointment of the time and place of attendance, signed by one at least of the arbitrators or by the umpire, must be served upon the witness, together with, or after, the rule or order, and his expenses tendered to him in the same manner as in the case of a trial; after which, disobedience of the rule or order will be deemed a contempt of the court (*b*). But he shall not be compelled to attend more than two consecutive days, to be named in such order (*c*). There is no objection, it should seem, to have one order for all the witnesses on each side, and to serve copies upon them personally, at the same time showing them the original, in the same manner as in the case of a subpœna; but it may be prudent to have a signed appointment for each witness.

The witnesses may be sworn by any one of the arbitrators or the umpire (*d*). And the submission directing the witnesses to be sworn before a judge or commissioner (which may still be done), (*e*) does not exclude this general power of the arbitrator to administer the oath (*f*). The form of oath to be administered may be thus: "*You shall true answers make to all such questions as shall be asked of you, touching the matters in question between the parties to this reference: So help you God.*" Or in the case of a Quaker or Moravian, he may make an affirmation thus, repeating it after the arbitrator: "*I, A, B. being* [*one of the people*

(*a*) *Re Guarantee Society and Levy*, 1 Dowl. & Lo. 907.
(*b*) 3 & 4 W. 4, c. 42, s. 40.
(*c*) Id.
(*d*) Id. s. 41.
(*e*) *James* v. *Attwood*, 5 Bing. N. C. 628.
(*f*) *Hodsoll* v. *Wise*, 4 Mees. & W. 536. *S. C. nom. Hodson* v. *Wilde*, 7 Dowl. 15.

called Quakers," or *"one of the united brethren called Moravians] do solemnly, sincerely and truly declare and affirm, that I shall true answers make to all such questions as shall be asked of me, touching the matters in question between the parties to this reference."* So, seemingly, other persons having an objection to take an oath may be allowed to make an affirmation, in the same manner as at *nisi prius* (*a*). It is no objection, however, to an award, that the witnesses were not examined upon oath, if that objection were not made at the time of the examination (*b*). And where by the terms of the submission the arbitrators were to be at liberty, if they thought fit, to examine the parties and their respective witnesses upon oath, it was holden that the arbitrators were not bound to examine the parties on oath, although required by one of the parties to do so (*c*). But where the submission required the witnesses to be examined on oath, and the arbitrator received some affidavits, the Court set aside the award, saying that the deponents ought to have been examined *vivâ voce* (*d*).

Examination of the parties.

The rule or order of reference usually authorises the arbitrator to examine the parties, if he think fit. Formerly, indeed, arbitrators very seldom availed themselves of the power; and when they did, it was usually by examining one party for the other, as to matters of which there was no other evidence (*e*). But there was no objection to his

(*a*) See stat. 17 & 18 Vict. c. 125, s. 20.
(*b*) *Ridout* v. *Pye*, 1 B. & P. 91.
(*c*) *Smith* v. *Goff*, 14 Mees. & W. 264.
(*d*) *Banks* v. *Banks*, 1 Gale, 46.
(*e*) See *Warne* v. *Bryant*, 3 B. & C. 590.

examining the parties, each in support of his own case, if he thought fit (*a*); and as now the parties to suits, actions, or other proceedings in courts of justice, are not merely competent, but are compellable to give evidence for or against each other (*b*), it will be the duty of the arbitrator to examine the parties, if required, even it should seem in cases where no action is pending. Or he may require one or both of them to submit to be examined, under the terms of the rule or order of reference, even against their consent. But he cannot compel him to answer any question tending to criminate himself (*c*). The examination in such a case was usually conducted by the arbitrator himself, without the interference of counsel, &c.; but this practice is no longer adopted.

Umpire and Umpirage.

Appointed under the submission.

If the submission direct an umpirage, in case the arbitrators should disagree, it either names the umpire, or directs how and when he shall be appointed. If he is to be appointed by the arbitrators, he may in general be appointed by them before they enter upon the reference, even although the submission give the power to appoint only in case of their disagreeing (*d*). They may, in fact, appoint him either before or after the time limited for making their own award (*e*). But they must appoint him, if at all, before the time appointed by the submission for the making of his umpirage (*f*)

(*a*) *Wells* v. *Benskin*, 9 Mees. & W. 45.
(*b*) 14 & 15 Vict. c. 99, s. 2.
(*c*) Id. s. 3.
(*d*) *Bates* v. *Cook*, 9 B. & C. 407. *Roe d. Wood* v. *Doe*, 2 T. R. 644.
(*e*) *Harding* v. *Watts*, 15 East, 556.
(*f*) *Re Doddington et al.*, 8 Law J. 331, cp.

If the arbitrators are to appoint him, his appointment should be matter of choice, not of chance: they cannot choose him by lot, or by tossing up, or the like; if they do, his umpirage cannot be enforced, and the Court upon application will set it aside (*a*),—unless indeed he have been so chosen, with the knowledge and consent of the parties (*b*), or their agents (*c*). Also the appointment of an umpire is holden to be a judicial act; and where the power to appoint was given to two arbitrators, it appeared that the appointment had not been made by both at the same time or in each other's presence, the Court refused a rule for an attachment for non-performance of the award of the umpire (*d*). Where one of two arbitrators chose the umpire, under some claim of right to do so which was acquiesced in, though with some reluctance, and for the sake of peace, by the other: the Court refused to set aside the umpirage (*e*). Where arbitrators choose an umpire, and, upon his refusing to act, choose another, their second choice is good; their power to appoint is not determined by the first choice, if the umpire then chosen refuse to act (*f*). Where the power was given to two arbitrators, if they should not agree, to appoint a third person "to be umpire in or to join with them in considering all or any of the matters referred," it was holden that they might appoint

(*a*) *Re Cassel*, 9 B. & C. 624. *Ford* v. *Jones*, 3 B. & Ad. 248. *Wells* v. *Cooke*, 2 B. & A. 218. *Young* v. *Miller*, 3 B. & C. 407. *Re Greenwood et al.*, 9 Ad. & El. 699. *Hodson* v. *Drewry*, 7 Dowl. 569. *European & American Steam Shipping Company* v. *Croskey*, 29 Law J. 155, cp.

(*b*) *Re Tunno & Bird*, 5 B. & Ad. 488; 2 Nev. & M. 328; and see *Re Jamieson*, 2 Har. & W. 35.

(*c*) *Backhouse* v. *Taylor*, 20 Law J. 233, qb.

(*d*) *Lord* v. *Lord*, 26 Law J. 34, qb.

(*e*) *Re Vinicombe & Morgan*, 10 Law J. 128, qb.

(*f*) *Trippet* v. *Eyre*, 3 Lev. 563. *Oliver* v. *Collings*, 11 East, 367.

ny legal arbitrator, the arbitrator, however, called in an attorney to sit with him, whereupon the defendant protested against it, and withdrew from the reference: an award afterwards made in his absence was holden bad (*a*).

Or if, where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator, such parties or arbitrators do not appoint an umpire or third arbitrator;—or if any appointed umpire or third arbitrator refuse to act, or become incapable of acting, or die, and the terms of the document authorising the reference do not show that it was intended that such a vacancy should not be supplied, and the parties or arbitrators respectively do not appoint a new one:—then in every such instance any party may serve the remaining parties or the arbitrators, as the case may be, with a written notice to appoint an arbitrator, umpire, or third arbitrator respectively; and if within seven clear days after such notice shall have been served no arbitrator, umpire, or third arbitrator be appointed, it shall be lawful for any judge of any of the superior Courts of law or equity at Westminster, upon summons to be taken out by the party having served such notice as aforesaid, to appoint an arbitrator, umpire, or third arbitrator, as the case may be, and such arbitrator, umpire, and third arbitrator respectively shall have the like power to act in the reference and make an award, as if he had been appointed by consent of all parties (*b*).

(*a*) *Proctor* v. *Williamson*, 29 Law J. 157, cp.

(*b*) 17 & 18 Vict. c. 125, s. 12.

such person before any difference had arisen, and before any proceedings had been taken in the reference, and that such was the proper course to pursue: and the effect of his appointment was, that he was to sit with the arbitrators and hear the evidence, and if they did not agree in an award, to make one himself, not merely in the matters on which they disagreed, but upon the whole of the matters referred (*a*).

If the parties or arbitrators do not appoint the umpire, or if the umpire die or refuse to act, we have seen (*b*) that a judge upon application will appoint the umpire (*c*).

Where an umpire shall have been appointed, it shall be lawful for him to enter on the reference in lieu of the arbitrators, if the latter shall have allowed their time or their extended time to expire without making an award, or shall have delivered to any party or to the umpire a notice in writing stating that they cannot agree (*d*).

Appointed under the statute.

By stat. 17 & 18 Vict. c. 125. s. 14, when the reference is to two arbitrators, and the terms of the document authorising it do not show that it was intended that there should not be an umpire, or provide otherwise for the appointment of an umpire, the two arbitrators may appoint an umpire at any time within the period during which they have power to make an award, unless they be called upon by notice as aforesaid to make the appointment sooner (*e*). When a cause was referred to a mining agent, objection being made to

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(*a*) *Winteringham* v. *Robertson*, 27 Law J. 301, ex.
(*b*) *Antè*, p. 15.
(*c*) 17 & 18 Vict. c. 125, s. 12.
(*d*) Id. s. 15.
(*e*) Id. s. 14.

any legal arbitrator, the arbitrator, however, called in an attorney to sit with him, whereupon the defendant protested against it, and withdrew from the reference: an award afterwards made in his absence was holden bad (*a*).

Or if, where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator, such parties or arbitrators do not appoint an umpire or third arbitrator;—or if any appointed umpire or third arbitrator refuse to act, or become incapable of acting, or die, and the terms of the document authorising the reference do not show that it was intended that such a vacancy should not be supplied, and the parties or arbitrators respectively do not appoint a new one:—then in every such instance any party may serve the remaining parties or the arbitrators, as the case may be, with a written notice to appoint an arbitrator, umpire, or third arbitrator respectively; and if within seven clear days after such notice shall have been served no arbitrator, umpire, or third arbitrator be appointed, it shall be lawful for any judge of any of the superior Courts of law or equity at Westminster, upon summons to be taken out by the party having served such notice as aforesaid, to appoint an arbitrator, umpire, or third arbitrator, as the case may be, and such arbitrator, umpire, and third arbitrator respectively shall have the like power to act in the reference and make an award, as if he had been appointed by consent of all parties (*b*).

(*a*) *Proctor* v. *Williamson*, 29 Law J. 157, cp.

(*b*) 17 & 18 Vict. c. 125, s. 12.

His proceedings.

When the umpire enters upon his umpirage, he may re-examine the witnesses; but it has been holden not to be objectionable for the umpire to receive the evidence from the arbitrators (*a*), unless the parties require him to do otherwise (*b*), or expressly consent to his doing otherwise; if either of them request of him to examine the witnesses, and he refuse to do so, the Court will set aside the award (*c*). So, if an umpire refuse to receive further evidence, besides that which was given before the arbitrators, his umpirage will be bad, and the Court will set it aside; and the fact of one of the parties having taken it up, will be no waiver of the objection (*d*). And where a matter was referred to two arbitrators, and such third person as they, or the majority of them, should appoint, and the two arbitrators having disagreed, each made a written statement as to what he thought the award should be, and submitted it to the umpire, and the umpire, and one of the arbitrators, without any meeting of the three, made the award: this was holden bad (*e*). He may make his umpirage at any time before the expiration of the time limited for that purpose by the submission; he may do so even before the time limited for the arbitrators making their award (*f*). Where the umpire was to make his umpirage within six months, and he made it within six calendar months, but not within six lunar months,

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(*a*) *Re Firth & Howlett*, 19 Law J. 169, qb.
(*b*) *Hall* v. *Lawrence*. 4 T. R. 589.
(*c*) *Re Salkeld et al.*, 10 Law J. 22, qb.
(*d*) *Re Jenkins et al.*, 11 Law J. 71, qb.
(*e*) *Re Templeman and Reed*, 9 Dowl. 962.
(*f*) *Sprigens* v. *Nash*, 5 M. & S. 193. *Smailes* v. *Wright*, 3 M. & S. 559.

the umpirage was holden bad(*a*); but this perhaps would now be holden otherwise. There is no objection to the arbitrators joining with him in his umpirage; their doing so does not affect the umpirage either one way or the other (*b*). But it seems that arbitrators cannot decide upon part, and the umpire upon another part, of the matters referred, unless the submission contain a special authority to that effect (*c*). On the other hand, where by the submission the arbitrators had a power to appoint an umpire, and the parties bound themselves to perform and obey the award of the said two arbitrators *and* their umpire, an award was made by the two arbitrators only, and it did not appear they had appointed any umpire; the Court held the award bad, and refused to grant an attachment for the non-performance of it (*d*).

(*a*) *Re Swinford and Horn*, 6 M. & S. 226.

(*b*) *Soulsby* v. *Hodgson*, 3 Burr. 1474. *Beck* v. *Sargent*, 4 Taunt. 232.

(*c*) *Tollit* v. *Saunders*, 9 Price, 512. See *Harlow* v. *Read*, 1 M. Gr. & S. 733.

(*d*) *Hetherington* v. *Robinson*, 4 Mees. & W. 608. See *Peterson* v. *Ayre*, 23 Law J. 129, cp.

PART III.

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Time for making the Award enlarged.

Under the submission.

Formerly if the submission mentioned a time within which the award should be made, that was a condition which must have been strictly complied with. If that time elapsed before the award was made, the Court could not interfere, either at the instance of the arbitrator or of one of the parties (*a*),

(*a*) *Burley* v. *Stevens,* 4 Dowl. 255.

without the consent of the rest (*a*). If, indeed, a verdict had been taken subject to the award, that placed the case within the power of the Court; and where the time was accidentally allowed to elapse by the arbitrator, and the defendant refused to consent to its enlargement, the Court ordered that, unless he would consent, judgment should be given and execution issued for the amount of the verdict (*b*). But the Court refused to make such an order, where the award was not made within the time limited, owing to the negligence of the plaintiff's attorney (*c*). Also, if the arbitrator enlarged the time, without authority for that purpose, and made his award within the enlarged time, it was bad (*d*).

The submission, however, usually contains a power to the arbitrator to enlarge the time for making his award (*e*); and which power he may exercise as often as he finds it necessary for the purpose (*f*). And if power be thus given to arbitrators to enlarge the time, and in case of their disagreement they are to choose an umpire, who shall have power to make the award "at the time and in manner aforesaid," this impliedly gives the umpire power to enlarge the time by his single authority (*g*). It is usually required to be done in some particular way specified in the submission; and the power must be strictly pursued. Where the order of reference required the arbitrator to

(*a*) *Teasdale* v. *Atkins*, 2 Tidd, 880.
(*b*) *Taylor* v. *Gregory*, 2 B. & Ad. 774. *Wilkinson* v. *Time*, 4 Dowl. 37.
(*c*) *Doe* v. *Saunders*, 3 B. & Ad. 783.
(*d*) See *M'Arthur* v. *Campbell*, 2 Nev. & M. 446 (a).
(*e*) See *Kirk* v. *Unwin*, *et al.*, 20 Law J. 345, ex.
(*f*) *Payne* v. *Deakle*, 1 Taunt. 509. *Barratt* v. *Parry*, 4 Taunt. 658.
(*g*) *Re Vinicome and Morgan*, 10 Law J. 128, qb.

make his award on or before a certain day, or before such further day as he should appoint by an indorsement on the order, and the Court or a judge should order; and the arbitrator enlarged the time by indorsement, and made his award within the enlarged time, but no judge's order was obtained: the Court held the award to be bad, for at the time it was made the arbitrator had no authority (*a*). And the same where, before the passing of stat. 3 & 4 W. 4, c. 42, hereafter mentioned (*b*), the time was to be enlarged by indorsement, and it was, in fact, enlarged by a judge's order (*c*). So, where a cause was referred to two arbitrators, with power to them to appoint a third, and the award was to be made by a day named, or such other day as "they or any two of them" should direct; they in fact enlarged the time before they appointed: the Court held this to be clearly a bad enlargement, and that an award afterwards made by the three, was bad (*d*). And the objection is not waived in such a case by the party's attending before the arbitrator, cross-examining a witness (*e*), or the like. But where the power given by an order of reference was, that the arbitrator might enlarge the time as he might require, and a judge of the court might think reasonable and just; and the arbitrator, before the original time expired, indorsed on the order that he required a further time, but the judge's order was not obtained till a day subsequent: this was

(*a*) *Mason* v. *Wallis*, 10 B. & C. 107.
(*b*) *Post*, p. 36.
(*c*) *Leggett* v. *Finlay*, 6 Bing. 255.
(*d*) *Reade* v. *Dutton*, 2 Mees. & W. 69.
(*e*) *Hall et al.* v. *Rouse*, 4 Mees. & W. 24. But see *Hallett* v. *Hallett*, 5 Mees. & W. 25, *semb. cont.*

holden to be sufficient (*a*). Where a submission enabled the arbitrator to enlarge the time, but did not mention in what manner it was to be done, it was holden to be sufficiently enlarged by the arbitrator appointing a subsequent day for another meeting, in the presence of the parties (*b*). Where a matter was referred to A. and B. who were to make their award on or before the 20th August, or such other time as they should appoint, and in case they disagreed it was to be referred to C. as umpire, so as his umpirage should be made before the 20th September, or such other day as he should appoint; A. and B. did not make their award before the 20th August, but enlarged the time until the 1st November; and in the meantime C. enlarged his time until the 20th December; on the 20th October A. and B. gave notice to C. that they could not agree, and he afterwards made his umpirage on the 19th December: the Court held the time to have been well enlarged by the umpire, although at the time he did so he did not know that he should be called upon to act (*c*). And an irregularity in this respect may in general be cured by the consent of parties (*d*). Where he enlarges it "until" a particular day, it is deemed inclusive of that day (*e*). In bonds, &c. of submission, such powers to enlarge the time are not so usual; but if omitted, the day mentioned may be altered, and the bond re-executed (*f*) or the

(*a*) *Reid* v. *Fryatt*, 1 M. & S. 1.
(*b*) *Burley* v. *Stevens*, 4 Dowl. 770.
(*c*) *Re Doddington et al.*, 5 Bing. N. C. 591.
(*d*) See *Benwell* v. *Hinxman*, 1 Cr. M. & R. 934. *Lawrence* v. *Hodgson*, 1 Young. & J. 16. See *Davison* v. *Gauntlett*, 3 Man. & Gr. 550.
(*e*) *Kerr* v. *Jeston*, 1 Dowl. N.C. 538; and see *Higham* v. *Jessop*, 9 Dowl. 203.
(*f*) See *Watkins* v. *Philpotts*, 1 M'Clel. & Y. 393.

enlargement of the time may be effected by indorsement (*a*).

r statute. By stat. 3 & 4 W. 4, c. 42, s. 39, the Court or any judge thereof may from time to time enlarge the term for any such arbitrator making his award (*b*); and this even in a case where the arbitrator had the power to enlarge the time, but had omitted to exercise it before a previously enlarged time had elapsed (*c*). But it is discretionary with the Court whether they will enlarge the time or not; and in such a case as the above, the Court, although they held that they had power to enlarge the time, they refused to do so, owing to the peculiar circumstances of the case (*d*). And it is now holden by the Court of Exchequer, that this proviso in stat. 3 & 4 W. 4, c. 42, s. 39, "that the Court or any judge thereof may from time to time enlarge the term for any such arbitrator making his award," is not confined to the case of revocation mentioned in that section, but is of general application (*e*). And therefore, where a time is limited in the submission for the making of the award, and power is given to the arbitrator to enlarge it, but he through inadvertence allows the time to pass without doing so, the Court upon application will enlarge it (*f*), if a very long and unreasonable

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(*a*) *Greig* v. *Talbot*, 2 B. & C. 179. *Evans* v. *Thompson*, 5 East, 189.

(*b*) See *antè*, p. 34.

(*c*) *Leslie* v. *Richardson*, 17 Law J. 324, cp. *Parkes* v. *Smith*, 19 Law J. 405, qb. *Browne* v. *Collyer*, 20 Law J. 426, qb. See *Andrews* v. *Eaton*, 21 Law J. 110, ex. *Edwards* v. *Davies*, 23 Law J. 278, qb. *Re Johnson and Collie*, 24 Law J. 43, qb.

(*d*) *Edwards* v. *Davies*, 23 Law J. 278, qb.

(*e*) *Burley* v. *Stevens*, 1 Mees. & W. 156; and see *Potter* v. *Newman*, 2 Cr. M. & R. 742, *Leslie* v. *Richardson*, 17 Law J. 324, cp. *Parkes* v. *Smith*, 19 Law J. 405, qb.

(*f*) *Parberry* v. *Newnham*, 7 Mees. & W. 378; and see *Davison* v. *Gauntlett et al.*, 3 Man. & Gr. 550.

time have not been allowed to elapse (*a*). But where the time was allowed intentionally to expire, and one of the parties afterwards refused to consent to the enlargement, the Court held that they had no power to compel him (*b*). On the other hand, where the submission (which was by deed) limited no time for making the award, but the arbitrators, by a memorandum afterwards indorsed on the deed, and signed by them, but not by the parties, agreed that the award should be made within a certain time: Coleridge, J., held that the arbitrators had no power to do this, and that an award made after the time was valid (*c*).

And also now, by stat. 17 & 18 Vict. c. 125, s. 15, the arbitrator, acting under any document or any compulsory order of reference, as aforesaid, or under any order referring the award back, shall make his award under his hand, and (unless such document or order respectively shall contain a different limit of time) within three months after he shall have been appointed, and shall have entered on the reference, or shall have been called upon to act by a notice in writing from any party; but the parties may by consent in writing enlarge the term for making the award; and it shall be lawful for the superior Court of which such submission, document, or order is or may be made a rule or order, or for any judge thereof, for good cause to be stated in the rule or order for enlargement, from time to time to enlarge the term for making the award; and if no period be stated for

(*a*) See *Lambert et al.* v. *Hutchinson*, 2 Man. & Gr. 858.
(*b*) *Doe* v. *Powell*, 7 Dowl. 539. But see now stat. 17 & 18 Vict. c. 125, s. 15, *infra*.
(*c*) *Re Morphett*, 14 Law J. 259, qb.

the enlargement in such consent or order for enlargement, it shall be deemed to be an enlargement for one month (*a*). And where the award was not made within the three months, and the time was not enlarged by the Court or a judge or the written consent of the parties, but they nevertheless continued to attend before the arbitrator without objection, the Court held that the party against whom the award was made was estopped from alleging that there was no written consent to the enlargement (*b*). It is not necessary that the order for enlargement under this Act should state any cause for making it (*c*).

The Award.

The award. It is not necessary to the validity of an award that it should be in any precise form of words; it is enough if it appear that the arbitrator has finally decided on the matters submitted to him (*d*). And where by the terms of the submission the arbitrator was to have a view before he made his award, and he had a view accordingly, it was holden not necessary to state this in his award (*e*). But where a matter in difference was referred, and the arbitrator, after having examined into it, wrote a letter to the parties in which, after making some observations, he said "I propose Mr. V. should pay Mr. L. 10*l.*;" this was holden not to be an award; it was merely a recommendation (*f*). Care, however,

(*a*) 17 & 18 Vict. c. 125, s. 15.
(*b*) *Tyerman* v. *Smith*, 25 Law J. 359, qb.
(*c*) *Re Burdon*, 27 Law J. 250, cp.
(*d*) See *Bradbee* v. *Gov. of Christ's Hospital*, 2 Dowl. N. C. 164. *Law et al.* v. *Blackburrow*, 23 Law J. 28, cp.
(*e*) *Spence* v. *Eastern Counties Railway Co.*, 7 Dowl. 697.
(*f*) *Lock* v. *Vulliamy*, 5 B. & Ad. 600.

must be taken that the award pursue the submission; that it decide on all the matters referred to the arbitrator, and no more; that it be, and appear to be, a final settlement of all these matters; and that it be drawn up with great certainty. Care must also be taken that the award be made and published within the time limited for that purpose by the submission, or the time to which it is enlarged. These several qualities of an award shall be considered fully, when we come to notice the defects for which an award may be set aside. Where the time for making it has been enlarged, it is usual, though not always necessary (*a*), to state that fact upon the face of the award.

Where there is a reference to two arbitrators, both must sign it at the same time and in the presence of each other; otherwise no action can be maintained on it (*b*); but the Court, in such a case of defective execution, will in general upon application send it back to the arbitrators to be re-executed (*c*).

The award or certificate must be signed by the arbitrator or arbitrators, and where it is to be signed by two or more, it ought in strictness to be signed by them in the presence of each other; at least the Court will not enforce it by attachment, if signed otherwise, although they will not set it aside for this defect (*d*). Where the award purported on the face of it to be the award of three arbitrators, but it was signed by two only, yet as by the submission it was to be by the three or any

(*a*) *George* v. *Lousley*, 8 East, 13.
(*b*) *Wade* v. *Dowling*, 23 Law J. 302, qb.
(*c*) *Anning* v. *Hartley*, 27 Law J. 145, ex.
(*d*) *Stalworth* v. *Inns*, 13 Mees. & W. 466.

two of them, this was holden to be a good award of the two (*a*).

Care should be taken that it be properly stamped; for although a defect in this respect is not a ground for setting the award aside (*b*), yet it cannot legally be enforced. Even the officer who is to draw up the rule for the attachment may refuse to do so on this ground (*c*). The stamp is 35*s.*; and if it contain 30 sheets of 72 words each, or upwards, it must have an additional stamp of 25*s.* for every 15 sheets above the first fifteen (*d*).

An award is said to be made as soon as it has been signed by the arbitrator; and it is said to be published as soon as the arbitrator has apprised the parties that it is ready for delivery (*e*).

The instant an arbitrator makes and publishes his award he is *functus officio*, and cannot afterwards alter it (*f*); but if he alter it, and the alteration be in an immaterial part, that will not vitiate the award (*g*). So, an alteration by an umpire of the sum awarded, after he had given notice of the award, though on the same day, and before the delivery of it, was holden void; but the award was holden good for the original sum awarded, which was still legible (*h*). However, the Court or a judge may send the award back to the arbitrator if he have made any mistake which may be amended (*i*).

(*a*) *White* v. *Sharp*, 12 Mees. & W. 712.

(*b*) *Preston* v. *Eastwood*, 7 T. R. 95.

(*c*) *Hill* v. *Slocombe*, 9 Dowl. 339.

(*d*) 55 G. 3, c. 184. See *Boyd* v. *Emerson*, 4 Nev. & M. 99.

(*e*) *Musselbrook* v. *Dunkin*, 9 Bing. 605. *M'Arthur* v. *Campbell*, 5 B. & Ad. 518. *Brook* v. *Mitchell*, 6 Mees. & W. 473. See S. C. 8 Dowl. 392, *semb. cont.*

(*f*) *Ward* v. *Dean*, 3 B. & Ad. 234.

(*g*) *Trew* v. *Burton*, 1 Cr. & M. 533.

(*h*) *Henfree* v. *Bromley*, 6 East, 309.

(*i*) See 17 & 18 Vict. 125, s. 8,

By stat. 17 & 18 Vict. c. 125, s. 5, upon any compulsory reference under this Act, or upon any reference by consent of parties where the submission is or may be made a rule or order of any of the superior Courts of law or equity at Westminster, it shall be lawful for the arbitrator, if he shall think fit, and if it is not provided to the contrary, to state his award as to the whole or any part thereof, in the form of a special case for the opinion of the Court; and when an action is referred, judgment, if so ordered, may be entered according to the opinion of the Court (*a*). This judgment is not such as a writ of error will lie on it within the 32nd section of the statute (*b*). Special case.

In some cases, where a verdict is taken at *nisi prius*,—in order to save the expense of an award, it is merely required of the arbitrator to certify the amount of the damages for which the verdict shall be entered up. This he may do at any time, if there be nothing in the terms of the reference which obliges him to certify within any limited time; there is no rule of practice which requires him to certify before the return of the jury process (*c*). The certificate should indicate exactly the manner in which the *postea* is to be drawn up, in the same manner as if a verdict had been given: if both parties be entitled respectively to verdicts on different issues, it should state it (*d*); or if an issue is to be taken distributively, and part found for one party, part for another, it should point out Certificate, in what cases.

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post; and see *Bird* v. *Penrice*, 9 Law J. 257, ex. *Ferguson* v. *Norman*, 4 Bing. N. C. 52.

(*a*) 17 & 18 Vict. c. 125, s. 5.

(*b*) *Gunner* v. *Fowler*, 29 Law J. 189, qb.

(*c*) *Salter* v. *Yeates*, 2 Cr. & M. 67.

(*d*) *Woof* v. *Hooper*, 4 Bing. N. C. 449.

the manner in which the verdict is to be entered. Cases illustrative of this, will be mentioned, when we come to treat of the defects for which an award may be set aside. No order of *nisi prius* is necessary where the arbitrator is thus empowered to certify (*a*).

The following is a form of an award :—

The Award.

rm of an ard.

To all to whom these presents shall come, I, A. C., esquire, of Lincoln's Inn, barrister-at-law, send greeting: Whereas on [*reciting the bond, rule, or order, &c., in the past tense, as for instance;*] "the —— day of ——, in the —— year of the reign of our sovereign lady Queen Victoria, in a certain cause then depending in the court of our lady the Queen before the Queen herself, in which John Nokes was plaintiff, and Joseph Styles was the defendant, in a certain action on contract, upon hearing Mr. ——, of counsel for the defendant, and Mr. ——, of counsel for the plaintiff, and by their consent, it was ordered in the words following, that is to say: It is ordered," [*as in the rule, &c. to the end*]. "And whereas, on the motion of Mr. ——, afterwards on the —— day of ——, in the —— year of the reign of our said lady the Queen, it was further ordered by the said Court in the said cause, in the words following: Upon reading the rule made on Saturday the —— day of —— last past, it is ordered, that the time limited for the arbitrator making his award between the parties be enlarged until the second day inclusive of the next term. And whereas, on the motion of Mr. ——, afterwards on the —— day of ——, in the year aforesaid, it was further ordered by the said Court, in the said cause, in the words following: Upon reading the rule made on ——, it is ordered, that the time limited for the arbitrator making his award between the parties, be further enlarged until the last day inclusive of this same term. Now, know ye, that I, the said A. C., having taken upon myself the burden of the said reference, and having heard, examined, and considered the allegations, witnesses, and evidences of both the said parties, do hereby award, order, and finally determine the said cause in favour of the said plaintiff: And I do hereby find and award, that [the sum of ninety pounds was and still remains due from the said defendant to the said

(*a*) *Thomas* v. *Hawkes*, 8 Law J. 214, qb.

plaintiff in respect of the cause of action in the said cause mentioned]: And I do further award and direct, that the said defendant do, upon demand, pay to the said plaintiff, or his attorney, the said sum of ninety pounds, together with the costs of this action, to be taxed by the master, and that the said cause be no further proceeded in: And I do further award and direct, that each of the said parties do pay and bear their own costs of this reference: and that the said plaintiff do pay the expenses of this my award, and that the said defendant do, upon demand, repay to the said plaintiff, or to his attorney, one moiety thereof.

A. C.

Signed and published by the within-named A. C. this —— day of ——, 18—, as his award (being first duly stamped), in the presence of

B. E.

Costs.

Where there is no cause in Court.

If there be no cause in Court, and the submission be silent as to costs, the arbitrator cannot award them. So in a reference under the 3rd sect. of stat. 17 & 18 Vict. 125 (*a*), the arbitrator has no power over the costs, if the order of reference be silent on the subject (*b*). But where it appeared that the understanding of the officer of the Court and of the parties on the drawing up of the rule was, that the costs should abide the event, and the arbitrator had awarded in favour of the plaintiff with costs, the Court amended the rule *nunc pro tunc*, so as to give effect to the intention of the parties (*c*). If it contain any specific directions as to costs, the arbitrator must award the costs accordingly. If it states that the costs are to be in the arbitrator's discretion, he may allow them to the party in whose favour he makes his

(*a*) *Antè*, p. 17.
(*b*) *Leggo* v. *Young*, 24 Law J. 200, cp.
(*c*) *Bell* v. *Postlethwaite*, 25 Law J. 63, qb.

award, or he may omit all mention of them as he may think fit.

If the arbitrator make any mistake in his award as to costs, the award, although bad as to that, may be good for the residue (*a*).

Where there is a cause in Court.

If there be a cause in Court, the arbitrator may award the costs of the cause, as consequent upon his authority to determine the cause itself, although the submission give him no authority upon the subject (*b*); and this, although not the only cause, but all other matters in difference be referred (*c*). Where a cause was referred at *nisi prius*, and the award for the plaintiff was for a less sum than 20*l.*, the Court held that the costs of the reference were not to be taxed on the lower scale (*d*). Where at the trial of a cause, a verdict was taken for the plaintiff for the sum of 1038*l.* 5*s.*, subject to a reference to an arbitrator to reduce the amount if he should think proper; the order of *nisi prius* was silent as to costs: the arbitrator made a formal award, by which he directed the verdict to be entered for 1038*l.* 4*s.*: it was holden that the decision of the arbitrator, though in form an award, was in substance a certificate, and that the plaintiff was entitled to the costs of the reference as costs in the cause (*e*). He cannot give costs as between attorney and client, but as between party and party only (*f*). He usually awards the costs, generally, to be taxed by the proper officer; and the costs

(*a*) *Aitcheson* v. *Cargey*, 9 Moore, 381. *Morgan* v. *Smith*, 1 Dowl. N. C. 617; 9 Mees. & W. 427. *Re Lloyd et al.*, 18 Law J. 151, qb.

(*b*) *Roe* v. *Doe*, 2 T. R. 644.

(*c*) *Whitehead* v. *Firth*, 12 East, 165. *Firth* v. *Robinson*, 1 B. & C. 217.

(*d*) *Gallway* v. *Marshall*, 23 Law J. 78, ex.

(*e*) *Sim* v. *Edwards*, 25 Law J. 175, cp.

(*f*) *Marder* v. *Cox*, Cowp. 127; and see *Bartle* v. *Musgrave*, 1 Dowl. N. C. 325.

are then taxed in the same manner precisely as if a verdict were given to the same effect as the award (*a*). And he may do this, even where there is no cause in Court (*b*). If by the submission the costs are to be in the discretion of the arbitrator, he can give them only to that party in whose favour he makes the award (*c*). If the costs are to abide the event, then if the arbitrator award entirely in favour of one party, or if he award upon different issues, some in favour of one party, some in favour of the other, the costs follow and are taxed in the same manner as if the finding were by verdict (*d*). But if he award partly in favour of one party, and partly in favour of the other, without reference to the issues, and in such a way that it cannot be said in whose favour he has decided, he cannot give cost to either (*e*). In one case where costs were to abide the event, and the award, instead of deciding the cause in favour of either, directed all proceedings in the cause to cease, and that one should pay to the other 6*l.*, but made no award as to costs, the award was holden to be bad as not being final (*f*). But where the award decides the cause in favour of one party or the other, and the costs are to abide the event, there it is immaterial whether the award gives the costs to such party, or be altogether silent on the subject; for in either way, the officer of the Court would

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(*a*) See *Allenby* v. *Proudlock*, 5 Nev. & M. 636. *Rigby* v. *Okell*, 7 B. & C. 57.

(*b*) *Bhear* v. *Harradine*, 21 Law J. 127, ex.

(*c*) *Finlayson* v. *M'Leod*, 1 B. & A. 663.

(*d*) *Daubuz* v. *Rickman*, 1 Hodg. 75. See *Linegar* v. *Pearce*, 23 Law J. 225, ex.

(*e*) *Boodle* v. *Davies*, 4 Nev. & M. 788. *Yates* v. *Knight*, 1 Hodg. 368.

(*f*) *Re Leeming and Fearsby*, 5 B. & Ad. 503.

tax the costs for the party succeeding (*a*). And where in such a case, the award ordered the costs to be paid at a specified time, the Court held that the award was not bad on that ground, as the clause might be rejected as surplusage (*b*). The event means the legal event of the cause; and therefore where an action by an administrator, in which some of the counts in the declaration were upon promises to himself, was referred to arbitration, the costs to abide the event, and an award was made in favour of the defendant; the Court held the plaintiff to be personally liable for the costs (*c*). So, where several actions were referred, "the costs of the several actions and of all matters and things relating thereto" to abide the event of the award, it was holden to mean that the costs in each action were to abide the event of the award as to that action; and the arbitrator having ordered the costs in each action to be paid to the successful party in each suit respectively, the award was holden good, although the same party had not succeeded in all the actions (*d*). So, where there are several issues, and the costs of the actions are to abide the event, the arbitrator must award as to what issues he finds for the plaintiff, what for the defendant, that the master may tax the costs accordingly (*e*). But if this be done in substance, it will be sufficient: where, for instance, there

(*a*) *Jupp* v. *Grayson*, 1 Cr. M. & R. 523.
(*b*) *Cockburn et al.* v. *Newton*, 9 Dowl. 676.
(*c*) *Spivy* v. *Webster*, 2 Dowl. 46. And see *Ratcliffe* v. *Hall*, 2 Cr. M. & R. 258.
(*d*) *Jones* v. *Powell*, 6 Dowl. 483.
(*e*) *Bourke* v. *Lloyd*, 10 Mees. & W. 550; 2 Dowl. N. C. 452. *Kilburn* v. *Kilburn*, 14 Law J. 160, ex.; 2 Dowl. & Lo. 633. *Williamson* v. *Locke*, 2 Dowl. & Lo. 782. *Doe* v. *Hillen*, 2 Dowl. N. C. 694. *Adam* v. *Rowe*, 15 Law J. 223, qb. *Wolfe* v. *Cooper*, 6 Dowl. 617. *Brooks* v. *Parsons*, 13 Law J. 50, qb. *Pearson* v. *Archbold*, 11 Mees. & W. 477.

were five pleas to one count of a declaration, and the award, without finding on each plea separately, found that the plaintiff had a good cause of action on that count: the Court held it to be sufficient. (*a*) And this is not necessary, where a cause is referred before plea; for until plea pleaded, it is impossible to say what the issues would be (*b*). So, where a cause in which the defendant had paid 10*l.* into court, was referred, together with all other matters in difference, the costs to abide the event, and the arbitrator awarded that the plaintiff had no cause of action beyond the 10*l.* paid into court: it was holden that the plaintiff was liable to the costs (*c*). So, formerly, if an action of assault, where no justification was pleaded, were referred, and the award were for damages under 40*s.*, the plaintiff should have no more costs than damages (*d*). So, at present, if an action for a debt be referred, and the arbitrator award under 20*l.*, the master must tax the costs of the action upon the reduced scale; and this, even although it appear that the defendant opposed an application to have the case tried before the sheriff (*e*). But where a cause was referred, costs to abide the event, and the costs of the reference and award to be at the discretion of the arbitrator, and by the award less than 20*l.* was recovered: it was holden that the costs of the reference were not to be taxed on the lower scale, as that applied only to the costs in the cause (*f*). On the other hand,

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(*a*) *Williamson* v. *Lock*, 14 Law J. 93, qb.
(*b*) *Bearup* v. *Peacock*, 2 Dowl. & Lo. 850.
(*c*) *Dawson* v. *Garrett*, 2 Dowl. 624.
(*d*) *Swinglehurst* v. *Altham*, 3 T. R. 138; and see *Ward* v. *Mallinder*, 5 East, 489.
(*e*) *Elleman* v. *Williams*, 13 Law J. 219, qb., 2 Dowl. & Lo. 46.
(*f*) *Holland* v. *Vincent*, 23 Law

if in trespass or case a power be given to the arbitrator to certify in the same manner as a judge at *nisi prius*, he may certify that the action was brought to try a right, and so entitle the plaintiff to costs, although he award damages under 40*s.* (*a*); if he do not certify, the plaintiff will not be entitled to costs, nor will the Court send the award back to the arbitrator, to amend it in this respect (*b*). Where an action brought in one of the superior Courts, but which might have been brought in a county court, is referred, and the arbitrator awards the plaintiff less than 20*l.* in an action on a contract, or 5*l.* in an action for a tort, it should seem that he should not award costs (*c*). And where particular costs are allowed upon verdict by statute, an award is not deemed equivalent to a verdict in such a case, and the party in whose favour the award is made, would not be entitled to such costs, but merely to costs as in ordinary cases (*d*).

Costs of the reference.

As to the costs of the reference; if nothing be said in the submission about them, the arbitrator cannot include them in his award (*e*). But if the costs generally are to abide the event, he may (*f*). Where the costs of the reference are to abide the event,—this means the event of the award generally, without relation to the issues (*g*)— they are not like the costs of the action, which may depend upon the arbitrator's finding with respect to the

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J. 78, ex. And *Nicholson et al.* v. *Sykes*, Id. 193, ex.

(*a*) *Spain* v. *Cadell*, 9 Dowl. 745.

(*b*) *Perry* v. *Dunn*, 12 Law J. 351, qb., S. C. nom. *Bury* v. *Smith*, 1 Dowl. & Lo. 141.

(*c*) See 13 & 14 Vict. c. 61, s. 11.

(*d*) See *Barnard* v. *Moss*, 1 H. Bl. 107. *Gurney* v. *Buller*, 1 B. & A. 670.

(*e*) *Bradley* v. *Tunstow*, 1 B. & P 34. *Firth* v. *Robinson*, 1 B. & C. 277. *Strutt* v. *Bogers*, 7 Taunt. 213.

(*f*) *Wood* v. *O'Kelly*, 9 East, 436; see *Mackintosh* v. *Blyth*, 1 Bing. 269.

(*g*) *Duckworth* v. *Harrison*, 8 Law J. 41, ex.

different issues (*a*). And where a cause in which a verdict had been entered for the plaintiff, was referred, with all matters in difference to arbitration, the costs of the cause to abide the event of the award; and the arbitrator directed the verdict to stand for a certain sum, which he ordered the defendant to pay to the plaintiff, but he also ordered certain lamps in respect of which the plaintiff claimed damages in the action to be delivered to the defendant: the Court held that the event of the award was in favour of the plaintiff, and that he was therefore entitled to the costs of the cause (*b*). But the general rule is, where the costs are to abide the event, if the arbitrator award partly in favour of one party, partly in favour of the other, each party has to pay his own costs(*c*). In what cases they are deemed costs in the cause, see the cases referred to below (*d*). And it may be necessary here to observe, that the costs of witnesses examined before the arbitrator, to prove the issues in a cause, are costs of the reference, not costs in the cause (*e*). And where a witness did not arrive at the assize town until after the cause was referred, his expenses were not allowed as costs in the cause (*f*). Where the arbitrator, as to the costs of the reference, ordered by his award that one third should be paid by the plaintiff and two thirds by the defendant: the master, after taxing the costs of both parties, added those of

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(*a*) See *Bourke* v. *Lloyd*, *antè*, p. 46.
(*b*) *Matlock Gas Co.* v. *Peters*, 25 Law J. 273, qb.
(*c*) *Gribble* v. *Buchanan*, 26 Law J. 24, cp.
(*d*) *Tregoning* v. *Atterbury*, 7 Bing. 733. *Taylor* v. *Lady Gordon*, 1 Dowl. 720. *Bignall* v. *Gale*, 1 Dowl. N. C. 497.
(*e*) *Brown* v. *Nelson*, 13 Mees. & W. 397. *Fryer* v. *Sturt*, 24 Law J. 154, cp.
(*f*) *Fryer* v. *Sturt*, Ib.

the plaintiff (68*l.*) to the costs of the defendant (45*l.*), making together 113*l.*, and taking two thirds (75*l* 6*s.* 8*d.*), made his allocatur of this as the sum to be paid by the defendant to the plaintiff: but this was holden to be wrong; two thirds of the plaintiff's costs (45*l.* 6*s.* 8*d.*), less one third of the defendant's (15*l.*), being 30*l.* 6*s.* 8*d.*, was the sum the defendant was to pay as his share of the costs of reference (*a*). Where by the submission the arbitrator was to ascertain the amount of the costs of the reference, but he did not do so, his award was holden bad in that respect; but upon the plaintiff waiving his right to these costs, the Court enforced the award for the residue (*b*). On the other hand, where an arbitrator was empowered to dispose of the estate of a partnership, and to award, &c., and the costs of the reference and award were left in his discretion; and in his award he stated that he had received and disposed of the estate, and awarded a certain sum to be paid by one party to the other; the award then proceeded thus:—"I certify that I have deducted and retained to myself the costs of this my award out of the monies which have been received by me as such receiver as aforesaid; I award and determine that each of the parties to the above reference shall bear and pay his own costs of the said reference respectively." It was holden by the Exchequer Chamber, overruling the decision of the Court of Common Pleas in the same case (*c*), that the award was good, although it did

(*a*) *Walton* v. *Ingram*, 10 Law J. 188, cp. See also *Day* v. *Norris*, 11 Law J. 62, ex.
(*b*) *Morgan* v. *Smith*, 1 Dowl. N. C. 617; 9 Mees. & W. 427. See *Re Young et al.*, 22 Law J. 160, cp.
(*c*) 27 Law J. 78, cp.

not state the amount of the costs of the award which the arbitrator had deducted, or which of the parties he had charged with them (*a*).

Costs of the award.

As to the costs of the award, they are deemed part of the costs of the reference, and follow the same rules. If the arbitrator give up the award without payment of these costs, it is very doubtful whether the law affords him any remedy for them: the Court will not interfere in his favour (*b*); and it is very doubtful whether he can maintain an action for them (*c*). In order to ensure payment the award usually requires the successful party to pay them, and the other party to repay him a moiety or the whole (*d*). Where, by a submission to arbitrators, who were to choose an umpire, the costs of the award and umpirage were to be in the discretion of the arbitrators and umpire respectively; the umpire by his umpirage awarded a certain sum to be paid as costs "of the said umpirage and of this my award," including the costs of the arbitrators as well as his own: and the Court held that he had a right to do so, the charges of the arbitrators being part of the costs of the umpirage (*e*). If, on the other hand, the arbitrators charge what the party may deem too much, the Court have no jurisdiction to order them to take less, or, after being paid, to order them to refund any portion of their fees (*f*); but where the arbitrator charged an unreasonable and extortionate sum for his costs, and the party

(*a*) *Roberts* v. *Eberhardt*, 28 Law J. 74, cp.
(*b*) *Burroughs* v. *Clarke*, 1 Dowl. 48.
(*c*) See *Virany* v. *Warne*, 4 Esp. 46. *Swinford* v. *Burn*, 1 Gow. 7.
(*d*) See *Hicks* v. *Richardson*, 1 B. & P. 93. *Stokes* v. *Lewis*, 2 Smith, 12.
(*e*) *Ellison* v. *Ackroyd*, 20 Law J. 193, qb.
(*f*) *Dossett* v. *Gingell*, 2 Man. & Gr. 870.

was obliged to pay it, in order to get up the award, it was holden that he might maintain an action against the arbitrator to recover the excess (*a*). As to the taxation of these costs, see the cases cited below (*b*).

s for de- ng the eedings.

In all references by rule of court, order of *nisi prius*, or judge's order, the rule or order contains a provision that if either party, by affected delay or otherwise, shall wilfully prevent the arbitrator from making his award, he shall pay such costs to the other as the Court shall think reasonable and just. And before the late statute, 3 & 4 W. 4, c. 42, s. 39, already noticed (*antè*, p. 36), if a party to such a reference revoked the submission without a reasonable cause, the Court would oblige him to pay the other party's costs of the reference (*c*). And the Court, upon application, will still oblige a party to pay costs occasioned by any wilful delay upon his part in proceeding upon the reference (*d*). But this does not extend to cases where the delay, &c., takes place after an award has in fact been made, but only to cases where the completion of the award is thereby prevented (*e*). The mode of proceeding is by application to the Court, upon affidavit, for a rule *nisi*.

(*a*) *Fernley* v. *Branson*, 20 Law J. 178, qb.

(*b*) *Bignall* v. *Gale*, 1 Dowl. N.C. 497. 2 Man. & Gr. 830. *Threlfall* v. *Fanshawe*, 19 Law J. 334, qb. *Bhear* v. *Harradine*, 21 Law J. 127, ex.

(*c*) See *Smith* v. *Fielder*, 2 Dowl. 764. *Aston* v. *George*, 2 B. & A 395.

(*d*) See *Morgan* v. *Williams*, 2 Dowl. 123. *Gladwin* v. *Chilcote*, 9 Dowl. 550.

(*e*) *Bradley et ux.* v. *Phelps*, 21 Law J. 310, ex.

PART IV.

SETTING ASIDE THE AWARD.

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For what Defects.

Generally.

It may be necessary to premise, that an award may be bad in part, and good for the residue (*a*), if the parts can be treated as distinct and separate (*b*). It may be necessary also to premise, that in considering an award, upon an application to set it aside, the Court will make no distinction between legal and other arbitrators, or treat the awards made by the one in any manner differently from those made by the other (*c*). And, lastly, it may be remarked, that where a matter is referred under the compulsory clause of stat. 17 & 18 Vict. c. 125 (*d*), the proceedings are to be conducted in like manner, and subject to the same rules and enactments as to the power of the arbitrator and of the Court, the attendance of witnesses, the production of documents enforcing or setting aside the award, and otherwise, as upon a reference made by consent under a rule of court or judge's orders (*e*). The objections usually made to awards may be classed under the following heads:—

Misconduct of the arbitrator.

If an award be obtained by "corruption or undue means," it will be void, and the Court will set it aside (*f*); although this would be no answer to

(*a*) *Manser* v. *Heaver*, 3 B. & Ad. 295. *Addison* v. *Gray*, 2 Wils. 293. *Hetherington* v. *Robinson*, 8 Law J. 148, ex. *Winter* v. *Lethbridge*, M'Clel. 253. *Doe* v. *Richardson*, 8 Taunt. 697. *Morgan* v. *Smith*, 1 Dowl. N. C. 617. *Re Lloyd et al.*, 18 Law J. 151, qb. See *Re Earl of Cardigan and Henderson*, 22 Law J. 83, qb. *Goddard* v. *Mansfield*, 19 Law J. 305, qb. *Nicholls* v. *Jones*, 20 Law J. 275, ex.

(*b*) *Re Marshall & Dresser*, 3 Q. B. 878.

(*c*) *Jupp* v. *Grayson*, 1 Cr. M. & R. 523. *Huntig* v. *Ralling*, 8 Dowl. 879.

(*d*) 9 & 10 W. 3, c. 15, s. 2.

(*e*) See *ante*, p. 16.

(*f*) 17 & 18 Vict. c. 125, s. 7. See *Hogg* v. *Burgess*, 27 Law J. 318, ex. *Brown* v. *Hellaby*, 26 Law J. 217, ex.

an application for an attachment (*a*), nor could it perhaps be pleaded to an action on the award, &c. (*b*) So, an award may be set aside for collusion or any other gross misbehaviour of the arbitrators (*c*). Where an action for the price of a phaeton was referred to a coachmaker, and the question was whether the phaeton was built according to a certain agreement; at the first meeting the plaintiff produced seven witnesses, and requested that they might be examined; but the arbitrator, after inspecting the phaeton, said there was no use in examining witnesses, and ultimately awarded in favour of the defendant: the Court, upon application, set aside the award, saying, that although the arbitrator was not guilty of misconduct, in the bad sense of that word, yet he was bound to examine the plaintiff's witnesses (*d*). But where a dispute having arisen as to the result of a horse-race, the stewards (who by the rules of the course were to be arbiters of all disputes), decided against a horse, against which one of them had made a bet: it was held that the decision of the stewards was not invalid, on the ground of one of them being an interested arbitrator (*e*). If an arbitrator proceed *ex parte*, in the absence of one of the parties, the Court will in general set aside the award, unless a very strong case of wilful delay on

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(*a*) *Braxier* v. *Bryant*, 3 Bing. 167.
(*b*) 1 Saund. 327, a. (5.)
(*c*) *Sturt* v. *Moggeridge*, 2 Tidd. 894. See *Waltonshaw* v. *Marshall*, 1 Har. & W. 209.
(*d*) *Phipps* v. *Ingram*, 3 Dowl. 669; and see *Anon.* 2 Chit. 44. *Pepper* v. *Gorham*, 4 Moore, 148. *Dodington* v. *Hudson*, 1 Bing. 384. *Potter* v. *Newman*, 4 Dowl. 504.
(*e*) *Ellis* v. *Hopper*, 28 Law J. 1, ex.

the part of the party not attending be made out (*a*). An usage for arbitrators appointed to determine between outgoing and incoming tenants of a farm, the value of the away going crop, and the deductions for want of repairs of the farm buildings and fences, to make their award on inspection of the crops and premises, without notice to the parties and without evidence, may be good; but no usage can justify the arbitrators in hearing one party and his witnesses only, in the absence of and without notice to the other party (*b*). But where the arbitrator had made an appointment, and one of the parties, although under a mistaken notion that there would be another meeting before an award was made, went away without tendering evidence, or intimating that he intended to offer it: it was holden that the arbitrator might proceed *ex parte*, and make his award (*c*). So, where the plaintiff attended before the arbitrator by counsel, without giving notice of it to the defendant, and the latter thereupon prayed an adjournment, that he might have an opportunity also of instructing counsel; but this was refused, unless he would pay the costs of the day, and there was an award against him: the Court set aside the award, saying, that it was unreasonable that one party should have the assistance of counsel, and the other not (*d*). So, where all matters in difference between certain parties were referred to a barrister and two merchants, they or any two of

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(*a*) *Gladwin* v. *Chilcote*, 9 Dowl. 550.

(*b*) *Oswald* v. *Earl Grey*, 24 Law J. 69, qb.

(*c*) *Tryer* v. *Shaw*, 27 Law J. 320, ex.

(*d*) *Whatley* v. *Morland*, 2 Cr. & M. 347.

them to make an award; the merchants left a point of law, which arose in the case, wholly to the decision of the barrister, and he and one of the others made the award; the Court set it aside, because, as to the point of law, it was the decision of one arbitrator only (*a*). But where an award purported to be made by three arbitrators, but was executed by two only, and by the submission an award by the three or any two of them was to be binding; the Court held this good as the award of the two who signed it (*b*). So, where an umpire, on being chosen, was requested by one of the parties to recall the witnesses and examine them, but he refused to do so, and decided merely upon the notes of the arbitrators, the Court set aside the award (*c*). And where the arbitrators, by agreement amongst themselves, separately examined witnesses in the absence of the parties, the Court set aside the award (*d*). But where an umpire, instead of examining the witnesses, allowed the arbitrators to do so for their respective parties, and received the examinations from them, and he was not requested by the parties to examine the witnesses himself, the Court held that this was no objection to the award (*e*). So, re-examining some of the witnesses in the absence of the parties (*f*), or excluding both parties and witnesses, except the witnesses immediately under

(*a*) *Little et al.* v. *Newton*, 2 Man. & Gr. 351.
(*b*) *White* v. *Sharp*, 12 Mees. & W. 712; and see *Re Marsh*, 16 Law J. 330, qb.
(*c*) *Re Jenkins et al.*, 1 Dowl. N. C. 276.
(*d*) *Re Plews & Middleton*, 14 Law J. 139, qb.
(*e*) *Re Tunno & Bird*, 2 Nev. & M. 328. *Twogood* v. *Twogood*, Id. 335, n.
(*f*) *Atkinson* v. *Abraham*, 1 B. & P. 175.

examination (*a*), or not having examined the witnesses upon oath, no objection being made on this account at the time of the examination (*b*), or refusing an application for a further meeting, after the examination of the witnesses had been finally closed by consent of both parties (*c*), or proceeding *ex parte*, where the party had full notice of the meeting, and would not attend (*d*), if not clearly shown to proceed from a corrupt motive, is no ground for setting aside an award. So, the mere fact of an arbitrator being indebted to the party in whose favour he made his award, is not of itself sufficient to set it aside, though the other party were ignorant of the circumstance when the arbitrator was appointed, and as soon as he knew it, objected to the arbitrator's proceeding (*e*). So, where the alleged misconduct of the arbitrator was known to the parties three weeks before the award was executed, and no complaint whatever was made upon the subject, the Court held that the parties had thereby waived the objection to it (*f*). So, where evidence was received by the arbitrators at a meeting improperly convened, at which neither the plaintiff nor the defendant were present, but the arbitrators swore that they did not consider that evidence in making their award, and that the parties had subsequently proceeded with their case before them: the Court refused to set aside

(*a*) *Hewlett* v. *Laycock*, 2 Car. & P. 574; but see *Re Hick*, 8 Taunt. 694.
(*b*) *Ridout* v. *Pye*, 1 B. & P. 91.
(*c*) *Ringer* v. *Joyce*, 1 Marsh. 404; and see *Re Marsh*, 16 Law J. 330, qb.
(*d*) *Scott* v. *Sandau*, 6 Q. B. 237.
(*e*) *Morgan* v. *Morgan*, 1 Dowl. 611.
(*f*) *Bignall* v. *Gale*, 2 Man. & Gr. 830.

the award (*a*). So, where the arbitrator received in evidence the books of one of the parties, but it did not appear that he acted upon them, the Court refused to set aside the award (*b*). So arbitrators may consult other persons, without the assent of the parties, provided they act on their own judgment; if, however, they bind themselves to adopt the opinion of a person the parties have agreed they may consult, the award would be bad, as not being in fact their award (*c*).

Mistake in law.

As the parties, by submitting their case to arbitration, have chosen to substitute an arbitrator for a court and jury, the Court will not set aside an award, or the certificate of an arbitrator (*d*), for an alleged mistake of the arbitrator, either in point of law or of fact (*e*), whether the arbitrator be a barrister or not (*f*), unless the mistake appear upon the face of the award (*g*), or on some other paper delivered with it (*h*), and the law be quite clear upon the point (*i*); or unless the mistake be so gross as

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(*a*) *Kingwell* v. *Elliott et al.*, 7 Dowl. 423; 8 Law J. 241, cp.

(*b*) *Hagger* v. *Baker*, 14 Mees. & W. 9.

(*c*) *Whitmore* v. *Smith*, 29 Law J. 402, ex.

(*d*) *Price* v. *Price*, 9 Dowl. 334.

(*e*) *Wohlenberg* v. *Lageman*, 6 Taunt. 254. *Bouttilier* v. *Thick*, 1 D. & R. 366. *Wilson et al.* v. *King*, 2 Cr. & M. 689. *Savage* v. *Ashwin*, 8 Law J. 43, ex. *Avelleti* v. *Goddard*, 11 Law J. 123, cp. *Delver* v. *Barnes*, 1 Taunt, 48. *Wade* v. *Malpas*, 2 Dowl. 638. *Perryman* v. *Steggall*, Id. 726. *Armstrong* v. *Marshall*, 4 Dowl. 593; 1 Har. & W. 643. *Symes* v. *Goodfellow*, 4 Dowl. 642; 2 Bing. N. C. 532; Hodg. 400. *Fuller* v. *Fenwick*, 16 Law J. 70, cp. *Faviall* v. *Eastern Railway Company*, 17 Law J. 223, ex.; 297, ex.

(*f*) *Jupp* v. *Grayson*, 3 Dowl. 199. *Ashton* v. *Poynter*, Id. 201. *Phillips* v. *Evans*, 12 Mees. & W. 309. See 2 Dowl. 651.

(*g*) *Payne* v. *Massey*, 9 Moore, 666. *Sharman* v. *Bell*, 5 M. & S. 504. *Cramp* v. *Symons*, 1 Bing. 104. *Ames* v. *Milard*, 2 Moore, 713. See *Bird* v. *Penrice*, 6 Mees. & W. 754. *Moore* v. *Butlin*, 7 Ad. & El. 595. *Smith* v. *Festiniog Railway Company*, 4 Bing. N. C. 23.

(*h*) *Kent* v. *Elstob*, 3 East, 18. *Jones* v. *Corry et al.*, 5 Bing. N. C. 187.

(*i*) *Richardson* v. *Nourse*, 3 B. & A. 237.

to imply misconduct in the arbitrator (*a*). And even if the mistake appear on the face of the award, yet if that part can be rejected as surplusage, it shall not hurt (*b*). Nor can such mistake be amended by the arbitrator himself (*c*). If the award order an act to be done which is illegal, the Court will set it aside (*d*); but if the award appear to be contrary to some rule of practice of the courts merely, the Court will not interfere (*e*). If, indeed, the submission authorise the arbitrator to state the facts specially on his award, and he do so, the Court will then decide any point of law which may arise from them (*f*). This, however, must be deemed merely a permission; it does not bind him to make any such statement (*g*). And where, in such a case, he not only stated the facts, but his own judgment also, the Court of Exchequer refused to examine the facts, saying that the arbitrator's opinion upon them was final (*h*). But the arbitrator, without any such authority in the submission, may now state his award, as to the whole or part of it, in the form of a special case, as hereinbefore (*i*) mentioned; and the Court in that case will decide the point raised by it. Where a cause was referred at *nisi prius*, with the usual clause in the order, that the parties

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(*a*) *Chase* v. *Westmore*, 13 East, 357. *Re Hall & Hinds*, 2 Man. & Gr. 847.

(*b*) *Harlow* v. *Read*, 14 Law J. 239, cp.

(*c*) *Ward* v. *Dean*, 3 B. & Ad. 234. *Ex parte Cuerton*, 7 D. & R. 774. *Irvine* v. *Elnon*, 8 East, 54.

(*d*) *Alder* v. *Savill*, 5 Taunt. 454. *Aubert* v. *Maze*, 2 B. & P. 371.

(*e*) *Re Badger*, 2 B. & Ad. 691. But see *Broadhurst* v. *Darlington*, 2 Dowl. 38, *semb. cont.*

(*f*) *Jephson et al.* v. *Hawkins et al.*, 2 Man. & Gr. 366. *France et al.* v. *White et al.*, 8 Dowl. 53. *Ferguson* v. *Norman*, 8 Law J. 3, cp.

(*g*) *Wood* v. *Hotham*, 5 Mees. & W. 674. *Bradbee* v. *Mayor of London*, 11 Law J. 209, cp.

(*h*) *Barrett* v. *Wilson*, 1 Cr. M. & R. 586. *Barton* v. *Ranson*, 3 Mees. & W. 322. *Wright et al.* v. *Cromford Canal Company*, 1 Q. B. 98. *Archer* v. *Owen*, 9 Dowl. 341.

(*i*) *Antè*, p. 41.

should not bring or prosecute any action or suit against the arbitrator or against each other, and the arbitrator decided for the defendants upon an issue on a plea which was bad in law, the Court held that the plaintiff could not afterwards move for judgment *non obstante veredicto* (*a*). Nor has an arbitrator the power to award judgment *non obstante veredicto* (*b*).

Award not pursuing the submission.

The award must strictly pursue the submission: if the parties submit one thing, and the arbitrator decide another, the award is clearly bad, as not being authorised by the submission (*c*). Where, upon a cause being referred by judge's order, it was expressly stipulated by the defendant that the plaintiff should not be examined as a witness, and the clause to that effect in the printed form was accordingly struck out; before the arbitrator he was tendered as a witness, and although strongly objected to, the arbitrator decided to receive his evidence, and afterwards he was cross-examined on the part of the defendant: the Court on application set aside the award, and held that the objection was not waived by the defendant's cross-examination, or his proceeding with the reference (*d*). Also, if by the terms of the submission the arbitrator "shall and may" award upon a certain matter, he must (*e*). But where the reference was of a cause and all matters in difference, and the award recited it as a reference of the cause only, this was holden to be no ground for setting it aside, or opposing an attachment for not obeying

(*a*) *Britt.* v. *Pashley et al.*, 16 Law J. 240, ex.

(*b*) *Linegar* v. *Pearce*, 23 Law J 225, ex.; and see *Toby* v. *Lovibond*, 5 C. B. Rep. 770; 17 Law J. 201, cp.

(*c*) See *Hall* v. *Alderson*, 2 Bing. 476.

(*d*) *Smith* v. *Sparrow*, 16 Law J. 139, qb.

(*e*) *Cramp* v. *Adney et al.*, 1 Cr. & M. 355.

it (*a*). And where, by a submission to three arbitrators, the award of the three, or any two of them, was to be binding; and the award, though purporting on the face of it to be the award of the three, was executed by two only, it was holden to be sufficient (*b*).

That the arbitrator has exceeded his authority.

Where a cause is referred before trial, or where the submission is silent as to a verdict, the arbitrator has no authority by his award to direct a verdict or judgment to be entered (*c*); if he do, the Court will not enforce the award by attachment (*d*), but they will not set it aside (*e*). So, if a cause be referred, with authority to the arbitrator to order a verdict to be entered, if, instead of ordering it to be entered for one party or the other, he order a *stet processus*, the Court will set aside his award (*f*). So, if he decide upon a right not claimed, or which has been abandoned (*g*), or expressly excluded (*h*), or not included in the submission (*i*),—or decide as to persons who are not parties to the submission (*k*), or order something to be done upon the land of a third person, who is not party to the submission (*l*),—or where costs are in his discretion, and he awards costs as between attorney and client, instead of costs as between

(*a*) *Paull* v. *Paull*, 2 Cr. & M. 235.
(*b*) *White* v. *Sharp*, 12 Mees. & W. 712.
(*c*) *Doe* v. *Cox*, 15 Law J. 317, qb.
(*d*) *Jackson* v. *Clark*, 1 M'Clel. & Y. 200. *Hutchinson* v. *Blackwell*, 8 Bing. 331. *Cock* v. *Gent*, 14 Mees. & W. 680.
(*e*) *Cock* v. *Gent*, 15 Law J. 33, ex.; 13 Mees. & W. 364. See *Hawkyard et al.* v. *Greenwood et al.*, 14 Law J. 236, qb.; *semb. cont.*
(*f*) *Hunt* v. *Hunt*, 5 Dowl. 442. *Leeming* v. *Fearnley*, 2 Nev. & M. 232.
(*g*) *Hooper* v. *Hooper*, 1, M'Clel. & Y. 509. *Crowfoot et al.* v. *London Dock Company*, 2 Cr. & M. 637; and see *Bonner* v. *Liddle*, 1 Brod. & B. 80.
(*h*) *Harris* v. *Thomas*, 2 Mees. & W. 32.
(*i*) *Poyner* v. *Hatton*, 7 Mees. & W. 211. See *Atkinson* v. *Jones*, 1 Dowl. & Lo. 225.
(*k*) See *Fisher* v. *Pimbley*, 11 East. 188.
(*l*) *Turner* v. *Swainson*, 1 Mees. & W. 572.

party and party (*a*),—the award will be set aside, on the ground that he has exceeded his authority. But where the right of two rectors to the tithes of certain lands was referred, with power to devise all means to prevent future litigation between them, it was holden that the arbitrator did not exceed his authority by awarding an undivided moiety of the tithes to each (*b*). So, where authority was given to an arbitrator to decide on what terms a partnership agreement should be cancelled, and he awarded, amongst other things, that one partner should have all the debts, and that he should be at liberty to use the name of the other in suing for them: it was holden that in giving the power of using the partner's name he had not exceeded his authority (*c*). So, where, in replevin, the issue was as to the right of the defendants, husband and wife, to a certain annuity left upon condition to the wife by will, and the cause and all matters relating to the annuity were referred to an arbitrator, and the award directed the payment of 50*l.* as due when the distress was made, and 40*l.* as having accrued since, and directed that both sums should be paid to the wife: this was holden good (*d*). So, where a verdict is taken subject to the certificate of an arbitrator, he may order a verdict to be entered for the defendant, although no authority be expressly given to him to do so (*e*). Where a cause and all matters in difference were referred to a legal arbitrator, pending a

(*a*) *Succombe* v. *Babb*, 6 Mees. & W. 129.

(*b*) *Prosser* v. *Goring*, 3 Taunt. 426.

(*c*) *Burton* v. *Wigley*, 1 Bing. N. C. 665: and see *Morley* v. *Newman*, 5 D. & R. 317. *Reeves et al.* v. *M'Gregor et al.*, 9 Ad. & El. 576.

(*d*) *Wynne* v. *Wynne, et ux.*, 9 Dowl. 901.

(*e*) *Jones* v. *Hawkes*, 10 Ad. & El. 32; and see *Patch* v. *Fountain*, 5 Bing. N. C. 442. *Brown* v. *Watson*, 8 Dowl. 22.

demurrer to a plea, and the arbitrator by his award ordered judgment on the demurrer to be entered for the defendant: the Court refused to set aside his award on that ground (*a*). But where a cause was referred at *nisi prius* in the ordinary way, the Court held that the arbitrator had no power to order the judgment to be arrested (*b*). So, where in an action brought by the assignees of a bankrupt against a debtor to the estate, all matters in difference were referred, it was holden that the arbitrator did not exceed his authority by awarding that the assignees should refund a portion of a certain sum which the debtor had before paid to them (*c*). And where all matters in difference are referred, the arbitrator may decide on all matters which were in difference between the parties at the date of the submission, and must decide upon them, if insisted upon by either party (*d*). And where all matters in difference between A. on the one side, and B. and C. on the other, were referred, it was holden that the arbitrator had authority to decide on matters in difference between A. and B. or C. severally, as well as matters between him and them jointly (*e*). So, where a cause was referred, and the arbitrator awarded the plaintiff a greater sum than he claimed by his particulars, but the particulars had not been brought before the arbitrator: the Court refused to set aside the award, but they granted a rule *nisi* to reduce the amount (*f*).

(*a*) *Matthew* v. *Davis*, 1 Dowl. N. C. 679.

(*b*) *Angus* v. *Redford*, 11 Mees. & W. 69.

(*c*) *Malcolm* v. *Fullarton*, 2 T. R. 645.

(*d*) *Charlton et al.* v. *Spencer*, 3 Q. B. 693.

(*e*) *Adcock* v. *Wood*, 20 Law J. 435, ex.; 21 Law J. 204, ex.

(*f*) *Kenrick* v. *Phillips*, 7 Mees. & W. 415.

So, it is no objection to an award that the arbitrator received evidence as to other matters, if he have not decided upon them, such evidence being also applicable to the matter submitted (*a*). And even in cases where the arbitrator may have exceeded his authority, if the excess can be separated from the other parts of the award, as, for instance, where he exceeds his authority by awarding costs, that shall not vitiate the award as to the residue (*b*).

That he has not awarded on all the matters referred to him.

Where two distinct matters, with all other matters in difference, are referred, if the arbitrator omit to decide upon one of such distinct matters, that vitiates the whole award (*c*); and the same, where he refuses or omits to adjudicate between all the parties to the reference (*d*). And advantage may be taken of the invalidity of the award on this ground, under a plea *nul tiel agard* in an action on the award (*e*). Where, for instance, an action on a promissory note, with a count upon an account stated, was referred, and the arbitrator omitted to award as to the count on the account stated: the Court set aside the award (*f*). So, in an action for money had and received, where the general issue, payment and a set-off were pleaded, and the reference was of the action and all matters in difference; the arbitrator awarded that a verdict should be entered for the defendant on all the

(*a*) *Eastern Counties Railway Company* v. *Robertson*, 1 Dowl. & Lo. 498.

(*b*) *Aitcheson* v. *Cargey*, 9 Moore, 381. *Ward* v. *Hall*, 9 Dowl. 610. *Re Doddington & Bailwara*, 8 Law J. 331, cp. *Cockburn et al.* v. *Newton*, 10 Law J. 207, cp.

(*c*) *Randall* v. *Randall*, 7 East, 81. *Robson* v. *Railton*, 1 B. & Ad. 723. *Norris* v. *Daniel*, 2 Dowl. 798. *Wykes* v. *Shipton*, 3 Nev. & M. 240. *Hayward* v. *Phillips*, 1 Nev. & P. 288. *Upperton* v. *Tribe*, 1 Har. & W. 280. *Bhear* v. *Harradine*, 21 Law J. 127, ex.

(*d*) *Winter* v. *White*, 2 Moore, 23. *Samuel* v. *Cooper*, 1 Har. & W. 86.

(*e*) *Roberts* v. *Eberhardt*, 27 Law J. 70, cp.

(*f*) *Gisborne* v. *Hart*, 5 Mees. & W. 50.

issues: this was holden bad, as not deciding on the set-off (*a*). So, where an action of ejectment was referred, and the arbitrator found that the lessor of the plaintiff was entitled to a part of the lands claimed, setting them out by metes and bounds, but said nothing as to the residue, the award was holden bad, and the judgment signed in pursuance of it set aside (*b*). But where, by submission to arbitration under the Lands Clauses Consolidation Act, of a question of disputed compensation, the arbitrator was to determine what sum should be paid for the purchase of certain land, and what other "if any" sum for severance damage; and the arbitrator by his award, after reciting the submission, and that he had considered the matters so referred to him, awarded a sum to be paid for the purchase of the land, without saying anything as to the severance damage: the Court held the award to be final and good, and that the arbitrator by his silence had negatived any right to compensation for severance damage (*c*). In trespass, where several issues were joined, and there was judgment by default upon a new assignment, and the *venire* was as well to try the issues as to assess damages on the new assignment; at the trial a verdict was taken for the plaintiff, subject to the award of an arbitrator, who awarded that a verdict should be entered for a certain sum, but took no notice of the new assignment: the award was holden bad, and set aside (*d*). Where,

(*a*) *Maloney* v. *Stockley*, 4 Man. & Gr. 647.

(*b*) *Doe* v. *Horner et al.*, 8 Ad. & El. 235.

(*c*) *Re Duke of Beaufort & the Swansea Harbour Trustees*, 29 Law J. 241, cp.

(*d*) *Wykes* v. *Shipton et al.*, 8 Ad. & El. 264, n. *Re Rider et al.*, 3 Bing. N. C. 874. *Stone* v. *Phillips*, 4 Id. 37. *Wood et al.* v. *Duncan*, 7 Dowl. 91.

by an agreement of reference, the costs thereof, and of the reference and award should be in the discretion of the arbitrator, and he awarded a sum to be paid to the plaintiff, but made no mention as to costs, the Court held the award to be bad; the meaning of the submission was, not that the arbitrator should have it in his discretion whether he would allow costs or not, but merely as to the mode in which the costs were to be paid (*a*). But where a cause and all matters in difference were referred at *nisi prius*, and the award, which purported to be made "of and concerning the said several premises so referred as aforesaid," awarded to the plaintiff on all the issues, and directed the defendant to pay a certain sum to the plaintiff, but made no mention of other matters in difference: the Court held the award to be good, as it sufficiently appeared on the face of it that the arbitrator had decided on all the matters referred to him (*b*). And it is for the Court, in construing the submission, to say whether the matter alleged to be omitted, was one of the matters submitted or not (*c*); and for the party to make out, not only that the arbitrator has omitted to award upon such matter (*d*), but that it was brought before him as a matter in dispute (*e*), and that he did not take it into his consideration (*f*). Whether the award expressly notice every matter in difference, or not,

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(*a*) *Richardson et al.* v. *Worsley*, 19 Law J. 317, ex. And see *Williams* v. *Wilson*, 23 Law J. 17, ex.

(*b*) *Creswick* v. *Harrison*, 20 Law J. 56, cp.; 21 Law J. 113, cp.

(*c*) See *Re Hurst*, 1 Har. & W. 275. *Angus* v. *Redford*, 12 Law J. 180, ex.; *Toby* v. *Levibond*, 17 Law J. 201, cp. *Re Marsh*, 16 Law J. 330, qb.

(*d*) *Ingram* v. *Milnes*, 8 East, 445.

(*e*) *Martin* v. *Thornton*, 4 Esp. 180. *Layman* v. *Gowan*, 10 Law J. 95, cp. *Perry* v. *Mitchell*, 14 Law J. 88, ex.

(*f*) *R.* v. *St. Katherine's Dock Co.*, 1 Nev. & M. 121.

seems to be immaterial, if the arbitrator have in fact decided upon all matters in difference submitted to him (*a*). And where a cause and all matters in difference were referred at *nisi prius*, and at the hearing the arbitrator was pressed by the plaintiff to order a judgment *non obstante*, as to one of the pleas, which was alleged to be bad, but in his award he did not notice the objection, but ordered a verdict for the defendant on that plea: the Court refused to set aside the award (*b*). So, where a cause and all matters in difference were referred, and the arbitrator awarded that on a settlement of all the matters in difference there was due a sum of 300*l.* 15*s.* 9*d.* from the defendant to the plaintiff, this was holden to be sufficient (*c*). Also, where an action was referred at *nisi prius*, with power to the arbitrator to determine what he should think fit to be done by either party; and he awarded that the verdict for the plaintiff should stand, and that the damages should be reduced to 1*s.*, but he gave no directions as to what in future should be done by either party: the Court held that although he might, he was not bound to direct what should be done by the parties in future (*d*).

That the award is uncertain.

The matter awarded must be stated with certainty, that the party may know what he has to perform, and that the Court may see that the arbitrator has not exceeded his authority. Where an action of assumpsit, and all matters in difference,

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(*a*) *Gray* v. *Gwennap*, 1 B. & A. 106. *Halkyar* v. *Ellis*, 6 Bing. 225. *Dunn* v. *Warliers*, 9 Mees. & W. 293. *Wyatt* v. *Curnell*, 1 Dowl. N. C. 327. *Day* v. *Bonnin*, 3 Bing. N. C. 219.

(*b*) *Toby* v. *Lovibond*, 17 Law J. 201, cp. *Angus* v. *Redford*, 12 Law J. 180, ex.

(*c*) *Bradley et ux.* v. *Phelps*, 21 Law J. 310, ex.

(*d*) *Angus* v. *Redford*, 11 Mees. & W. 69; 12 Law J. 180, ex.

were referred at *nisi prius*, with power to the arbitrator to direct a verdict to be entered for either party, and the arbitrator directed a verdict to be entered for the plaintiff, without saying for what amount: the Court held the award bad for uncertainty, although it also awarded that the defendant was indebted to the plaintiff in 260*l.*; because that sum might have been due with respect to the other matters in difference, and not in the cause (*a*). So, where a cause and all matters in difference were referred, and the arbitrator awarded a gross sum to be paid by the defendant to the plaintiff, without saying whether it was on account of the cause or of the other matters in difference: the Court held the award bad (*b*). But where, in debt on money bond, the only plea was payment by a co-obligee, and the arbitrator directed a verdict to be entered for the plaintiff, without stating what amount was due upon the bond: the Court held the award to be sufficient (*c*). An award, that A. *or* B. shall do a certain act is bad for uncertainty (*d*). An award, that the costs of making a submission a rule of court should be borne by such of the parties by whose default the same shall become necessary, has been holden bad (*e*). But an award directing one of two things to be done, in the alternative, is good; for if one be uncertain or impossible, the party must perform the other (*f*). Where in a reference of an action for

(*a*) *Martin* v. *Burge*, 6 Nev. & M. 201. *Laud* v. *Hudson*, 12 Law J. 365, qb.; 1 Dowl. & Lo. 236.

(*b*) *Crosbie* v. *Holmes*, 15 Law J. 125, qb. *Rule* v. *Bryde et al.*, 16 Law J. 256, ex.

(*c*) *Cayme* v. *Watts*, 3 D. & R. 224.

(*d*) *Lawrence* v. *Hodgson*, 1 Young & J. 16.

(*e*) *Re Smith & Wilson*, 18 Law J. 320, ex. *Williams* v. *Wilson et al.*, 23 Law J. 17, ex.

(*f*) *Simmonds* v. *Swaine*, 1 Taunt. 549.

polluting a watercourse, the arbitrator was to direct how the water should be enjoyed in future; and he awarded that the defendant should take all reasonable precautions to prevent the water from being rendered less fit for use by his business of a dyer: this was holden bad for uncertainty, in not stating what precautions were to be taken (*a*). Where arbitrators awarded that 230*l.* was due to the plaintiff, and that out of that sum 93*l.* should be paid for the expenses of the reference, and for the costs of certain actions due to the plaintiff's attorney: this award was holden to be uncertain and bad, as it did not particularise what portion of the 93*l.* was to be appropriated to the expenses of the reference, what portion to the costs in each action (*b*). Where an award found that certain fixtures of the value of 11*l.* were wrongfully removed by a lessor of certain premises, and that the lessee should replace them with others, and that the lessor should pay him 11*l.*: this was holden bad for uncertainty, in not specifying the quality, description, or value of the fixtures to be set up by the lessee (*c*). So, where an action, in which there were several issues, was referred, and amongst other things the arbitrator awarded that the costs of the several issues should be paid "to the plaintiff or to the party entitled thereto:" the award, so far as related to the costs, was holden to be void for uncertainty(*d*). So, where an ejectment on several demises was referred, and the arbitrator

(*a*) *Stonehewer* v. *Farrer*, 14 Law J. 122, qb. See *Angus* v. *Redford*, *supra*.

(*b*) *Robinson* v. *Henderson*, 6 M. & S. 276.

(*c*) *Price* v. *Parkin*, 10 Ad. & El. 139.

(*d*) *Hetherington* v. *Robinson*, 8 Law J. 148, ex.

ordered a verdict to be entered for the plaintiff generally, without saying on which of the demises, the award was holden bad for uncertainty (*a*). But where by the submission the arbitrator was authorised, in a certain event, to order one of the parties to pay for certain iron work at the market price of pig iron, and he awarded that the party should pay for it "such sum of money as the same amounts to according to the present market price of pig iron:" this was holden sufficiently certain, as pursuing the authority in the submission, although the sum to be paid was not specified, nor the market price of pig iron, nor the market at which such price was to be ascertained (*b*). So, where two actions by and against the same parties, were referred by a judge's order, and the arbitrator awarded that the defendant should pay to the plaintiff 41*l.* 17*s.* 9*d.* in full of all demands in the said causes: this was holden sufficiently certain, without awarding a specific sum in each action (*c*). So, where one action, brought for a balance alleged to be due to the plaintiff upon seven different contracts for work performed by him for the defendants was, with all matters in difference, referred to an arbitrator, the costs of the reference to abide the event; the accounts for the different works were all kept separately, and were separately proved before the arbitrator, and the plaintiff also claimed damages for an injury done to one of his carriages by the defendants; and the arbitrator awarded a gross sum to the plaintiff, and costs; this was ob-

(*a*) *Doe* v. *Hillier*, 12 Law J. 166, qb.

(*b*) *Waddle et al.* v. *Downman*, 12 Mees. & W. 562.

(*c*) *Wynne* v. *Edwardes*, 12 Mees. & W. 708; 13 Law J. 222, ex.

jected to for uncertainty, for as the costs were to abide the event, there ought to have been a separate award as to each contract; but Wightman, J., held it to be sufficiently certain (*a*). And the same, where there were several issues, and the sum appeared to be awarded in respect of all the matters referred (*b*). So, awarding that an executor shall pay a certain sum on a certain day, out of assets in his hands, has been holden sufficiently certain, without expressly stating that he had assets to that amount (*c*). So, awarding that two persons should pay a debt, in proportion to their respective shares in a ship, the ratio of their shares not being disputed, has been holden sufficiently certain (*d*). So, where the award directed the defendant to pay a certain sum to the plaintiff, and to pay the costs of the reference and award (without stating to whom), it was holden sufficiently certain (*e*). And where a cause and all matters in difference were referred, and the award found that nothing was due to the plaintiff, this was holden to be sufficiently certain, being equivalent to a finding that the plaintiff had no right to recover in the action (*f*). So, where an action of assumpsit, in which there was a plea of payment of 30*l.*, and of payment into court of 45*l.*, was referred at *nisi prius*, and the arbitrator certified that 74*l.* 7*s.* was the proper sum *to be* paid by the defendant to the plaintiff, this was holden to be

(*a*) *Crawshaw et al.* v. *York and North Midland Railway Company*, 21 Law J. 274, qb.

(*b*) *Humphrey et al.* v. *Pearce*, 22 Law J. 120, ex. *Creswick* v. *Harrison*, 20 Law J. 56, cp.

(*c*) *Love* v. *Honeybourne*, 4 D. & R. 814.

(*d*) *Wohlenberg* v. *Lageman*, 6 Taunt. 254.

(*e*) *Baily et al.* v. *Curling*, 20 Law J. 235, qb.

(*f*) *Dickins* v. *Jarvis*, 5 B. & C. 528. *Hallyar* v. *Ellis*, 6 Bing. 225; and see *Doe* v. *Richardson*, 8 Taunt. 697. *Cooper* v. *Landon*, 11 Law J. 222, ex.; 9 Mees. & W. 60.

equivalent to a verdict for the defendant (*a*). So, where an action and all matters in difference were referred, and the arbitrator ordered a verdict to be entered for the plaintiff for 500*l.*, and also awarded him a further sum of 350*l.* as damages, "for grievances not included in the plaintiff's declaration:" the Court held that to be sufficiently certain, for it was matter of evidence what matters in difference were laid before the arbitrator (*b*). Even where an action and all matters in difference were referred, and the arbitrator awarded a gross sum to the plaintiff for his damages in the action, and for the several other matters in difference referred and submitted to him, without saying how much in respect of the action, and how much for the other matters: this was holden to be sufficiently certain (*c*). So, where an award, dated the 13th October, awarded a sum of money to be paid "on the 28th day of October next:" the Court held that it sufficiently appeared that "next" had reference to the day, not to the month, and that the money was to be paid on the 28th of the same month of October in which the award was dated (*d*). So, where an action of ejectment was referred, and the arbitrator, after reciting the submission, awarded thus: "I award and determine that the verdict in the said cause be entered for the lessors of the plaintiff,"—instead of for the plaintiff: the Court (Williams, J., *dis.*) held that the arbitrator must be understood to have finally determined the cause in favour of the plain-

(*a*) *Slater* v. *Yates*, 2 Mees. & W. 67.

(*b*) *Wrightson* v. *Bywater et al.*, 3 Mees. & W. 199; and see *Re Brown & Croydon Canal Company*, 9 Ad. & El. 522.

(*c*) *Taylor* v. *Shuttleworth*, 8 Dowl. 281.

(*d*) *Brown* v. *Smith*, 8 Dowl. 876.

tiff (*a*). So, where an action of trespass to houses and lands was referred, with power to the arbitrator to settle at what price the defendant should purchase the plaintiff's "property," and the arbitrator fixed a certain price at which the defendant should purchase the plaintiff's said "property," it was holden that this was sufficiently certain, without specifying the property, as that was not a matter in difference (*b*). So, where the arbitrator found for the plaintiff on the general issue, and for the defendant on a special plea going to the whole action: it was holden sufficient, without stating expressly that he found for the defendant (*c*). And where in such a case he awarded nominal damages to the plaintiff, it was holden that this might be rejected as surplusage (*d*). So where he found damages on each issue separately, and stated certain facts for the opinion of the Court, it was holden sufficient (*e*). So, where there were several issues, and the award found a specific sum to be due to the plaintiff in respect of all the matters in difference referred, this was holden to be sufficient (*f*). In this latter case it was also decided, that a recital in the award that it was drawn by a person who, under the terms of the submission, attended the arbitrator as an attorney, showed no improper delegation of authority, and did not affect the validity of the award (*g*).

(*a*) *Law and others* v. *Blackburrow*, 23 Law J. 28, cp.

(*b*) *Round* v. *Hatton*, 10 Mees. & W. 660; 12 Law J. 7, ex. See *Johnson* v. *Latham*, 20 Law J. 226, qb.

(*c*) *Allen* v. *Lowe*, 4 Q. B. 66. *Greenfield* v. *Edgcombe*, 14 Law J. 322, qb.

(*d*) *Ross* v. *Clifton et al.*, 2 Dowl. N. C. 983.

(*e*) *Bradbee* v. *Mayor, &c., of London*, 2 Dowl. N. C. 164.

(*f*) *Wilcox et al.* v. *Wilcox*, 19 Law J. 27, ex. *Phillips* v. *Higgins*, 20 Law J. 357, qb. *Hobson* v. *Stewart*, 16 Law J. 145, qb. *Baker* v. *Cotterill*, 18 Law J. 345, qb.

(*g*) *Baker* v. *Cotterill*, *supra*.

If one part of an award be inconsistent with another, so as to render it uncertain what is to be performed, the award is bad, and cannot be enforced. Therefore in assumpsit, where the defendant pleaded the general issue, payment, and set-off; and the arbitrator, to whom the action and all matters in difference were referred at *nisi prius*, awarded that a verdict should be entered generally for the defendant, instead of awarding separately on the several issues: the Court held the award to be inconsistent and bad, and set it aside (*a*). But where an action for use and occupation and for goods sold, &c., in which there was a plea of the general issue and a set-off, was referred at *nisi prius*, and a verdict taken for plaintiff, and the arbitrator was to certify whether the verdict should stand, and for what amount, or whether it should be vacated and a verdict entered for defendant; and he certified that the verdict should be vacated, and a verdict entered for the defendant generally: the Court held that there was nothing inconsistent in this, for the defendant might not be indebted to the plaintiff, and the plaintiff might be indebted to the defendant, and so both pleas be true (*b*). And where the general issue, and also special pleas, are pleaded, and the arbitrator directs a verdict to be entered for the plaintiff on the general issue, without damages, and for the defendant on the special pleas, there is nothing inconsistent in this, if on the face of the

That it is inconsistent.

(*a*) *Fenton* v. *Dimes*, 9 Law J. 297, qb.: *sed, vide infra.*

(*b*) *Williams* v. *Moulsdale*, 7 Mees. & W. 134. And see *Cooper* v. *Langdon*, 9 Mees. & W. 60. *Duke of Beaufort* v. *Welch*, 10 Ad. & El. 527. *Maloney* v. *Stackley*, 2 Dowl. N. C. 122; 12 Law J. 92, cp. *Duckworth* v. *Harrison*, 4 Mees. & W. 432.

record it appears that the plaintiff is not entitled to damages (*a*).

That it is not final.

Where several matters are referred, and some only decided by the award, we have seen that the award is bad (*b*); and it is bad, because it is not a final settlement of the matters in difference between the parties (*c*). So, where it was awarded that the defendant should pay a certain sum to the plaintiff unless he should within twenty-one days exonerate himself from certain payments and receipts, and in that case he was to pay a less sum: this award was holden to be inconclusive and bad (*d*). So, where an award, after deciding the matters in difference, and awarding as to costs generally, directed that the costs of making the submission a rule of court should be paid by the party disobeying the award, and obliging the same to be made a rule of court: the Court held the award to be bad, as not being final as to these latter costs (*e*). So, where the award ordered a verdict to be entered for the plaintiff, and that the defendant should do certain work, and if the plaintiff should be dissatisfied with the work, he might adduce evidence before the arbitrator of its insufficiency, at any time within two months: the Court held this latter part of the award bad; but that such part might be rejected, and the award stand good for the residue (*f*). So, where the award, after ordering certain conveyances, stated that if

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(*a*) *Warwick* v. *Cox*, 12 Mees. & W. 774; and see *Nalder* v. *Batts*, 13 Law J. 10, qb. *Ross* v. *Clifton*, 12 Law J. 265, qb.

(*b*) *Antè*, p. 65.

(*c*) See *Samuel* v. *Cooper*, 4 Nev. & M. 520. *Ross* v. *Boards*, 8 Ad. & El. 290.

(*d*) *Pedley* v. *Goddard*, 7 T. R. 73.

(*e*) *Williams* v. *Wilson et al.*, 23 Law J. 17, ex. *Re Smith & Wilson*, 18 Law J. 320, ex.

(*f*) *Manser* v. *Heaver*, 3 B. & Ad. 295.

any dispute should arise as to the form of them, it should be decided by such counsel or attorney as the arbitrator should appoint: this was holden bad, as not final (*a*). So, where an award, amongst other things, ordered that the parties should execute mutual releases, the form to be settled by J. S.: the Court held it to be bad, so far as respected the releases (*b*). So, where an award respecting the height at which a weir should be built and maintained, ordered that, for ascertaining the depth of water next the weir, such durable marks and erections should be placed on the land adjoining as J. S. might direct: the Court held the award to be bad (*c*). So, where the award merely ordered a nonsuit to be entered without otherwise adjudicating on the matters in difference, it was holden bad, as not being a final determination of the matter of the suit; and this, although by the terms of the submission he had authority to order a nonsuit (*d*). So, where all matters in difference between A. & B., partners, were referred, and the arbitrator awarded that A. was indebted to B. 3000*l.* and ordered payment, and that B. on payment thereof should pay to certain bankers such sum as should be sufficient to release certain deeds of A. which had been pledged to them, but the award did not ascertain what that sum was: the Court held that the award was not final on that point, and therefore bad (*e*). But where two parties agreed to be bound by the

(*a*) *Re Tandy & Tandy*, 9 Dowl. 1044.
(*b*) *Goddard* v. *Mansfield*, 19 Law J. 305, qb.
(*c*) *Johnson* v. *Latham*, 19 Law J. 329, qb.
(*d*) *Wild et al.* v. *Holt et al.*, 9 Mees. & W. 161.
(*e*) *Hewitt* v. *Hewitt*, 1 Q. B. 110; and see *Re Marshall*, 12 Law J. 104, qb.

opinion of a barrister, and he gave his opinion in favour of one of them: this was holden to be final, although it recommended that a printed statute should be compared with the parliament roll before the matter was settled, under a doubt whether the statute was not misprinted (*a*). So, where the award directed the defendants (a railway company) to pay the plaintiff a certain sum of money, as soon as he should have satisfied the damages of certain local agents which he had undertaken to satisfy: the Court held it to be sufficient (*b*). So, where the arbitrator, being authorised by the submission, stated facts for the opinion of the Court as to the admissibility of certain depositions, and awarded a certain sum to the plaintiff in case the Court should decide that the depositions were admissible, or a certain other sum in case they were not admissible: this was holden to be sufficiently final (*c*). So, where a cause and all matters in difference were referred, and the arbitrator awarded as to all, except a certain claim by the plaintiff for a loss on hats, and as to that claim he found that no sufficient evidence was laid before him to show that any loss had been sustained up to that time: this was holden to be sufficiently final (*d*). So, an award that certain actions should be discontinued, and each party pay his own costs, is final and good, being in effect an award of a *stet processus* (*e*). So,

(*a*) *Price* v. *Hollis*, 1 M. & S. 105.

(*b*) *Miller et al.* v. *De Burgh*, 19 Law J. 127, ex.

(*c*) *Scott* v. *Van Sandau*, 6 Q. B. 237.

(*d*) *Cockburn et al.* v. *Newton*, 2 Man. & Gr. 899.

(*e*) *Blanchard* v. *Lilly*, 9 East, 497. *Hawkins* v. *Colclough*, 1 Burr. 274. And see *Yates* v. *Knight*, 2 Bing. N. C. 277. *Nicholson et al.* v. *Sykes*, 23 Law J. 193, ex.

where a suit and all matters in difference were referred, and the award found that the plaintiff had no demand upon the defendant with respect to the action, or on any other account whatsoever, this was holden sufficiently final although the suit was not thereby put an end to in terms (*a*). So, where the declaration was for two distinct causes of action, and the award ordered a general verdict for the plaintiff for a certain sum, this was holden sufficiently certain, without awarding specifically as to each cause of action (*b*). On the other hand, where two actions, in which there were several issues, were referred, and the arbitrator found separately on the several issues, without stating that the finding terminated the suits: the Court held the award to be sufficiently final (*c*).

That it is void.

If an award be void, the Court will not on that ground set it aside, if nothing can be done upon it without suit or application to the Court; but if the party can enforce it without applying to the Court to enable him to do so, as for instance, if the award order a verdict to be entered, there the Court will set it aside, for otherwise the party might proceed to judgment and execution upon it (*d*).

For perjury or fraud.

The Court will not set aside an award, although the affidavit in support of the application disclose strong imputations upon the testimony of a material witness who was examined before the arbi-

(*a*) *Jackson* v. *Yabsley*, 5 B. & A. 848. *Harding* v. *Forshaw*, 1 Mees. & W. 415. And see *Eardley* v. *Steer*, 2 Cr. M. & R. 327. *Steepel* v. *Bonsall*, 2 Har. & W. 11. *Dibbin* v. *Marquis of Anglesea*, 2 Cr. & M. 722.

(*b*) *Bird* v. *Cooper*, 4 Dowl. 148. See *Gyde* v. *Boucher*, 2 Har. & W. 127; 5 Dowl. 127 (overruled by *Creswick* v. *Harrison*, 20 Law J. 56, cp.) *Duckworth* v. *Harrison*, 4 Mees. & W. 432. *Savage* v. *Ashwin*, 4 Mees. & W. 530. *Cooper* v. *Langdon*, 9 Id. 60. *Maloney* v. *Stockley*, 4 Man. & Gr. 647.

(*c*) *Allen* v. *Lowe*, 4 Q. B. 66.

(*d*) *Doe* v. *Brown*, 5 B. & C. 384; and see *Preston* v. *Eastwood*, 7 T. R. 95.

trator (*a*). Nor will the Court set aside an aw on the ground that the order of reference has b fraudulently obtained; the application ought tc to set aside the order of reference, and should made within due time after the order was c tained (*b*).

When and How.

In the case of a compulsory reference.

By stat. 17 & 18 Vict. c. 125, s. 9, all applications to set aside any award, made on a compulsory reference under this Act, shall and may be made within the first seven days of the term next following the publication of the award to the parties, whether made in vacation or term; and if no such application is made, or if no rule is granted thereon, or if any rule granted thereon is afterwards discharged, such award shall be final between the parties (*c*). This section does not require that the rule shall be granted within the seven days, but only that it shall be moved for within that time (*d*). It must be observed that this section does not extend to orders of reference made by consent (*e*).

re the ission is a rule irt.

In all cases where the submission has been made a rule of court under stat. 9 and 10 W. 3, c. 15, application may be made at any time before the last day of the term next after the award or umpirage thereon shall be made and published, to set it aside for corruption, or undue practice of the arbitrator (*f*), or for any other cause (*g*). And it

(*a*) *Scales* v. *East London Waterworks Co.*, 1 Hodg. 91.
(*b*) *Sackett* v. *Owen*, 2 Chit. 39.
(*c*) 17 & 18 Vict. c. 125, s. 9.
(*d*) *Bennett* v. *Watson*, 29 Law J. 357, ex.
(*e*) Id.
(*f*) 9 & 10 W. 3, c. 15, s. 2.
(*g*) *Zachary* v. *Shepherd*, 2 T. R. 781.

must be made within that time, for the Court will not entertain it afterwards (*a*), even for objections appearing on the face of the award (*b*), and even although a portion of the delay was caused by the opposite party improperly preventing the submission being made a rule of court (*c*), or by the party not knowing the contents of the award, owing to the arbitrators refusing to give it up until they were paid extortionate fees (*d*). Even where the rule *nisi* had been obtained the last day but one of the term, but it was sought to be amended, for the purpose of using an affidavit sworn on the last day of term: Littledale, J., held that it could not be done, as by the statute the motion and rule must be before the last day of term (*e*). Where a cause pending was referred, not by rule or judge's order, as is usually done, but by agreement, containing the clause of consent according to this statute, it was holden to be a case within the statute, and that a motion to set aside the award should be made within the time above-mentioned (*f*). The time here limited is computed from the day the award is published, that is, from the day on which notice of it is given to the parties (*g*). Where it was published after the essoign day and before the *quarto die post* of the term, this was holden to be within the term, and consequently that the party had until the last day of the next following term, to move to set it aside (*h*); but it is very doubtful

(*a*) *Fream* v. *Pinneger*, Cowp. 23. *Ridley* v. *Goddard*, 7 T. R. 73; see *Re Perring & Keymer*, 3 Dowl. 98.

(*b*) *Lowndes* v. *Lowndes*, 1 East, 276.

(*c*) *Smith* v. *Blake*, 8 Dowl. 133.

(*d*) *Moore* v. *Darley*, 1 M. Gr. & S. 445.

(*e*) *Re Holloway & Monk*, 8 Dowl. 138.

(*f*) *Rushworth* v. *Barron*, 3 Dowl. 317; 1 Har. & W. 122.

(*g*) *Musselbrook* v. *Dunkin* 1 Dowl. 722.

(*h*) *Re Burt*, 5 B. & C. 668.

whether it would be holden so now, as the terms are fixed to commence on particular days by stat. 11 G. 4 and 1 W. 4, c. 70, s. 6.

Where the submission is by rule of court or judge's order, although it does not come within the above statute, yet, in analogy to the statute, the Court require the motion to set aside an award in such a case to be made before the end of the term next after publishing of the award (*a*). But, as the Court are not bound by the statute in these cases, they will not insist rigidly upon the rule thus laid down by them, if a sufficient case be made out to induce them to entertain the motion at a later period (*b*). It has been holden, however, to be no excuse that the party did not obtain the award in time, owing to the arbitrator demanding an exorbitant sum for his award (*c*).

Where the reference is by order of *nisi prius*.

If the submission be by order of *nisi prius*, and the reference be of the cause alone (*d*), and a verdict be taken, a party intending to move to set aside the award or certificate of the arbitrator, must do so within the time allowed for moving for a new trial, unless a sufficient reason for the delay be shown (*e*); and this, even although the objections all appear on the face of the award (*f*). So, where the arbitrator ordered a verdict to be entered for 250*l.*, and then stated certain facts for the

(*a*) *M'Arthur* v. *Campbell*, 2 Nev. & M. 444. *Potter* v. *Newman*, 4 Dowl. 504. And see *Worrall* v. *Deane*, 2 Dowl. 261.

(*b*) *Rogers* v. *Dallimore*, 6 Taunt. 111. *Hobbs* v. *Ferrars*, 8 Dowl. 779.

(*c*) *M'Arthur* v. *Campbell*, 5 B. & Ad. 518; see also *Emet* v. *Ogden*, 7 Bing. 258. *Hayward* v. *Phillips*, 1 Nev. & P. 288. *Kennard* v. *Harris*, 2 B. & C. 801.

(*d*) *Riccard* v. *Kingdon*, 15 Law J. 269, qb. *Paston* v. *Gt. Northern Railway Company*, Id. 270, qb.

(*e*) *Rawsthorn* v. *Arnold*, 6 B. & C. 629. *Borrowdale* v. *Hitchener*, 3 B. & P. 244. *Thompson* v. *Jennings*, 10 Moore, 110; and see *Gravatt* v. *Atwood*, 19 Law J. 474, qb.

(*f*) *Sell* v. *Carter*, 2 Dowl. 245.

opinion of the Court, and directed that, if the Court should be of opinion on these facts that the verdict should be for 125*l.* only, the damages should be reduced to that sum: the Court held that a motion to enter the verdict for the latter sum should have been made within the regular time for setting aside the award (*a*). This rule, however, is not to be deemed imperative, although the Court usually require a strong case to justify their departure from the practice established by it (*b*). And it is confined to cases where the cause alone is referred, and does not extend to cases where there is a reference of the cause and all matters in difference (*c*). But if the judgment signed upon the verdict in such a case be irregular, by reason of some defect appearing upon the face of the award, the party may move to set aside the judgment, although the time for impeaching the award may have elapsed (*d*). And the same, where a judgment is signed in pursuance of a submission by judge's order or rule of court (*e*). It may be necessary to observe that the Courts at Westminster have no authority to set aside an award made in an action depending in the Court of Common Pleas at Lancaster, and referred by order of *nisi prius* (*f*).

In the rule *nisi* must be stated all the objections to the award, intended to be insisted upon at the time of making such rule absolute (*g*). And this rule extends also to cases where merely a certifi- Motion.

(*a*) *Anderson* v. *Fuller*, 4 Mees. & W. 470.
(*b*) *Sherry* v. *Okes*, 1 Har. & W. 119.
(*c*) *Moore* v. *Butlin*, 7 Ad. & El. 595. *Hayward* v. *Phillips*, 6 Ad. & El. 119. *Allenby* v. *Proudlock*, 4 Dowl. 54, per Coleridge, J.; see *Lyng* v. *Sutton*, 5 Dowl. 39, *cont.*
(*d*) *Manser* v. *Heaver*, 3 B. & Ad. 295.
(*e*) *Doe* v. *Horner et al.*, 8 Ad. & El. 235.
(*f*) *Plumley* v. *Isherwood*, 12 Mees. & W. 190.
(*g*) Rule Gen. 169.

cate, and not an award, has been given by the arbitrator(*a*). The objections must be stated in the rule with certainty and precision (*b*); it is not sufficient to say, generally, that the arbitrator has exceeded his authority, or that the award is uncertain or not final(*c*), or that the arbitrator had made his award under a misapprehension of the terms of the reference(*d*), or the like. But stating that the arbitrator has not awarded on a matter in difference submitted to him, has been deemed sufficient(*e*). Where, however, a verdict is taken, subject to an award, and a judgment is irregularly entered thereon, it is not necessary, in moving to set aside that judgment, to state the grounds of objection, although they arise upon the face of the award (*f*). Or if the motion be made upon affidavit, and the objections be there stated, it is not necessary to state them in the rule(*g*). It is no ground for setting aside an award, that the unsuccessful party suffered a surprise, as the arbitrator would have power to postpone the proceedings upon any reasonable application for that purpose(*h*).

Previously to moving to set aside the award, the order or agreement of submission must be made a rule of court(*i*). But it seems that it is not necessary, though usual, to make the enlargements a part of the rule(*k*); although it is otherwise, we shall see(*l*), when it is intended to enforce the

(*a*) *Carmichael* v. *Houchen*, 3 Nev. & M. 203. *Whatley* v. *Morland*, 2 Cr. & M. 347.

(*b*) *Staples* v. *Hay*, 1 Dowl. & Lo. 711.

(*c*) *Boodle* v. *Davis*, 4 Nev. & M. 788. *Gray* v. *Leaf*, 8 Dowl. 654.

(*d*) *Allenby* v. *Proudlock*, 4 Dowl. 54.

(*e*) *Dunn* v. *Warliers*, 9 Mees. & W. 293.

(*f*) *Manser* v. *Heaver*, 3 B. & Ad. 295.

(*g*) *Rawsthorne* v. *Arnold*, 6 B. & C. 629.

(*h*) *Solomon* v. *Solomon*, 28 Law J. 129, ex.

(*i*) See *Harrison* v. *Smith*, 1 Dowl. & Lo. 876. *Ross* v. *Ross*, 16 Law J. 138, qb.

(*k*) *Re Welsh et al.*, 1 Dowl. N. C. 331.

(*l*) *Post*, p. 97.

award. The rule must be drawn up, on reading the rule by which the matter was referred (*a*), and also a copy of the award (*b*), unless the award be void for matter extrinsic (*c*). But it is not necessary that the other party should take an office copy of the award (*d*).

In the Court of Queen's Bench, cause cannot be shown against this rule on the last day of term, but the rule must be enlarged, until the term following (*e*). And the practice is the same in the Common Pleas (*f*) and Exchequer.

Award referred back to the Arbitrator.

In what cases.

After an award has been made and published, the arbitrator cannot alter it (*g*) without the consent of the parties, or unless the Court or a judge send it back to him for that purpose. But, by stat. 17 & 18 Vict. c. 125, s. 8, in any case where reference shall be made to arbitration as aforesaid, the Court or a judge shall have power at any time, and from time to time, to remit the matters referred, or any or either of them, to the re-consideration and re-determination of the said arbitrator, upon such terms, as to costs and otherwise, as to the said Court or judge may seem proper (*h*). And this has been holden to extend not only to compulsory references under section 3, but to all

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(*a*) *Christis* v. *Hamlet*, 5 Bing. 195.
(*b*) *Sherry* v. *Okes*, 1 Har. & W. 119; 3 Dowl. 349.
(*c*) *Hinton* v. *Meade*, 24 Law J. 140, ex.
(*d*) *Hawkyard et al.* v. *Greenwood et al.*, 14 Law J. 236, qb.
(*e*) R. M. 36 G. 3.
(*f*) *Bignall* v. *Gale*, 2 Man. & Gr. 364. *Re Evans and Havill*, 4 Id. 767.
(*g*) *Ward* v. *Dean*, 3 B. & Ad. 234.
(*h*) 17 & 18 Vict. c. 125, s. 8.

references by consent of parties (*a*). And therefore, where an award was defective on the face of it, in the mode of awarding costs, the Court referred it back to the arbitrator for the sole purpose of setting right that defect, and it was holden that he might correct the award in this respect without giving notice to or hearing the parties (*b*). But it merely empowers the Court to remit back the award in such cases only as they might have done so before that Act if the submission had contained a clause to that effect (*c*), or where they have a power to set aside the award for errors on the face of it, or misconduct of the arbitrators (*d*). Before the passing of this Act, the Court, with the assent of the parties, might send the award back to the arbitrator if he had made any mistake in it which might be amended (*e*). And it was usual to insert in the submission a clause, in this or the like form, "that in the event of either of the parties disputing the validity of the award, or moving the Court to set the same or any part thereof aside, the Court shall have power to remit the matters thereby referred to the re-consideration and determination of the said arbitrator (*f*). Where to a declaration containing a single count for work and labour, money paid, board and lodging, and on an account stated, the defendant pleaded never indebted and a set-off, the cause was referred, the costs of the cause, and of the reference and award or certificate, to abide the event of the award or certificate;

(*a*) *Re Morris & Morris*, 25 Law J. 281, qb.
(*b*) Id.
(*c*) *Hodgkinson* v. *Fernie*, 27 Law J. 66, cp.
(*d*) *Begg* v. *Burgess*, 27 Law J. 318, cp.
(*e*) See *Bird* v. *Pearice*, 6 Mees. & W. 704; 9 Law J. 257, ex. *Ferguson* v. *Norman*, 4 Bing. N. C. 52.
(*f*) See *Baker* v. *Hunter*, 16 Law J. 203, ex. *Johnson* v. *Lanham*, 19 Law J. 329, qb. *Brumby et ux.* v. *Phelps*, 21 Law J. 310, ex.

the defendant certified that a verdict should be entered on the first issue for the plaintiff, and on the second issue for the defendant; and he afterwards stated that he considered that the plaintiff had made out no claim against the defendant, except for board and lodging: the Court, under a power to that effect, remitted the matters to the arbitrator to certify specifically upon the claims in the declaration, and as to what sum, if any, he found to be due from the defendant to the plaintiff in respect of one or either of such claims (*a*). But under this form the Court could only remit the award back to the arbitrator, where it was bad; and not where it was merely sought to get the arbitrator to certify as to the costs of an action (*b*), or the like. Where, however, the party against whom an award was made applied to have it sent back to the arbitrator, on the ground that he had since found a letter in the other party's handwriting containing material evidence in his favour, and which the arbitrator stated would have materially affected his decision if it had been given in evidence before him: the Court remitted the case to the arbitrator, although the other party swore that the letter was a forgery (*c*). Where it was remitted merely for the purpose of the arbitrator altering the name of James to Joseph in the award, it was holden not to be necessary that he should give any notice to the parties to attend before him (*d*). And where in a like case the arbi-

(*a*) *Gore* v. *Baker*, 24 Law J. 94, qb.

(*b*) *Webber* v. *Lee*, 1 Dowl. & Lo. 584.

(*c*) *Burnard* v. *Wainwright*, 19 Law J. 423, qb. And see *Paterson* v. *Ayre*, 23 Law J. 129, cp.

(*d*) *Howett* v. *Clements*, 1 M. Gr. & S. 128.

trator merely certified that the award ought to be amended in the name, this was holden sufficient, without his actually amending it (*a*). But on the other hand, where the award was remitted on the ground that the arbitrator had not finally disposed of a matter submitted to him, and with respect to which he had received evidence; and, upon the parties attending before him by appointment, evidence was tendered to him upon the subject, but he refused to receive it: the Court held that he ought to have received it; but, doubting their power to send it back to him a second time, instead of doing so they set aside the award (*b*). When an award, being defective, is referred back to the arbitrator, who hears fresh evidence and makes a second award, the arbitrator's charges for the first award are to be borne equally by each party (*c*).

(*a*) *Davies* v. *Pratt*, 25 Law J. 71, cp.

(*b*) *Nickalls* v. *Warren*, 14 Law J. 75, qb.; 2 Dowl. & Lo. 549.

(*c*) *Blair* v. *Jones*, 20 Law J. 295, ex.

PART V.

ENFORCING THE AWARD.

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In what Manner.

On a sub sion by d &c.

If there be no cause pending in court, and the submission contain words purporting that the parties intended that it should not be made a rule of court, the mode of enforcing the award is by action of debt on the bond of submission; or by action of

covenant, if the submission be by any other deed; or by assumpsit, if the submission be by agreement not under seal, or by parol; or by debt on the award, if the award be for the payment of money only (*a*). And in such action the defendant may take advantage of any defect which renders the award void, under the plea of *nul tiel agard* (*b*). Or, where the submission is in writing, and either contains the clause of consent above mentioned, or does not contain words purporting that the parties intended that it should not be made a rule of court (*c*), the party in whose favour the award is made may have his remedy upon it by attachment (*d*). Or where the award is only for money or costs, the party may enforce it by a writ of execution, in the manner hereinafter directed.

Where a cause is referred at *nisi prius*.

Where a cause is referred at *nisi prius*, and a verdict taken subject to an award or certificate, the party in whose favour the award is afterwards made, or certificate granted, may have the *postea* indorsed on the *nisi prius* record accordingly; and may, without any personal service of the award, but merely serving it in the ordinary way upon the attorney of the opposite party, sign judgment and sue out execution, without any previous application to the Court (*e*). And where a cause and all matters in difference were referred at *nisi prius*, and a verdict taken for the plaintiff, and the arbitrator awarded that the verdict should stand for 548*l.* 17*s.* 8*d.*,

(*a*) See *Sutcliffe* v. *Brook*, 15 Law J. 118, ex. *Dressor* v. *Stansfield*, Id. 274, ex.

(*b*) *Roberts* v. *Eberhardt*, 27 Law J. 70, cp.

(*c*) See *antè*, p. 9.

(*d*) Vide *infra*.

(*e*) *Lee* v. *Lingard*, 1 East. 401. *Borrowdale* v. *Hitchener*, 3 B. & P. 244. *Cromer et al.* v. *Churt*, 15 Law J. 263, ex. See *Grundy* v. *Wilson*, 7 Taunt. 700. *Deere* v. *Kirkhouse*, 20 Law J. 195, qb.

which sum was to be paid by the defendant to the plaintiff; and he found also that 202*l.* 13*s.* 6*d.* was due from the plaintiff to the defendant: the plaintiff obtained the *postea* and signed judgment at the expiration of fourteen days for the amount of his verdict; and the Court held that he had a right to do so, and was not obliged to wait until the time for moving to set aside the award had expired (*a*). If the award be for a greater sum than the amount of damages given by the verdict, the Court will not amend the declaration and verdict by increasing the damages, so as to give the plaintiff the full benefit of his award (*b*); but they will allow the judgment to be entered for the amount of the verdict; or if the judgment by mistake be entered up for the greater sum, they will amend it by reducing it to the sum laid as damages in the declaration (*c*). Where the award was lost, the Court of Common Pleas allowed judgment to be signed, upon an affidavit of its contents (*d*). Where the award is not published, or the certificate not delivered to the associate, until after the time at which the party would be entitled to judgment if the cause had not been referred, the Court, upon a special application and a proper case made out by affidavit, would probably allow the judgment to be entered *nunc pro tunc* (*e*).

Where the submission is by rule of court, or by a judge's order which is afterwards made a rule of court, the party may have his remedy for non-

Where th submissio by rule o court, or judge's o

(*a*) *O'Toole* v. *Pott*, 26 Law J. 88, qb., overruling *Ivorcs* v. *Iver*, 20 Law J. 69, cp.

(*b*) See *Pearse* v. *Cameron*, 1 M. & S. 675.

(*c*) *Prentice* v. *Reed*, 1 Taunt. 151.

(*d*) *Hill* v. *Townsend*, 3 Taunt. 45.

(*e*) See *Brooke* v. *Fearns*, 2 Dowl. 114, and see R. G. H. 4 W. 4, r. 2, s. 3.

performance of the award by attachment, as for a contempt of the Court in not obeying the rule (*a*). Or if, as is sometimes the case, the rule or judge's order directs that the party in whose favour the award shall be made shall be at liberty to sign final judgment for the amount, tax costs, and sue out execution, he may do so, without any previous application to the Court; even a defendant may do so, if the award be in his favour (*b*). As the remedy by attachment, however, is a very general one, and requires to be treated in detail, it may be convenient to do so under a separate head.

On a compulsory reference.

By stat. 17 & 18 Vict. c. 125, s. 10, any award made on a compulsory reference under this Act may, by authority of a judge, on such terms as to him may seem reasonable, be enforced at any time after seven days from the time of publication, notwithstanding that the time for moving to set it aside has not elapsed (*c*).

In cases of land.

By stat. 17 & 18 Vict. c. 125, s. 16, when any award made on any such submission, document, or order of reference as aforesaid, directs that possession of any land or tenements capable of being the subject of an action of ejectment shall be delivered to any party, either forthwith or at any future time, or that any such party is entitled to the possession of any such lands or tenements, it shall be lawful for the Court, of which the document authorising the reference is or is to be made a rule or order, to order any party to the reference who shall be in possession of any such lands or tenements, or any

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(*a*) *Vide infra.*
(*b*) *Maggs* v. *Yorston*, 6 Dowl. 481.
(*c*) 17 & 18 Vict. c. 125, s. 10.

person in possession of the same, claiming under or put in possession by him since the making of the document authorising the reference, to deliver possession of the same to the party entitled thereto, pursuant to the award; and such rule or order to deliver possession shall have the effect of a judgment in ejectment against every such party or person named in it, and execution may issue, and possession shall be delivered by the sheriff as on a judgment in ejectment (*a*).

Attachment for Nonperformance of an Award.

In what cases.

Where the submission is by rule of court, or by an order of *nisi prius* or judge's order which is afterwards made a rule of court, or by a bond or agreement, &c., which is afterwards made a rule of court, as already mentioned, the award may be enforced by attachment. But the award must contain an order by the arbitrator to pay the money or do the act awarded; for otherwise the not doing of it, will be no breach of the rule, and the Court cannot grant an attachment (*b*); merely stating that A. is indebted to B. in a certain sum (*c*), or directing a verdict to be entered for the party, where the arbitrator has no authority to do so (*d*), is not equivalent to it. So, where by agreement A. was to purchase certain lands of B. at a certain price to be fixed by an arbitrator, and the arbitrator accordingly awarded a certain sum as the

(*a*) 17 & 18 Vict, c. 125, s. 16.
(*b*) *Edgell* v. *Dallimore*, 3 Bing. 634. *Scott* v. *Williams*, 3 Dowl. 508. *Hopkins* v. *Davies*, 1 Cr. M. and R. 846. *Deanad* v. *Howey*, 7 Dowl. 318.
(*c*) Id.
(*d*) *Donlan* v. *Brett*, 4 Nev. & M. 834.

price; it was holden that an attachment would not lie for the non-payment of the money (*a*). So, a party shall not recover interest on the sum awarded to him, by attachment (*b*). And where, after an award directing money to be paid to the plaintiff, matter arose which gave the defendant a counter-claim against the plaintiff for an equal amount, the Court refused to grant the plaintiff an attachment for nonpayment of the money awarded (*c*). Also the Court will never grant an attachment where an action is pending on the same award, even although the plaintiff offer to waive the action (*d*); unless the party will consent to discontinue and pay the costs before he sues out the attachment (*e*). But where a plaintiff, to whom a sum of money was awarded, filed an affidavit of debt in the Court of Bankruptcy, under stat 1 & 2 Vict., c. 110, s. 8, for the amount, and a bond with sureties was accordingly given, but no action was in fact brought: the Court held that he was not thereby precluded from enforcing the award by attachment (*f*). On the other hand, where the plaintiff obtained an attachment first, and arrested the defendant upon it, but finding the defendant obstinate, and that he would not pay the money, he commenced an action against him upon the award: the Court ordered the defendant to be discharged, upon his giving the plaintiff a bond, with sureties, in the nature of a bail bond, to the satisfaction of the master (*g*).

(*a*) *Re Lee & Hemingway*, 3 Nev. & M. 860.
(*b*) *Churcer* v. *Stringer*, 2 B. & Ad. 777.
(*c*) *Rees* v. *Rees*, 25 Law J. 352, qb.
(*d*) *Badley* v. *Loveday*, 1 B. & P. 81.
(*e*) *Paull* v. *Paull*, 2 Cr. & M. 235.
(*f*) *Mendell* v. *Tyrrell*, 9 Mees. & W. 217.
(*g*) *Earl Lonsdale* v. *Whinney*, 1 Cr. M. & R. 591.

In one case, the Court of Common Pleas granted an executor an attachment for non-performance of an award made in favour of his testator (*a*); but in a subsequent case the Court of King's Bench ruled otherwise (*b*). Nor will the Court grant an attachment to a person who is a stranger to the submission, although the award order a sum of money to be paid to him (*c*). But they will grant it against an executor, where it appears from the pleadings in the action referred that he would have been personally liable, if a verdict had been found against him (*d*). And where it is awarded that one party shall pay the costs of the award, and that the other shall repay him the whole or a moiety thereof, then, if the one pay the amount, he may compel the other by attachment to repay him his portion (*e*). And the Court will grant an attachment for not performing an award, although it appear that the party reside out of the jurisdiction of the Court (*f*). But they will not grant an attachment after a long time has elapsed from the making of the award, at least not without an affidavit accounting for the delay (*g*). Nor will the Court grant an attachment where the award appears bad or defective on the face of it (*h*). Nor will they in any case grant it against a peer (*i*) or member of parliament (*k*) for non-performance of an award.

(*a*) *Rogers* v. *Stanton*, 7 Taunt. 575.
(*b*) *R.* v. *Maffey*, 1 Dowl. 538.
(*c*) *Re Skeets et al.*, 7 Dowl. 618.
(*d*) *Spivy* v. *Webster*, 2 Dowl. 46.
(*e*) *Hicks* v. *Richardson*, 1 B. & P. 93. *Stokes* v. *Lewis*, 2 Smith, 12. See *Re Earl of Cardigan & Henderson*, 22 Law J. 83, qb.
(*f*) *Hopcraft* v. *Fermor*, 1 Bing. 379.
(*g*) *Storey* v. *Garry*, 8 Dowl. 299; but see *Baily et al.* v. *Curling*, 20 Law J. 235, qb, cont.
(*h*) *Cock* v. *Gent et al.*, 15 Law J. 33, x. *Graham* v. *D'Arcy*, 18 Law J., 6,1 cp.
(*i*) *Walker* v. *Earl Grosvenor*, 7 T. R. 171.
(*k*) *Culmur* v. *Knatchbull*, 7 T. R. 448.

Making the submission a rule of court.

Where the submission is by order of *nisi pr* or judge's order, or by bond or agreement contai ing the consent already mentioned, or not contai ing words purporting that the parties intend that it should not be made a rule of court (*a*), th first step in proceeding for an attachment for non performance of the award, is, to make the order o other submission a rule of court. And where the order of reference was made by a borough court of record, and contained this consent clause for mak- ing it a rule of one of the superior courts at West- minster, it was holden to be within the stat. 9 & 10 W. 3, c. 15 (*b*), as an agreement of reference between the parties, and it was made a rule ac- cordingly (*c*). Unless this be done, the Court cannot grant the attachment, even although the opposite party offer to waive the objection (*d*). The motion for this purpose, is a motion of course. If the submission be by an order, you have merely to annex it to a motion paper; if by a bond, &c., annex to it an affidavit of its due execution, and inclose it in a motion paper; then give them to counsel to move, and afterwards draw up the rule. In vacation you can obtain a judge's fiat for the rule; and upon taking it to the office, together with a motion paper signed by counsel, you may obtain the rule. If by the award or submission you are entitled to costs, get an appointment to tax upon the rule, give notice, and proceed to the taxation, as in ordinary cases. Where the arbitrator refused to give up an order of reference, that it might be

(*a*) See *antè*, p. 9.
(*b*) See *antè*, pp. 4, 9.
(*c*) *Harlow* v. *Winstanley*, 19 Law J. 430, qb.
(*d*) *Owen* v. *Hurd*, 2 T. R. 643.

made a rule of court, Patteson, J., allowed a duplicate of it to be used for the purpose (*a*). If there be an attesting witness to the submission, and he refuse to make an affidavit of the signing or execution of it, the Court will in general compel him; but the affidavit, and his expenses of swearing to it, must be previously tendered to him (*b*). If the time for making the award were enlarged by indorsement on the judge's order or other submission, or otherwise, the enlargement, as well as the submission, must be made a rule of court; otherwise the Court will not grant an attachment (*c*).

Service at demand.

A copy of the rule and allocatur, and a copy of the award (*d*), must be personally served upon the party intended to be attached, and the original rule and allocatur must at the same time be shown to him. The Court will not dispense with personal service in any case (*e*); but if it be for a payment to two persons, a service and demand by one of them will be sufficient (*f*); or if the award, however, be against two, and one of them be personally served, but a personal service on the other be found impracticable, the Court will grant the attachment against the one served (*g*). This service and demand should be before making the submission a rule of court; otherwise the party will not be allowed the costs of making it a rule of court (*h*).

(*a*) *Thomas* v. *Philby*, 2 Dowl. 145.

(*b*) *Ex p. Pike*, 1 Dowl. N. C. 275. See 17 & 18 Vict. c. 125, s. 48, *post*, under the title "*Affidavit.*"

(*c*) *Jenkins* v. *Law*, 8 T. R. 8. *Smith* v. *Blake*, 8 Dowl. 130; and see *Dickins* v. *Jarvis*, 5 B. & C. 528.

(*d*) *Laugher* v. *Laugher*, 2 Cromp. & J. 398, 1 Tyr. 352.

(*e*) *Read* v. *Fore*, 1 Chit. 170. *Brander* v. *Penleaze*, 5 Taunt. 813. *Richmond* v. *Parkinson*, 3 Dowl. 703; but see *Re Bower*, 1 B. & C. 264.

(*f*) *Drew* v. *Woolcock*, 24 Law J. 22, qb.

(*g*) *Richmond* v. *Parkinson*, 3 Dowl. 703.

(*h*) *Carter* v. *Burial Board of Tonge*, 29 Law J. 293, ex.

Affidavit, motion, &c.

The affidavit must state the making of the a by the arbitrator, and the time of making it and the award itself must be annexed. Al the time for making the award were enlarged, affidavit must show that it was regularly enlar that the defendant had notice of the enlargem and that the award was made within the enlar time (*b*); but where the enlargement was by dorsement on the order of reference, and the ord was made a rule of court, it was holden not nece sary to state that the indorsements were dul made (*c*); the enlargement being made a rule o court, it must be presumed that there had been an affidavit of such enlargement having been duly made; and if there were in fact no such affidavit, the Court upon application would set aside the rule making the order, &c. a rule of court (*d*). If the enlargements be indorsed upon a part of the submission which is in the possession of the opposite party, the Court on application will oblige him to have it made a rule of court (*e*). The affidavit must then state a personal service of copies of the rule and allocatur and award, and that the original rule and allocatur were at the same time shown to the party; and the rule and allocatur should be annexed. It must then state a personal demand of the money or other thing awarded, and a refusal or neglect to pay it, &c.; and if the demand were under a power of attorney, it must state it, must

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(*a*) See *Wohlenberg* v. *Lageman*, 6 Taunt. 254.

(*b*) Id. *Davis* v. *Vass*, 15 East, 97. *Moule* v. *Stawell*, 15 East, 99, n.; and see *Halden* v. *Glasscock*, 5 B. & C. 390. *Hilton* v. *Hopwood*, 1 Marsh, 66. *Trew* v. *Burton*, 1 Cr. & M. 533.

(*c*) *Dickins* v. *Jarvis*, 5 B. & C. 528. *Barton* v. *Ranson*, 3 Mees. & W. 322.

(*d*) Id. and S. C. 6 Dowl. 384.

(*e*) *Smith* v. *Blake*, 8 Dowl. 130.

annex the power of attorney, the attesting witness must swear to its due execution (*a*), and the affidavit must state that a copy of such power of attorney was served upon, and the original shown to, the party, at the time the demand was made (*b*); in such a case, the party himself should also swear that he has not received the money, &c.; and the affidavit should show, generally, that the money, &c., still remains unpaid, &c. (*c*). If there be a cause in court, the affidavit should be intituled in it (*d*); but otherwise, if the submission have been made a rule of court under the statute (*e*). And the same as to the affidavits in answer (*f*).

Upon this affidavit, &c., get counsel to move for a rule *nisi* for an attachment. Against this rule the other party may show as cause that the award is illegal and bad on the face of it (*g*), even although the time may have elapsed for moving to set aside the award for such an objection (*h*). Or he may show that the money is not due according to the terms of the award. But where an award, dated the 13th October, 1840, ordered the payment of a sum of money on the 28th day of October next, and upon an application for an attachment in Michaelmas term, 1840, it was objected that "October *next*" must mean October, 1841: the Court held that the word "next" applied to the day as well as the month, and as the meaning of the award evidently was that the money should be

(*a*) *Laugher* v. *Laugher*, 1 Tyr. 352, 2 Cr. & J. 398.
(*b*) Id.
(*c*) See *Gifford* v. *Gifford*, Forrest, 80.
(*d*) *Doe* v. *Stillwell et al.*, 6 Dowl. 305.
(*e*) *Bainbridge* v. *Houlton*, 5 East, 21.
(*f*) Id.; but see *Bevan* v. *Bevan*, 3 T. R. 601.
(*g*) *Hutchins* v. *Hutchins*, Andr. 297.
(*h*) *Pedley* v. *Goddard*, 7 T. R. 73.

paid on the 28th of the same month in which the award was made, they granted the attachment (*a*). But he will not be allowed to set up any other objection to the award in answer to the rule (*b*). Having a cross demand against the party who has obtained the rule is no answer to it (*c*). Even corruption in the arbitrator is no answer to it (*d*). If the party have objections to the award not appearing upon the face of it, he should move to set it aside. From two recent cases, however, it appears that where there is a doubt as to the validity of an award, the Court will neither enforce it by attachment nor set it aside, but leave the party to his remedy by action (*e*).

If the award be for costs only, and direct them to be paid by several persons in equal proportions, there must be a separate attachment against each (*f*).

Execution for the Sum awarded.

ıere the erence was npulsory.

By stat. 17 & 18 Vict. c. 125, s. 3, we have seen (*g*) that where the matter in dispute consists wholly or in part of matters of mere account which cannot be tried in the ordinary way, the Court or a judge may either decide the matter or may order it to be referred to an arbitrator, "and the decision or order of such court or judge, or the award or certificate of such referee, shall be enforceable

(*a*) *Brown* v. *Smith*, 8 Dowl. 867.
(*b*) *Holland* v. *Brooks*, 6 T. R. 161; *Per Ld. Mansfield in Lucas* v. *Wilson*, 2 Bur. 701; and see *M'Arthur* v. *Campbell*, 4 Nev. & M. 208; *Paull* v. *Paull*, 2 Cr. & M. 235; *Rowe* v. *Sawyer*, 7 Dowl. 691.
(*c*) *Smith* v. *Johnson*, 15 East, 213.
(*d*) *Brazier* v. *Bryant*, 3 Bing. 167.
(*e*) *Burley* v. *Stevens*, 4 Dowl. 770; *Thornton* v. *Hornby*, 8 Bing. 13.
(*f*) *Gulliver* v. *Summerfield*, 5 Dowl. 401.
(*g*) *Ante*, p. 16.

by the same process as the finding of a jury upon the matter referred." A judgment accordingly must be signed before execution is sued out (*a*). Before the decision of the case here cited, a judgment was not deemed necessary, and the execution was sued out on the judge's order or the award; and forms of the writ of execution were actually framed by the judges in conformity with the latter practice, which have been deemed informal by the Court in the case above cited. The reader will find the forms of these writs of execution in the Appendix, No. 116, &c. But until some more satisfactory solution of this difficulty is afforded us, it will be better to adopt the practice in use in ordinary cases, as described below, namely, by obtaining a rule upon the party to pay the money, and after service of the rule and demand of the money you may sue out execution.

In other cases.

Where the award in any other case is for the payment of money only, another remedy may be had by applying to the Court for a rule ordering the party to pay the money, and then suing out execution by *fi. fa.* or *ca. sa.* upon the rule (*b*). In order to do this the submission and enlargements must be made a rule of court, a copy of the award must be served upon the party, and the original at the same time shown to him (*c*), and the sum awarded must be demanded (*d*), in the same manner as upon moving for an attachment. You then move for a rule to show cause why the defendant should not pay to the applicant the sum awarded,

(*a*) *Kendil* v. *Marrett*, 25 Law J. 251, cp.
(*b*) 1 & 2 Vict. c. 110, s. 18.
(*c*) *Lloyd* v. *Harris*, 18 Law J. 346, cp.
(*d*) *Tattersall* v. *Parkinson*, 17 Law J. 208, ex.

upon an affidavit of service of a copy of the a and *allocatur* upon the defendant (*a*), and of th mand of the sum awarded, and upon that being a wards made absolute you may sue out execution you may upon any other rule for the payment money (*b*). And it is no objection to this p ceeding that the award contains no order to p the sum awarded (*c*). It was at one time thoug that execution might at once be sued out upon th award without a rule. But this was afterward holden not to be the case by the Court of Queen' Bench (*d*) and the Court of Exchequer (*e*), and the practice since adopted was then suggested. And the application may be made before the expiration of the time limited for moving to set aside the award: for if there be any objection to the award it may be shown as cause against the rule (*f*). The rule is a rule *nisi* only (*g*), and at the time it is drawn up the award must be deposited with the master (*h*). It is not necessary in it to call upon the defendant to show cause why the applicant should not be at liberty to issue execution, or to state that he foregoes his remedy by attachment (*i*); it is merely necessary to call upon him to show cause why he should not pay the money. The rule *nisi* in the Exchequer is a six day rule, and the Court will not, without some special reason, order it to be drawn up for a shorter time to save

(*a*) *Pearson* v. *Archbold*, 11 Mees. & W. 108; 2 Dowl. N. C. 769; *Doe* v. *Squire*, Id. 327.
(*b*) *Doe* v. *Amoy*, 8 Mees. & W. 565.
(*c*) *Baker* v. *Cotterill*, 18 Law J. 345. qb.
(*d*) *Jones* v. *Williams*, 11 Ad. & El. 175.
(*e*) *Jones* v. *Williams et al.*, Mees. & W. 349.
(*f*) *Hare* v. *Fleay*, 20 Law J. 249, cp.
(*g*) *Winwood* v. *Hoult*, 14 Mees. & W. 197.
(*h*) *Davis* v. *Potter*, 21 Law J. 134. qb.
(*i*) *Burton* v. *Mendizabel*, 1 Dowl. N. C. 336.

the term, nor will they order it to be drawn up to show cause at chambers (*a*). It should be served personally (*b*), unless from circumstances it appear necessary to the Court to dispense with such a service (*c*).

In showing cause against the rule, the party may object to the award, for any defect appearing upon the face of it, in the same manner as he may upon a motion for an attachment (*d*). And where there is any doubt as to the validity of the award, the Court will not make it absolute (*e*); indeed, they will not grant the rule *nisi* (*f*). And where, upon showing cause, it appeared that the application was made not upon the part of the plaintiff (who had become bankrupt), but on the part of his attorney, who claimed a lien upon it for his costs, the Court discharged the rule, saying there was no instance of an attorney enforcing his lien in that way (*g*). So it should seem good cause that the applicant had already brought an action to recover the same sum of money, and that the action was still pending. But it is no answer to such an application that the applicant had filed an affidavit of debt in the Court of Bankruptcy, under stat. 1 & 2 Vict. c. 110, s. 8, for the same sum, and that the defendant had given a bond with sureties, if no further proceedings have been taken upon it (*h*).

(*a*) *Arthur* v. *Marshall*, 13 Law J. 465; 2 Dowl. & Lo. 376.

(*b*) *Jordan* v. *Berwick*, 1 Dowl. N. C. 271; and see *Winwood* v. *Hoult*, *supra*.

(*c*) Id. *Hawkins* v. *Burton*, 14 Law J. 9, qb.; 2 Dowl. & Lo. 465; and see *Doe* v. *Squire*, 2 Dowl. N. C. 327. *Wilson* v. *Foster*, 12 Law J. 330, cp.; 6 Man. & Gr. 149.

(*d*) *Kerr* v. *Liston*, 1 Dowl. N. C. 340.

(*e*) *Spence* v. *Clarkson*, 1 Dowl. N. C. 837. *Wright* v. *Graham*, 18 Law J. 29, ex. *Creswick* v. *Harrison*, 20 Law J. 56, cp.

(*f*) *Dickenson* v. *Alsop et al.*, 13 Mees. & W. 722.

(*g*) *Holcroft* v. *Manby*, 7 Man. & Gr. 843.

(*h*) *Mendell* v. *Tyrrell*, 9 Mees. & W. 217.

APPENDIX.

SCHEDULE OF STATUTES.

1. **Stat. 9 & 10 Wm. 3, c. 15,** p. 105.

2. **Stat. 3 & 4 Wm. 4, c. 42. s. 39,** p. 106.

3. **Stat. 17 & 18 Vict. c. 125, s. 1, and s. 3, to 17,** p. 107.

SCHEDULE OF FORMS.

Under a Compulsory Reference, p. 112.

1. *Writ of Execution, when the Court or Judge decides Matters of Account, under Sect.* 3. *of Stat.* 17 & 18 *Vict. c.* 125, p. 112.
2. *The like, where the Matter of Account is referred by the Court or a Judge to an Arbitrator or Officer of the Court, under sect.* 3, p. 113.
3. *Special Case, under sect.* 4, p. 113.
4. *Issue in Fact, under sect.* 4, p. 113.
5. *Postea,* p. 114.
6. *Special Case, under sect.* 5, p. 114.
7. *Judgment thereon,* p. 114.
8. *Postea, where a Judge at the Trial directs an Arbitration as to Part, under sect.* 6, p. 115.

Under an Ordinary Reference, p. 115.

9. *Writ of* habere facias possessionem, *on a Rule to deliver possession of Land, pursuant to an Award, under sect.* 16, p. 115.
10. *Writ of* fieri facias *on a Rule for Payment of Money awarded,* p. 116.

11. *The like, for the Payment of Money and Costs*, p. 117.
12. *Writ of* capias ad satisfaciendum *on a Rule for Payment of Money awarded*, p. 117.
13. *The like, for the Payment of Money and Costs*, p. 118.
14. *Writ of* Elegit, *on a Rule for the Payment of Money awarded*, p. 119.
15. *The like, for Money and Costs*, p. 120.

Schedule of Statutes.

Stat. 9 & 10 William 3, c. 15.

An Act for determining Differences by Arbitration.

WHEREAS, it hath been found by experience, that references made by rule of Court have contributed much to the ease of the subject, in determining of controversies, because the parties become thereby obliged to submit to the award of the arbitrators, under the penalty of imprisonment for their contempt in case they refuse submission; Now, for promoting trade, and rendering the awards of arbitrators the more effectual in all cases, for the final determination of controversies referred to them by merchants and traders, or others, concerning matters of account or trade, or other matters: Be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in Parliament assembled, and by authority of the same, that from and after the eleventh day of May, which shall be in the year of our Lord one thousand six hundred and ninety-eight, it shall and may be lawful for all merchants and traders, and others, desiring to end any controversy, suit or quarrel, controversies, suits or quarrels, for which there is no other remedy but by personal action or suit in equity, by arbitration, to agree that their submission of their suit to the award or umpirage of any person or persons should be made a rule of any of his Majesty's Courts of Record, which the parties shall choose, and to insert such their agreement in their submission, or the condition of the bond or promise, whereby they oblige themselves respectively to submit to the award or umpirage of any person or persons, which agreement being so made and inserted in their submission, or promise, or condition of their respective bonds,

shall or may, upon producing an affidavit thereof made by the witnesses thereunto, or any one of them, in the Court of which the same is agreed to be made a rule, and reading and filing the said affidavit in Court, be entered of record in such Court, and a rule shall thereupon be made by the said Court, that the parties shall submit to, and finally be concluded by the arbitration or umpirage which shall be made concerning them by the arbitrators or umpire, pursuant to such submission; and in case of disobedience to such arbitration or umpirage, the party neglecting or refusing to perform and execute the same, or any part thereof, shall be subject to all the penalties of contemning a rule of Court, when he is a suitor or defendant in such Court; and the Court on motion shall issue process accordingly, which process shall not be stopped or delayed in its execution, by any order, rule, command, or process of any other Court, either of law or equity, unless it shall be made appear on oath to such Court, that the arbitrators or umpire misbehaved themselves, and that such award, arbitration, or umpirage was procured by corruption, or other undue means.

II. And be it further enacted by the authority aforesaid, That any arbitration or umpirage procured by corruption or undue means, shall be judged and esteemed void and of none effect, and accordingly be set aside by any Court of Law or Equity, so as complaint of such corruption or undue practice be made in the Court where the rule is made for submission to such arbitration or umpirage, before the last day of the next term after such arbitration or umpirage made and published to the parties; any thing in this Act contained to the contrary notwithstanding.

Stat. 3 & 4 William 4, c. 42, s. 39.

After noticing that it is expedient to render references to arbitration more effectual:—It is enacted, that the power and authority of any arbitrator or umpire, appointed by or in pursuance of any rule of court, or judge's order, or order of *nisi prius*, in any action now brought or which shall be hereafter brought, or by or in pursuance of any submission to reference containing an agreement that such submission shall be made a rule of any of his Majesty's courts of record, shall not be revocable by any party to such reference without the leave of the court by which such rule or order shall be made, or which shall be mentioned in such submission, or by leave of a judge; and the arbitrator or umpire shall and may and is hereby required to proceed with the reference, notwithstanding any

such revocation, and to make such award, although the person making such revocation shall not afterwards attend the reference; and that the court or any judge thereof may from time to time enlarge the term for any such arbitrator making his award.

Stat. 17 & 18 Vict. c. 125, s. 1, and ss. 3 to 17.

An Act for the further Amendment of the Process, Practice, and Mode of Pleading in, and Enlarging the Jurisdiction of, the Superior Courts of Common Law at Westminster, and of the Superior Courts of Common Law of the Counties Palatine of Lancaster and Durham. [12*th August*, 1854.

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons in this present parliament assembled, and by the authority of the same, as follows:

Judge by co try q of fact

I. The parties to any cause may, by consent in writing, signed by them or their attorneys, as the case may be, leave the decision of any issue of fact to the Court, provided that the Court, upon a rule to show cause, or a judge on summons, shall, in their or his discretion, think fit to allow such trial; or provided the judges of the superior courts of law at Westminster shall, in pursuance of the power hereinafter given to them, make any general rule or order dispensing with such allowance, either in all cases or in any particular class or classes of cases to be defined in such rule or order; and such issue of fact may thereupon be tried and determined, and damages assessed where necessary, in open Court, either in term or vacation, by any judge who might otherwise have presided at the trial thereof by jury, either with or without the assistance of any other judge or judges of the same Court, or included in the same commission at the assizes; and the verdict of such judge or judges shall be of the same effect as the verdict of a jury, save that it shall not be questioned upon the ground of being against the weight of evidence; and the proceedings upon and after such trial, as to the power of the Court or judge, the evidence, and otherwise, shall be the same as in the case of trial by jury.

Power court judge t direct tration trial.

III. If it be made appear, at any time after the issuing of the writ, to the satisfaction of the Court or a judge, upon the application of either party, that the matter in dispute consists wholly or in part of matters of mere account which cannot conveniently be tried in the ordinary way, it shall be lawful for such Court or judge, upon such application, if they or he think fit, to decide such matter in a summary manner, or to

order that such matter, either wholly or in part, be referred to an arbitrator appointed by the parties, or to an officer of the Court, or, in country causes, to the judge of any county court, upon such terms as to costs and otherwise as such Court or judge shall think reasonable; and the decision or order of such Court or judge, or the award or certificate of such referee, shall be enforceable by the same process as the finding of a jury upon the matter referred.

Special case may be stated, and question of fact tried.

IV. If it shall appear to the Court or a judge that the allowance or disallowance of any particular item or items in such account depends upon a question of law fit to be decided by the Court, or upon a question of fact fit to be decided by a jury, or by a judge upon the consent of both parties as hereinbefore provided, it shall be lawful for such Court or judge to direct a case to be stated, or an issue or issues to be tried; and the decision of the Court upon such case, and the finding of the jury or judge upon such issue or issues, shall be taken and acted upon by the arbitrator as conclusive.

Arbitrator may state special case.

V. It shall be lawful for the arbitrator upon any compulsory reference under this Act, or upon any reference by consent of parties where the submission is or may be made a rule or order of any of the Superior Courts of law or equity at Westminster, if he shall think fit, and if it is not provided to the contrary, to state his award, as to the whole or any part thereof, in the form of a special case for the opinion of the Court, and when an action is referred, judgment, if so ordered, may be entered according to the opinion of the Court.

Power to judge to direct arbitration at time of trial, when issues of fact left to his decision.

VI. If upon the trial of any issue of fact by a judge under this Act it shall appear to the judge that the questions arising thereon involve matter of account which cannot conveniently be tried before him, it shall be lawful for him, at his discretion, to order that such matter of account be referred to an arbitrator appointed by the parties, or to an officer of the court, or, in country causes, to a judge of any county court, upon such terms as to costs and otherwise, as such judge shall think reasonable; and the award or certificate of such referee shall have the same effect as hereinbefore provided as to the award or certificate of a referee before trial; and it shall be competent for the judge to proceed to try and dispose of any other matters in question, not referred, in like manner as if no reference had been made.

Proceedings before and power of such arbitrator.

VII. The proceedings upon any such arbitration as aforesaid shall, except otherwise directed hereby or by the submission or document authorizing the reference, be conducted in like manner, and subject to the same rules and enactments, as to the power of the arbitrator and of the Court, the attendance of witnesses, the production of documents, enforcing or setting aside the award, and otherwise, as upon a

reference made by consent under a rule of court or judge's order.

VIII. In any case where reference shall be made to arbitration as aforesaid the Court or judge shall have power at any time, and from time to time, to remit the matters referred, or any or either of them, to the re-consideration and re-determination of the said arbitrator, upon such terms, as to costs and otherwise, as to the said Court or judge may seem proper. **Power to send back to arbitrator.**

IX. All applications to set aside any award made on a compulsory reference under this Act shall and may be made within the first seven days of the term next following the publication of the award to the parties, whether made in vacation or term; and if no such application is made, or if no rule is granted thereon, or if any rule granted thereon is afterwards discharged, such award shall be final between the parties. **Application to set aside the award.**

X. Any award made on a compulsory reference under this Act may, by authority of a judge, on such terms as to him may seem reasonable, be enforced at any time after seven days from the time of publication, notwithstanding that the time for moving to set it aside has not elapsed. **Enforcing of awards within period for setting them aside.**

XI. Whenever the parties to any deed or instrument in writing to be hereafter made or executed, or any of them, shall agree that any then existing or future differences between them or any of them shall be referred to arbitration, and any one or more of the parties so agreeing, or any person or persons claiming through or under him or them, shall nevertheless commence any action at law or suit in equity against the other party or parties, or any of them, or against any person or persons claiming through or under him or them in respect of the matters so agreed to be referred, or any of them, it shall be lawful for the Court in which the action or suit is brought, or a judge thereof, on application by the defendant or defendants, or any of them, after appearance and before plea or answer, upon being satisfied that no sufficient reason exists why such matters cannot be or ought not to be referred to arbitration according to such agreement as aforesaid, and that the defendant was at the time of the bringing of such action or suit and still is ready and willing to join and concur in all acts necessary and proper for causing such matters to be decided by arbitration, to make a rule or order staying all proceedings in such action or suit, on such terms as to costs and otherwise as to such Court or judge may seem fit: provided always, that any such rule or order may at any time afterwards be discharged or varied as justice may require. **If action commenced by one party after all have agreed to arbitration, court or judge may stay proceedings.**

XII. If in any case of arbitration the document authoriz- **On failure of parties or ar-**

bitrators, judge may appoint single arbitrator or umpire.

ing the reference provide that the reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of arbitrator; or if any appointed arbitrator refuse to act, or become incapable of acting, or die, and the terms of such document do not show that it was intended that such vacancy should not be supplied, and the parties do not concur in appointing a new one; or if, where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator, such parties or arbitrators do not appoint an umpire or third arbitrator; or if any appointed umpire or third umpire refuse to act, or become incapable of acting, or die, and the terms of the document authorizing the reference do not show that it was intended that such a vacancy should not be supplied, and the parties or arbitrators respectively do not appoint a new one; then in every such instance any party may serve the remaining parties or the arbitrators, as the case may be, with a written notice to appoint an arbitrator, umpire, or third arbitrator respectively; and if within seven clear days after such notice shall have been served no arbitrator, umpire, or third arbitrator be appointed, it shall be lawful for any judge of any of the superior courts of law or equity at Westminster, upon summons to be taken out by the party having served such notice as aforesaid, to appoint an arbitrator, umpire, or third arbitrator, as the case may be, and such arbitrator, umpire, and third arbitrator respectively shall have the like power to act in the reference and make an award as if he had been appointed by consent of all parties.

When reference is to two arbitrators and one party fail to appoint, other party may appoint arbitrator to act alone.

XIII. When the reference is or is intended to be to two arbitrators, one appointed by each party, it shall be lawful for either party, in the case of the death, refusal to act, or incapacity of any arbitrator appointed by him, to substitute a new arbitrator, unless the document authorizing the reference show that it was intended that the vacancy should not be supplied; and if on such reference one party fail to appoint an arbitrator, either originally or by way of substitution as aforesaid, for seven clear days after the other party shall have appointed an arbitrator, and shall have served the party so failing to appoint with notice in writing to make the appointment, the party who has appointed an arbitrator may appoint such arbitrator to act as sole arbitrator in the reference, and an award made by him shall be binding on both parties as if the appointment had been by consent; provided, however, that the Court or a judge may revoke such appointment, on such terms as shall seem just.

Two arbitrators may appoint umpire.

XIV. When the reference is to two arbitrators, and the terms of the document authorizing it do not show that it was intended that there should not be an umpire, or provide

otherwise for the appointment of an umpire, the two arbitrators may appoint an umpire at any time within the period during which they have power to make an award, unless they be called upon by notice as aforesaid to make the appointment sooner.

Award to be made in three months, unless parties or court enlarge time.

XV. The arbitrator acting under any such document or compulsory order of reference as aforesaid, or under any order referring the award back, shall make his award under his hand, and (unless such document or order respectively shall contain a different limit of time) within three months after he shall have been appointed, and shall have entered on the reference, or shall have been called upon to act by a notice in writing from any party, but the parties may by consent in writing enlarge the term for making the award; and it shall be lawful for the superior Court of which such submission, document, or order is or may be made a rule or order, or for any judge thereof, for good cause to be stated in the rule or order for enlargement, from time to time to enlarge the term for making the award; and if no period be stated for the enlargement in such consent or order for enlargement, it shall be deemed to be an enlargement for one month; and in any case where an umpire shall have been appointed it shall be lawful for him to enter on the reference in lieu of the arbitrators, if the latter shall have allowed their time or their extended time to expire without making an award, or shall have delivered to any party or to the umpire a notice in writing stating that they cannot agree.

Rule to deliver possession of land pursuant to award to be enforced as a judgment in ejectment.

XVI. When any award made on any such submission, document, or order of reference as aforesaid directs that possession of any lands or tenements capable of being the subject of an action of ejectment shall be delivered to any party, either forthwith or at any future time, or that any such party is entitled to the possession of any such lands or tenements, it shall be lawful for the court of which the document authorizing the reference is or is made a rule or order to order any party to the reference who shall be in possession of any such lands or tenements, or any person in possession of the same claiming under or put in possession by him since the making of the document authorizing the reference, to deliver possession of the same to the party entitled thereto, pursuant to the award, and such rule or order to deliver possession shall have the effect of a judgment in ejectment against every such party or person named in it, and execution may issue, and possession shall be delivered by the sheriff as on a judgment in ejectment.

Agreement or submission in writing may be made rule

XVII. Every agreement or submission to arbitration by consent, whether by deed or instrument in writing, not under seal, may be made a rule of any one of the superior Courts of

of court, unless a contrary intention appear.

law or equity at Westminster, on the application of any party thereto, unless such agreement or submission contain words purporting that the parties intend that it should not be made a rule of Court; and if in any such agreement or submission it is provided that the same shall or may be made a rule of one in particular of such superior Courts, it may be made a rule of that Court only; and if when there is no such provision a case be stated in the award for the opinion of one of the superior Courts, and such Court be specified in the award, and the document authorizing the reference have not, before the publication of the award to the parties, been made a rule of Court, such document may be made a rule only of the Court specified in the award; and when in any case the document authorizing the reference is or has been made a rule or order of any one of such superior Courts, no other of such Courts shall have any jurisdiction to entertain any motion respecting the arbitration or award.

Schedule of Forms.

UNDER A COMPULSORY REFERENCE, &c.

9. *Writ of Execution where the Court or a Judge decides on Matters of Account.*

[The same as in ordinary cases of execution on a judgment, except that instead of the writ stating the money to be levied as having been recovered by a judgment, and omitting the direction to levy interest, say] "£——, which by a rule of our Court of Queen's Bench [or "Common Pleas," or "by an order of Sir ——, knight, one of our justices of our Court of Queen's Bench or Common Pleas," or "one of the barons of our Exchequer," as the case may be], dated the —— day of ——, 18—, made in pursuance of the third section of "The Common Law Procedure Act, 1854," in an action commenced in our said Court of —— at the suit of A. B. [or "the said A. B." if before mentioned] against the said C. D., was ordered to be paid by the said C. D. to the said A. B. [as the case may be, following the terms or substance of the rule or order]. [If costs were ordered to be paid, then the direction to levy them may be thus: "together with certain costs in the said rule [or "order"] mentioned, which said costs were afterwards, on the —— day of ——, 18—, taxed and allowed by our said Court of —— at £——.] [If the rule or order direct that interest shall be paid, then the direction to levy it may be thus: "together also with interest on the said sum of £—— at the rate of £—— per cent. from the said —— day of ——, 18—," as the case may be, according to the rule or order.]

10. *Writs of Execution where Matter of Account is referred to and decided on by an Arbitrator, Officer of the Court, or County Court Judge.*

[The same as directed in the preceding form, but instead of stating the levy to be of money ordered by a rule or order to be paid, say] "£——, which by an award [or "certificate"] dated the —— day of ——, 18— (date of award or certificate), made by E. F., Esquire, an arbitrator appointed by the parties [or, "by E. F., Esquire, one of the masters (or other officer, naming his office) of our Court of ——," or "by E. F., Esquire, the judge of the County Court of ——," as the case may be], pursuant to the third section of "The Common Law Procedure Act, 1854," was awarded [or "certified"] to be due and payable from the said C. D. to ["the said"] A. B.

11. *Special Case for the Opinion of the Court under Section 4 of the Common Law Procedure Act, 1854, where the Allowance or Disallowance of a particular Item or Items depends on a Question of Law.*

In the Queen's Bench ["Common Pleas" or "Exchequer"].

Between { A. B., Plaintiff, and C. D., Defendant.

The following case is stated for the opinion of the Court, under a rule of the Court [or "order of the Honourable Mr. Justice ——," or "Baron ——"], dated the —— day of ——, 18—, made pursuant to the fourth section of "The Common Law Procedure Act, 1854." [Here state the material facts of the case bearing upon the question of law to be decided.]

The question [or questions] for the opinion of the Court is [or are]:—

First. Whether, [&c.]

Second. Whether, [&c.]

12. *Issue to be tried by a Jury where the Court or a Judge has directed it, under Section 4, where the Allowance or Disallowance of a particular Item or Items depends on a Question of Fact.*

In the Queen's Bench [or "Common Pleas" or "Exchequer of Pleas"].

The —— day of ——, 18— (date of issue when delivered by the plaintiff).

(Venue) A. B. by —— his attorney sues C. D., and the

plaintiff [or "defendant"] affirms, and the defendant [or "plaintiff"] denies, that, &c. [Here state the question of fact to be tried as directed by the Court or Judge. In some cases it may be advisable to state an inducement before stating the question in dispute.] [If there be more than one question to be decided, state it thus: "and the said plaintiff [or "defendant"] also affirms, and the defendant [or "plaintiff"] also, denies, that," &c.] And it has been ordered by the Court [or "by the Honourable Mr. Justice ——" or "Baron ——"] that the said question [or "questions"] shall be tried by a jury: Therefore let the same be tried accordingly.

13. *Postea thereon.*

[The same as in ordinary cases, except that there is no assessment of damages.]

14. *Special Case stated by an Arbitrator under Section 5 of the Common Law Procedure Act*, 1854.

[In the special case the arbitrator must state whether the arbitration is under a compulsory reference under the Act, or whether it is upon a reference by consent of the parties where the submission has been or is to be made a rule or order of one of the superior Courts of law or equity at Westminster. In the former case the award must be entitled in the court and cause, and the rule or order of the court must be set forth. In the latter case the terms of the reference relating to the submission being made a rule or order of court must be set forth.]

15. *Judgment thereon when a Judgment has been ordered.*

[Copy the special case, and then proceed thus:] Afterwards on the —— day of ——, 18—, come here the parties aforesaid, and the Court is of opinion that [state the opinion of the Court on the question or questions stated in the case, in the affirmative or negative, as the case may be]. Therefore it is considered that the plaintiff do recover against the defendant the said £——, and £—— for his costs of suit.

[In the margin, opposite the words, "Therefore it is considered, &c.," write "Judgment signed the —— day of ——, 18—," inserting the day of signing final judgment.]

5. ***Postea where the Judge upon the Trial of an Issue in Fact fore him, under Section 1, directs an Arbitration as to Part of the Claim under Section 6 of the Common Law Procedure Act, 1854.***

[Proceed as in the above prescribed form of postea No. 4 or 5, as the case may be, to the statement of the appearance of the parties at the trial inclusive, and then proceed thus:] 'And as to the plaintiff's claim in the —— count of the declaration within mentioned [as the case may be], it appears to the said judge [or "baron"] that the questions arising thereon involve matter of account which cannot conveniently be tried before him; and hereupon the said judge [or "baron"] orders that the plaintiff's claim in the said —— count in the declaration mentioned be referred to E. F., of ——, Esquire, an arbitrator appointed by the said parties [or "to E. F., Esquire, being one of the masters of the Court of Queen's Bench," or "Common Pleas," or "Exchequer of Pleas" (or other officer of the Court, stating his office), or "to E. F., Esquire, being the judge of the County Court of ——, upon the terms, that, &c. [set forth the terms of the order], and the said judge [or "baron"] decides each of the said issues, except those relating to the said —— count of the declaration, in favour of the plaintiff [or the statement of the decision may be in the affirmative or negative words of the issue, as, for example, thus: "And the said judge [or "baron"] as to the first issue within joined decides that the defendant is guilty as within in the —— count of the declaration alleged, and as to the second issue within joined the said judge [or "baron"] decides that the defendant did not commit the acts within in the —— count of the declaration alleged by the plaintiff's leave."] And the said judge [or "baron"] assesses the damages of the plaintiff on occasion of the premises within in the —— count of the declaration complained of, over and above his costs of suit, to £——. [Omit the assessment of damages if none made.] Therefore, &c.

UNDER AN ORDINARY REFERENCE.

17. *Writ of Habere Facias Possessionem on a Rule to deliver Possession of Land pursuant to an Award.*

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, defender of the faith, to the sheriff of ——, greeting: We command you that you omit not by reason of any liberty of your county, but that you enter the same, and without delay you cause A. B. to

have possession of —— [here describe the lands and tenements as in the rule for the delivery of possession], and which lands and tenements, by a rule of our Court of Queen's Bench [or "Common Pleas" or "Exchequer of Pleas"], dated the —— day of ——, 18—, made pursuant to the sixteenth section of "The Common Law Procedure Act, 1854," E. F. (the party named in the rule) was ordered to deliver possession to the said A. B., and in what manner you have executed this our writ make appear to us [or in Common Pleas, "to our justices," or in Exchequer, "to the barons of our Exchequer"] at Westminster, immediately after the execution hereof, and have you there then this writ. Witness ——, at Westminster, the —— day of ——in the year, of our Lord ——.

77. *Writ of Fieri Facias on a Rule for Payment of Money.*

Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland Queen, defender of the faith, to the sheriff of ——, greeting: We command you that [if sued out of the Court of Exchequer, say, "We command you that you omit not by reason of any liberty of your county, but that you enter the same, and"] of the goods and chattels of C. D. in your bailiwick you cause to be made £——, which lately in our Court of Queen's Bench [or "Common Pleas," or "Exchequer of Pleas," as the case may be], by a rule of our said Court dated the —— day of ——, A.D. ——, were ordered to be paid by the said C. D. to A. B.; and that of the said goods and chattels of the said C. D. in your bailiwick you further cause to be made interest upon the said sum at the rate of four pounds per centum per annum from the —— day of ——, in the year of our Lord —— (*a*), on which day the said rule was made, and have that money, together with such interest as aforesaid, before us [or in the Common Pleas "before our justices," or in the Exchequer "before the barons of our Exchequer," as the case may be], at Westminster, immediately after the execution hereof, to be rendered to the said A. B.; and that you do all such things as by the statute passed in the second year of our reign you are authorised and required to do in this behalf. And in what manner you shall have executed this our writ, make appear to us [or in the Common Pleas "to our justices," or in the Exchequer "to

(*a*) The day on which the rule was made, or if it were made prior to the 1st of October, 1838, say "from the 1st day of October in the year of our Lord, 1838," omitting the words "on which day the said rule was made."

the barons of our Exchequer," as the case may be], at Westminster, immediately after the execution hereof, and have you there then this writ. Witness ——, at Westminster, the —— day of —— in the year of our Lord ——.

78. *Writ of Fieri Facias on a Rule for Payment of Money and Costs.*

Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland Queen, defender of the faith, to the sheriff of ——, greeting: We command you that [if sued out of the court of Exchequer, say, "We command you that you omit not by any liberty of your county, but that you enter the same, and"] of the goods and chattels of C. D. in your bailiwick you cause to be made £—— which lately in our Court of Queen's Bench [or "Common Pleas," or "Exchequer of Pleas," as the case may be], by a rule of our said Court dated the —— day of —— in the year of our Lord ——, were ordered to be paid by the said C. D. to A. B., together with certain costs in the said rule mentioned, which said costs have been taxed and allowed by our said Court at £——; and that of the said goods and chattels of the said C. D. in your bailiwick you further cause to be made interest upon the said two several sums at the rate of four pounds per centum per annum from the —— day of —— in the year of our Lord —— (*a*), and have those moneys, together with such interest as aforesaid, before us [or in the Common Pleas "before our justices," or in the Exchequer "before the barons of our Exchequer," as the case may be], at Westminster, immediately after the execution hereof, to be rendered to the said A.B.; and that you do all such things as by the statute passed in the second year of our reign you are authorised and required to do in this behalf. And in what manner you shall have executed this our writ make appear to us [or in the Common Pleas "to our justices," or in the Exchequer "to the barons of our Exchequer," as the case may be], at Westminster, immediately after the execution hereof, and have you there then this writ. Witness ——, at Westminster, the —— day of ——, in the year of our Lord ——.

(*a*) The day on which the costs were taxed. If the costs were taxed after the rule made, and you seek to recover interest on the principal money from the date of the latter, you must alter the form accordingly.

82. *Writ of Capias ad Satisfaciendum on a Rule for Payment of Money awarded.*

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland Queen, defender of the faith, to

the sheriff of ——, greeting: We command you that you take [if sued out of the Court of Exchequer, say, "We command you that you omit not, by reason of any liberty of your county, but that you enter the same and take"] C.D., if he shall be found in your bailiwick, and him safely keep, so that you may have his body before us [or in Common Pleas, "before our justices," or in Exchequer, "before the barons of our Exchequer," as the case may be] at Westminster, immediately after the execution hereof, to satisfy A. B. £——, which lately in our Court of Queen's Bench [or "Common Pleas," or "Exchequer of Pleas," as the case may be], by a rule of our said Court, dated the —— day of ——, in the year of our Lord ——, were ordered to be paid by the said C. D. to the said A. B., and further to satisfy the said A. B. interest upon the said sum at the rate of four pounds per centum per annum from the day and year aforesaid (*a*), and have you there then this writ. Witness ——, at Westminster, on the —— day of ——, in the year of our Lord ——.

(*a*) The day on which the rule was made, or if it were made prior to the 1st of October, 1838, say, "from the 1st day of October, in the year of our Lord, 1838."

83. *Writ of Capias ad Satisfaciendum on a Rule for Payment of Money and Costs.*

Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland Queen, defender of the faith, to the sheriff of ——, greeting: We command you that you take [if sued out of the Court of Exchequer, say, "We command you that you omit not, by reason of any liberty of your county, but that you enter the same, and take"] C. D., if he shall be found in your bailiwick, and him safely keep, so that you may have his body before us [or in the Common Pleas, "before our justices," or in the Exchequer, "before the barons of our Exchequer," as the case may be] at Westminster, immediately after the execution hereof, to satisfy A. B. £——, which lately in our Court of Queen's Bench [or "Common Pleas," or "Exchequer of Pleas," as the case may be] by a rule of our said Court dated the —— day of ——, in the year of our Lord ——, were ordered to be paid by the said C. D. to the said A. B., together with certain costs in the said rule mentioned, which said costs have been taxed and allowed by our said Court at £—— [the amount of the allocatur, or allocaturs if more than one], and further to satisfy the said A. B. the said last-mentioned sum, together with interest upon the said two several sums at the rate of four

pounds per centum per annum from the —— day of ——, in the year of our Lord —— (*a*), on which day the said costs were taxed; and have you there then this writ. Witness ——, at Westminster, the —— day of ——, in the year of our Lord ——.

(*a*) The day on which the costs of the rule were taxed. If interest be claimed on the principal money from the date of the rule, alter the form accordingly.

80. *Writ of Elegit on a Rule for the Payment of Money awarded.*

Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland Queen, defender of the faith, to the sheriff of ——, greeting: Whereas lately in our Court of Queen's Bench [or "Common Pleas," or "Exchequer of Pleas," as the case may be], by a rule of the said Court, dated the —— day of ——, in the year of our Lord ——, the sum of £—— was ordered to be paid by C. D. to A. B.; and afterwards the said A. B. came into our said Court, and, according to the form of the statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any person in trust for him, was seised or possessed of on the —— day of ——, in the year of our Lord —— (*a*), on which day the said rule was made, or at any time afterwards, or over which the said C. D. on that day, or any time afterwards, had any disposing power, which he might, without the assent of any other person, exercise for his own benefit; to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said sum, together with interest upon the same at the rate of four pounds per centum per annum from the said —— day of ——, in the year of our Lord —— (*a*), shall have been levied. Therefore we command you, that [if sued out of the Court of Exchequer, say, "Therefore we command you, that you omit not, by reason of any liberty of your county, but that you enter the same, and"] without delay, you cause to be delivered to the said A.B., by a reasonable price and extent, all the goods and chattels

(*b*) The day on which the rule was made.

of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any person in trust for him, was seised or possessed of on the said —— day of —— (*a*), or at any time afterwards, or over which the said C.D. on that day, or at any time afterwards, had any disposing power, which he might, without the assent of any other person, exercise for his own benefit; to hold the said goods and chattels to the said A. B. as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said £——, together with interest as aforesaid, shall have been levied. And in what manner you shall have executed this our writ, make appear to us [or in the Common Pleas "to our justices," or in the Exchequer "to the barons of our Exchequer," as the case may be], at Westminster, immediately after the execution hereof, under your seal and the seals of those by whose oath you shall make the said extent and appraisement, and have you there then this writ. Witness ——, at Westminster, the —— day of ——, in the year of our Lord ——.

(*a*) The day on which the rule was made.

81. *Writ of Elegit on a Rule for Payment of Money and Costs.*

Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland Queen, defender of the faith, to the sheriff of ——, greeting: Whereas lately in our Court of Queen's Bench [or "Common Pleas," or "Exchequer of Pleas," as the case may be], by a rule of the said Court, dated the —— day of —— in the year of our Lord ——, the sum of £—— was ordered to be paid by C. D. to A. B., together with certain costs in the said rule mentioned, which said costs were afterwards, on the —— day of —— in the year of our Lord ——, taxed and allowed by our said Court at £——; and afterwards the said A. B. came into our said Court, and, according to the form of the statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in our bailiwick, as the said C. D., or any one in trust for him, was seised or possessed of on the —— day of

—— in the year of our Lord —— (*a*), or at any time afterwards, or over which the said C. D. on that day, or at any time afterwards, had any disposing power, which he might, without the assent of any other person, exercise for his own benefit; to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums, together with interest upon the same at the rate of four pounds per centum per annum from the said —— day of —— in the year of our Lord —— (*a*), shall have been levied. Therefore we command you, that, [if sued out of the Court of Exchequer, say, "Therefore we command you, that you omit not, by reason of any liberty of your county, but that you enter the same, and"] without delay, you cause to be delivered to the said A. B., by a reasonable price and extent, all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any person in trust for him, was seised or possessed of on the said —— day of —— (*a*), or at any time afterwards, or over which the said C. D. on that day, or at any time afterwards, had any disposing power, which he might, without the assent of any other person, exercise for his own benefit; to hold the said goods and chattels to the said A. B. as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums of £—— and £——, together with interest as aforesaid, shall have been levied. And in what manner you shall have executed this our writ make appear to us [or in the Common Pleas "to our justices," or in the Exchequer "to the barons of our Exchequer," as the case may be], at Westminster, immediately after the execution hereof, under your seal and the seals of those by whose oath you shall make the said extent and appraisement, and have you there then this writ. Witness ——, at Westminster, the —— day of ——, in the year of our Lord ——.

(*a*) **The day on which the costs of the rule were taxed.**

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