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NORTH CAROLINA LAW REVIEW

Volume 6 | Number 4

Article 2

6-1-1928

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Wesley A. Sturges

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Recommended Citation

Wesley A. Sturges, *Arbitration under the New North Carolina Arbitration Statute -- The Uniform Arbitration Act*, 6 N.C. L. REV. 363 (1928).

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ARBITRATION UNDER THE NEW NORTH CAROLINA ARBITRATION STATUTE—THE UNIFORM ARBITRATION ACT

WESLEY A. STURGES*

The arbitration statute which was enacted by the legislature of North Carolina at its last session is the Uniform Arbitration Act which was drafted by the Conference of Commissioners on Uniform State Laws and recommended to the legislatures of the several states for adoption.¹ It has also been formally approved by the American Bar Association. It has been adopted in Nevada (1925), Utah (1927), Wyoming (1927) and North Carolina (1927).

In most, if not all, important particulars this act differs from the arbitration statutes which have been recently enacted in other jurisdictions as follows: The United States Arbitration Act (1925), effective January 1, 1926, the New York Arbitration Law (1920), and the arbitration statutes of New Jersey (1923), Massachusetts (1925), Oregon (1925), Territory of Hawaii (1925), California (1927) and Pennsylvania (1927).²

Without intending to minimize the importance of the other particulars in which the Uniform Act departs from the arbitration statutes last cited, it is proposed to report first what appears to have been regarded by the Commissioners and by the American Bar Association as the most important matter of difference between the two classes of arbitration statutes. That matter of difference assumes the further importance that the American Bar Association expressly repudiated the position which it had taken on the question in connection with the United States Arbitration Act when it approved the Uniform Act.

* Associate Professor of Law, Yale School of Law.

AUTHOR'S NOTE. The substance of this article constitutes part of a Manual on the American Law of Commercial Arbitration which is to be published during the current year by the Oxford University Press as one of a series of studies in Commercial Arbitration conducted by the American Arbitration Association. This advance publication is by their courtesy.

¹ Laws of North Carolina, 1927, Chapter 94.

² For a comparative survey of these statutory provisions see, Sturges, Arbitration Under The New Pennsylvania Arbitration Statute, 76 University of Pa. Law Review, 345 (1927). See also Curtis, Comparison of Recent Arbitration Statutes, XIII A. B. A. Journal 567 (1927).

AGREEMENTS TO ARBITRATE FUTURE DISPUTES

(a) *Provisions of the Statutes.*

The Uniform Arbitration Act does not embrace agreements to arbitrate disputes which may arise between the parties in the future. Section 1 of the act fixes its scope in this respect as follows:

"That two or more parties may agree in writing to submit to arbitration, in conformity with the provisions of this act, *any controversy existing between them at the time of the agreement to submit*. Such agreement shall be valid and enforceable, and neither party shall have power to revoke the submission without the consent of the other party or parties to the submission save upon such grounds as exist in law or equity for the rescission or revocation of any contract." (Italics are the writer's.)

The United States Act, on the contrary, and the new arbitration statutes of New York, New Jersey, Massachusetts, Oregon, Hawaii, California and Pennsylvania do embrace future-disputes clauses as well as agreements of submission of existing controversies.

This difference between the two types of statutes was the principal point of debate in the deliberations of the National Conference of Commissioners on Uniform State Laws and of the American Bar Association on the Uniform Act. The latter organization, as has been stated, recalled, at least formally, the position which it had taken in approving and furthering the enactment of the United States Act which embraces future-disputes agreements. Since the deliberations of these two organizations of lawyers involve apparently the most extended consideration which has been given to this subject, and because of the character of the membership of these organizations, the record of their deliberations will be summarized for the following purposes: (1) to afford opportunity to evaluate the reasons which were assigned for the inclusion and exclusion of future-disputes agreements in arbitration statutes generally, and for the exclusion of such agreements from the Uniform Act in particular; (2) to indicate what is the significance of the dual position of the American Bar Association on the question. The origin of the Uniform Act and the basis for its limited application in this important respect will be thus best set forth.

At the annual meeting of the American Bar Association in 1920 it was voted that its Committee on Commerce, Trade and Commercial Law should "consider and report at the next annual meeting . . . upon the further extension of the principle of commercial arbitra-

tion." The following year that committee reported drafts of a Uniform State Act and of a United States Arbitration Act. The latter, however, was reported as only a tentative draft; the committee requested further time upon it. Concerning the State Act the committee reported as follows: "It has taken as the basis of its work as to a uniform state arbitration act, the New Jersey Bill Assembly No. 412, which passed the House of New Jersey, but did not pass the Senate of New Jersey. It was drawn by the New Jersey State Chamber of Commerce and was modeled on the New York Law." The American Bar Association voted to refer the Uniform State Act so reported to the National Conference of Commissioners on Uniform State Laws.

At the meeting of the Association in 1922 its Committee on Commerce, Trade and Commercial Law reported a revised draft of a United States Arbitration Act and a draft of a treaty for Commercial Arbitration with foreign countries and recommended their approval. A revised draft of a Uniform State Act was also reported with the committee's recommendation that it be referred to the National Conference of Commissioners *for its consideration*. Each of these pieces of proposed arbitration legislation embraced written agreements to arbitrate future as well as existing disputes and provided for their irrevocability, specific enforceability and the court-appointment of arbitrators when necessary to carry out such agreements. The recommendations of the committee were approved. The committee's report concerning why it proposed legislation patterned after the New York and New Jersey statutes follows:

"The testimony received by your committee at the public sessions in New York, March 29, 30 and 31, 1922, confirms the testimony received by the committee in 1921, namely, that there is great satisfaction on the part of business men with principles and procedure of the New York law and that it is desired that these principles should be made effective in interstate commerce, intrastate commerce, and freight commerce."

In this report the committee also emphasized that it was "highly desirable that the federal statute and the uniform state statute should dovetail and fit each with the other."

The committee concluded its report as follows:

"In the opinion of your committee, the adoption of the international treaty, the federal statute and the uniform state statute will put the United States in the forefront in this procedural reform. It

will raise the standards of commercial ethics. It will reduce litigation. It will enable business men to settle their disputes expeditiously and economically, and will reduce the congestion in the federal and state courts. In pressing forward this improvement in the law, the Association will align itself with the best economic and commercial thought of the country and will do much to overcome the criticism of the law's delays."

At the meeting of the American Bar Association in 1923 its Committee on Commerce, Trade and Commercial Law again reported on its extended activity in promoting the new arbitration legislation. The bill for the United States Act "received the cordial support of the National Association of Credit Men, as well as the New York Chamber of Commerce, and was endorsed by the following among other organizations" (giving long list of names of national and local commercial associations), but the bill was not reported out of the Committee on the Judiciary because it had been submitted too late in the last session of Congress.

The committee also reported that it had learned that the Economic Committee of the League of Nations had been engaged in drafting articles of a protocol providing for international commercial arbitration, and that that committee was in accord with the Bar Association Committee on Article 1 of its proposed treaty on commercial arbitration in making irrevocable and enforceable written agreements to arbitrate future as well as existing disputes.

It also cited the following resolution of the International Chamber of Commerce adopted at its meeting in Rome in March, 1923:

"Full respect for the validity of arbitration clauses in a commercial contract is an indispensable condition for the extension of the practice of international commercial arbitration. One or more international conventions should be negotiated to pledge participating countries to give effect to arbitration clauses and to cause its courts to stay an action at law begun by a party to such a clause if the court is satisfied the other party is willing to carry out the arbitration. Through treaties, countries should provide that an award in a case of commercial arbitration made in one country will be enforceable in the other."

At the annual meeting of the American Bar Association in 1924 its Committee on Commerce, Trade and Commercial Law reported upon its success in furthering the enactment of the United States Act as follows:

"On January 29, 1924, the sub-committees of the Senate and House Committee on the Judiciary held a joint hearing on the bills.

At this hearing there were present the Chairman of your committee, Julius Henry Cohen; a member of the committee, Francis B. James; former Chairman of the Committee, Charles L. Bernheimer; Chairman of the Committee on Arbitration, Chamber of Commerce of the State of New York, representatives of the Brooklyn Chamber of Commerce, Philadelphia Chamber of Commerce, New Jersey State Chamber of Commerce, Massachusetts State Chamber of Commerce, American Bankers' Association, Arbitration Society of America, and representatives of many large trade organizations, all of whom spoke in favor of the bills.

"On January 24, 1924, the House Committee on the Judiciary made a favorable report on the House bill (Report No. 961), which report is annexed to this report as Appendix A."

The United States Act was approved by the President on February 12, 1925.³

The foregoing Summary of the activities of the American Bar Association and of its Committee on Commerce, Trade and Commercial Law in furthering legislation to validate and make irrevocable and specifically enforceable written agreements to arbitrate future as well as existing disputes brings us to the annual meeting of the Association in 1925 when the Uniform Act in the form in which it has been submitted to the legislatures of the states by the National Conference of Commissioners on Uniform State Laws was approved by the Association.

The Committee on Commerce, Trade and Commercial Law recommended the following resolution:

"That the American Bar Association hereby makes due acknowledgement to the commercial organizations throughout the United States for their splendid coöperation in support of Senate Bill 1005, enacted by the 68th Congress, which makes valid and enforceable written provisions or agreements for arbitration of disputes arising out of contracts, maritime transactions, or commerce among the states or territories or with foreign nations."

The outcome of this recommendation will be noticed later.

We may now turn to observe the progress of the Uniform State Arbitration Act before the National Conference of Commissioners

³ 43 Stat. 883 (1925), U. S. C. Lit. IX. Records of the proceedings of the American Bar Association and of the reports of its Committee on Commerce, Trade and Commercial Law, concerning the United States Arbitration Act, its proposed Uniform States Arbitration Act and the Draft Treaty for Commercial Arbitration appear in the following Reports of the Association: Volumes XLV, XLVI, XLVII, XLVIII, XLIX and L. A valuable summary is contained in the report of the Committee on Commerce, Trade and Commercial Law in volume L, Reports, A. B. A. (1925) 84, 357.

on Uniform State Laws which was referred to it for consideration by the American Bar Association at its meeting in 1922.

The Conference appointed its first Committee on Arbitration at its annual meeting in 1921. In 1923 a Second Tentative Draft of a Uniform State Act was reported to the Conference by its Arbitration Committee. This draft followed the lines of the Uniform State Act which was recommended by the American Bar Association; it embraced written agreements to arbitrate future disputes as well as existing controversies and provided that they should be irrevocable and specifically enforceable.⁴ The report of the Arbitration Committee follows:

"At the present time, there is on the statute books of the State of New York an Arbitration Act that seems to be working out to the satisfaction of the business men who have been willing to accept its provisions in the drafting of their contracts and which has met with the approval and the tests of the Court.

"Owing to the fact that a law of this kind would seem to come most appropriately under the provisions of our Federal Laws, a rather spirited and almost successful attempt was made to have Congress pass on this subject. The Judiciary Committee reported out a measure known as Senate Bill No. 4214, 67 Congress, 4th Session, that had been carefully considered, but failed of passage owing to the rush of business at the close of the session. Your Committee understands that there are bright prospects for reporting the same bill out in the coming Congress and, in all likelihood, it will receive Congressional sanction.

"The State of New Jersey at the last session of its legislature has also passed an Arbitration Act.

"Your committee taking full advantage of the proposed Federal Act and the Act passed by the State of New Jersey which has received the indorsement of the Commercial, Civic and Industrial organizations of that State, followed both the provisions of the proposed Federal Act and the New Jersey Act and report the same herewith for your consideration."

At this meeting, however, the Conference, being in session as a Committee of the Whole, reported out a different draft of a state arbitration act for adoption by the Conference.⁵ This draft did not embrace agreements to arbitrate future disputes. Section 1 of that draft became Section 1 of the present Uniform Arbitration Act without change. This draft, however, was referred to the Arbitration

⁴ Handbook, Nat'l Conference of Comrs. on Uniform State Laws, 187 (1923). Consult also page 85 for remarks on this report by the President of the Conference.

⁵ Handbook, (1923) 193.

Committee for further consideration. It was reported out again by the Committee at the meeting of the Conference in 1924.⁶

A summary of the report of the deliberations of the Conference upon Section 1 at its meeting in 1924 follows:

"Mr. Bailey (Mass.) raised the question whether the Conference was to approve the New York and New Jersey idea of arbitration, namely, that of allowing the parties to agree in advance to arbitrate any future differences, or whether it was to approve the Illinois idea, namely, that of allowing agreements to arbitrate only after disputes had arisen. . . .

"Mr. O'Connell (Mass.) stated that the committee had presented the two conflicting ideas regarding arbitration to the Conference; that it would be useless for the Conference to present an act which the Bar Association would not support, that he did not believe the Bar Association had committed itself to the New York and New Jersey idea; * * * that the American Bar Association Committee on Commerce, Trade and Commercial Law has unanimously approved the principle involved in the New York and New Jersey Acts; and that in addition Mr. Cohen and Mr. Bernheimer had succeeded in having the Senate Judiciary Committee at its last Congress approve and report favorably the Federal Arbitration Act allowing agreements to arbitrate in advance of disputes.⁷

"The bill did not pass and in the present Congress was not acted upon by the Senate or the House.

"Mr. Bailey (Mass.): I was told this morning that it had unanimously passed the House about two weeks ago Friday night, before adjournment.

"Mr. O'Connell (Mass.): Well, of course, there has been no real discussion of the subject as yet. The Senate Judiciary Committee has simply accepted the attitude of New York and New Jersey. Now then, we have taken the matter up, and at the last session we held in Minneapolis the subject was, at a very largely attended meeting, rather thoroughly discussed, and this committee which reported out last year the law based on the New Jersey and the New York Acts, was overturned, and the Conference decided that we would not follow New York and New Jersey, and as I gathered from the temper of the meeting and the remarks expressed and from the consideration which the committee has since given to it, it is felt by our Commissioners that it will be utterly impossible to secure the passage of a law that will take away from the courts the matter of deciding controversies by agreeing in advance to do so, and it is because we feel that it would be idle to recommend such a law that we are recom-

⁶ Handbook, (1924) 638-645.

⁷ Mr. O'Connell appears to have been the Chairman of the Committee on Arbitration of the Conference. He and his committee reported to the Conference in 1923 as is set forth, *supra*, page 368. See also Report of the Committee in 1925; Handbook, page 757 (1925).

mending a law which we feel will be accepted in the greatest number of the states of the Union, and so addressing ourselves to that problem of how we can find the best Arbitration Act we met in Chicago and we discussed with the Chamber of Commerce in Chicago, which is probably just as influential a body as the New York Chamber of Commerce—certainly having interests just as large—we discussed with their representatives the working and the manner in which the Arbitration Act of the Middle West, as represented in the Illinois Act, was being received by the merchants of that part of the world. It seemed to be the unanimous opinion of the merchants in Chicago that they would prefer to have the law as it is in the Illinois Act. There seemed to be no desire, not a single man appeared before us who asked that the law be changed. They felt that the farmers and the business men and the traders of that great Mississippi Valley would never give up their rights to go to the courts, not knowing in advance what those rights were. Now that seems to be the crux, and I call the attention of you gentlemen here to the fact that we are not only trying to get a uniform law but we are really legislating, and we have got to bear in mind what these legislators will do; we have got to bear in mind what the people want. Under the New York Act you are called upon⁸ to agree in advance through a clause that is in the contract, most often in small type, that all controversies of any nature, kind or description are to be taken out of the courts and are to be submitted to an arbitrator, either named then or to be named later. It is felt by the great majority of the committee that this is wrong in principle, to call upon men to agree in advance to arbitrate any difficulties that might arise, particularly in view of the fact that that would be done in most instances without any realization on the part of the contracting parties as to what they were really doing. Of course, we all agree that men ought to know what they are doing when they are signing contracts, but we all know from a practical experience that the fine type of contracts, whilst entirely binding, is seldom read, and we do feel that it is a giving up of rights that the American people really regard as sacred and they shouldn't be called upon to do so.

“Mr. Bailey (Mass.): Mr. Chairman, is the Chairman of the committee aware that this is not simply a local issue or a matter considered in New York, New Jersey and Illinois and the United States, but by the commercial interest of Europe and South America, as well as over here? I happen to be a member of the committee of the International Law Association where this matter is being discussed, and as I understand it, the Chambers of Commerce in London, England, France and elsewhere are in favor of following the New York

It should not be overlooked that the statutes which embrace future-disputes clauses as well as agreements to arbitrate existing controversies are predicated upon a written agreement of the parties. They do not “compel” arbitration in absence of such agreement.

and the New Jersey doctrine, and that the New York law was framed in harmony with the English and the French mode of procedure.

* * *

“Mr. Miller (Ia.) stated that, in his opinion, it was not practical to approve an Arbitration Act which allowed agreements in advance to arbitrate future disputes, since many courts had held such an agreement invalid and Commissioners from a large number of states had disapproved such an idea. He felt sure that an act involving New York and New Jersey principles would never receive general adoption.

“Mr. Piatt (Mo.) : This is not a commercial arbitration act. This act is an act perfectly clear, by the first section and also by the title, to arbitrate, as Chairman O’Connell well says, a controversy that has already arisen. In other words, by this act you are going to permit a man to settle his difficulty without going into court. . . . I take it that’s the inherent right of all disputants. . . .

“The other act has to deal with commercial matters and it is patterned after the commercial act of New York and New Jersey, and I simply want to call your attention to this particular phase of it, gentlemen. By the Commercial Arbitration Act agreeing in advance to submit controversies, arising under a contract into which you have entered, to arbitrators, if you do have a dispute you have put it in the power of the parties to compel the performance of the contract. In other words, you have put it into the power of commercialism today to make commercialism of today honest. . . .

“President MacChesney [President of the Conference] : I would like to discuss for just a moment some of the questions raised by the Commissioner from Missouri. He states that this is not an arbitration act at all but cover all matters of controversy. I take it that it does cover all matters of controversy but it is not for that reason any less a commercial arbitration act, and I can’t go with the Commissioner from Missouri when he says that the kind of contract contemplated by the New York and New Jersey Act makes for morality. On the contrary, similar provisions, it has been generally felt, in contracts are very unfair and are known generally as jug-handled contracts. You take this question of agreeing to submit in advance—that is usually printed in a contract—and the little merchant who buys from the big manufacturer or wholesaler knows nothing about it and only wakes up to find that he signed a contract to give his rights away. . . . It is rather significant that the talk about the demand for arbitration in this country along the line suggested by the committee of the American Bar Association is limited to New York and New Jersey. I call attention to the fact that there are forty-eight states in this Union, and that the rule in practically forty-six of them is along the lines of the report of this committee, and in the Chicago Association of Commerce, which has a great arbitration department organized and which does business from the Alleghanias

on the East to the Rockies on the West and to the Canadian lines and Gulf of Mexico, they feel very fearful of any such proposition as is laid down in the New York and New Jersey Acts. I think the committee has struck at the difference in opinion commented on by the Commissioner from Massachusetts, that is, that it has in New York and New Jersey the aspect of foreign trade, and between people of different countries there is some demand for that sort of thing and in that case it may be very fair that that should be true, so that the New York situation is not at all parallel, because where the importers or the exporters are doing business with each other they are doing business on a parity; but I want to say that the Chicago Association of Commerce, which is the largest commercial association in America, doing business in more states than any other commercial association and with a membership of more than double the New York Association, feel extremely fearful of any such rule. They say that in their judgment, it will absolutely destroy the principle of arbitration in this country, and why? Because if you pass a law such as is advocated by the gentleman who believes a man should waive his rights by contract in advance, and the country merchant goes into the city of Chicago, for instance, and does business with our great manufacturing or wholesale establishments there and he waives his rights and he gets what he feels is an unfair deal in the arbitration, and doesn't have a right to have it reviewed by the courts, he is going to feel that he has been badly used and robbed of his rights under the law, even though it may appear legal under the law, and the result will be, our people feel, that the country merchants will not agree to any arbitration contract, so that instead of submitting to arbitration any controversies which shall arise thereafter they will refuse to submit to arbitration at all, saying they will stand on their legal rights, and it is the judgment of the men who have given as long attention and as continuous attention and have as large an experience in it as any group of men in this country, represented by this arbitration board of the Chicago Association of Commerce, that to attempt to put such a thing in would practically destroy the work they have done for ten years in educating the public in favor of arbitration. In other words, they feel that men are not able to deal on a parity as they are in New York—and I hope you gentlemen will keep that in mind, as would be the importer and exporter; men are not able to deal on a parity, but the real difficulty is that between a large manufacturer or wholesaler in a city like Chicago or St. Louis and the small country merchant it is not fair to insert in a contract a provision by which the small merchant waives in advance his legal rights without knowing what they may be; and so, speaking for the group represented there and because the other Commissioners are not here from Illinois, I desire to urge upon the Commissioners the very great necessity of giving due weight to the fact that only two states in this Union have adopted this rule advocated by the com-

mittee of the American Bar Association and that forty-six states of the Union have chosen to follow the rule which protects primarily their own people doing business within their borders. . . .

"I don't think it is a question of morality. I don't like to think that I am going to yield to the importers of New York and New Jersey anything in the line of morality. I think this Conference of members of forty-eight states and some of the Territories have just as high ideals, so far as morality and law is concerned, as the gentleman in the New York Chamber of Commerce, and I am afraid that when he and his committee met in New York and listened to the blandishments of those importers talking morality, that they forgot the morality that prevailed on the plains and in the mountains away from New York City. I am afraid that this New York Act, when you come right down to it, gentlemen, is a species of special legislation for a certain group and a small group in just one section of the country that would be profited most by it. . . .

"Mr. Piatt (Mo.): I apologize to the Chairman of the Committee and to the Chairman of this section who may have understood my remarks as being either an appeal to emotionalism or sectionalism. I don't live in New York; I only come to New York, and I have only come to New York a few times, and when I come it is at my own expense, and I don't know what New York wants in that particular sense. I do know, it is a matter of common knowledge, that architect's contracts, building contracts and boards of trade, nearly all of them, have in them agreements to arbitrate, and in my simple western way I don't know why the little merchant out in rural Missouri shouldn't observe his contract with the St. Louis manufacturer, if he makes one, why he shouldn't be required to carry it out to the crossing of the 't' and the dotting of the 'i,' or vice versa, but I didn't rise here to get into a controversy with anybody in this section over matters pending before a committee of which I happen to be Chairman, and, as I say, I regret having arisen because of my connection with that committee and putting the matter in this embarrassing shape, and I ask that I be allowed to withdraw my remarks from the record.

"Mr. Washington (Tenn.): . . . The point reached by the gentlemen and by the legislatures of New Jersey and New York seems to me to be quite far-reaching. It should include any kind of an agreement looking to the future. It would include or might include, perhaps, two enterprising farmers who have bought large plantations adjoining each other, and they would meet and say, 'We have bought these farms in juxta-position; we don't know what controversies may arise between us, but having so located here and settled here let us enter into an agreement to submit to arbitration anything on earth that may occur between us touching these enterprises.' It seems to me that a thing like that could be quite far-reaching. You would have no means of knowing where it would

end. Arbitration is too summary to relegate important controversies before they have arisen."⁹

Following this discussion the Conference voted to adopt Section 1 of the present Uniform Act and thereafter voted the remainder of the present act section by section.

At the annual meeting of the American Bar Association in 1925 Mr. MacChesney, President of the Conference, submitted the Uniform Arbitration Act as approved and recommended by the Conference, for the approval of the Association.

In submitting his recommendation Mr. MacChesney reiterated the propositions which had been advanced chiefly by himself and Commissioner O'Connell at the meeting of the Conference of Commissioners in 1924 as reported above.¹⁰

The American Bar Association voted 175 in favor and 26 against approving the Act.¹¹

The proposed resolution of thanks to the commercial organizations who had aided the Association in procuring the enactment of the United States Arbitration Act was voted "upon the understanding that the thanking of these gentlemen for this assistance, is not to be regarded in any way as an indorsement of the position taken in that bill in the light of the vote just taken."¹²

In short, this change of position by the American Bar Association was accomplished after less than two hours discussion of the matter in open forum notwithstanding it had been committed to and had held to a different position since its annual meeting in 1921. This deliberation upon the matter, however, was described as "one of the most momentous debates that this Association has ever had presented to it" by a member who declared that he had attended almost every session of the Association since 1884.

This small quorum would seem to merit all of the criticism which it has received in approving the Uniform Act and repudiating the United States Act as it did. Customary courtesy to one of its committees by an Association so completely dependent upon its several committees for any substantial service would seem to have induced a different result. Strains of petty sectional prejudice and of pro-

⁹ Handbook, (1924) 60-73.

¹⁰ L, Reports, A. B. A., 135-138 (1925).

¹¹ L, Reports, A. B. A., 162 (1925). The membership of the Association was reported to be 23,450 by the Committee on Membership. Reports 465 (1925). Members registered at this meeting were 1839. Reports 182 (1925).

¹² Reports, A. B. A., 162 (1925).

vincialism, if not also of personal animus, sounded every now and then by Messrs. MacChesney and O'Connell, might well have made this group solicitous to preserve the record which the Association had made in furthering arbitration legislation.

When the act was voted upon in the Conference of Commissioners the Commissioners of the following jurisdictions voted against it: Connecticut, Massachusetts, Missouri, New Jersey, Pennsylvania and Porto Rico. Commissioners of twenty-three states voted in favor of the act as follows: Alabama, California, District of Columbia, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, New York, North Dakota, Ohio, Rhode Island, South Dakota, Tennessee, Utah, Vermont and Wyoming.¹³

Arbitration statutes have been long standing in nearly all of the states. While those early statutes vary in many particulars they are alike in the respect that they do not expressly embrace future-disputes agreements.¹⁴ In 1923 Wisconsin copied the New York Law excepting only those sections of the New York Law which deal with written agreements to arbitrate future disputes.

In Colorado and Washington the supreme court of each state has held that a future-disputes clause in a written contract is valid and irrevocable in the following particulars: (1) that the arbitration agreement can be pleaded to defeat an action in court upon a cause subject to the arbitration agreement; (2) that neither party can terminate the powers of arbitrators once appointed by giving notice of revocation.¹⁵ These courts appear to take the position that the legislatures have approved of arbitration as a method of adjusting controversies by enacting their arbitration statutes and although these statutes do not expressly embrace future-disputes agreements these courts find no reason why parties should not be allowed to contract in advance for that remedy.

The English Arbitration Act (1889), embraces written future-disputes clauses as well as agreements to arbitrate existing controversies.¹⁶

Concerning the Draft Treaty on Commercial Arbitration, ap-

¹³ Handbook, Nat'l. Conference of the Comrs. on Uniform State Laws 163 (1924).

¹⁴ Year Book on Commercial Arbitration pp. 1007-1100. Annex I (1927).

¹⁵ *Ezell v. Rocky Mountain etc., Co.*, 76 Colo. 409 (1925); *State ex rel. Fancher v. Everett*, 144 Wash. 592, 258 Pac. 286 (1927).

¹⁶ 52 and 53 Vict., c., 49, section 27 (1889).

proved by the American Bar Association in 1922 and the work of the Economic Committee of the League of Nations, mentioned in the report of the Bar Association Committee on Commerce, Trade and Commercial Law for 1923, it may be noted that the fourth Assembly of the League of Nations submitted the following Protocol on Arbitration clauses for adoption by the member nations on September 24, 1923:

"Each of the Contracting States recognizes the validity of an agreement whether relating to existing or future differences between parties subject respectively to the jurisdiction of different Contracting States by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matters capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject."¹⁷

In Report No. 7 of the International Chamber of Commerce it is stated that "a written agreement to submit future differences to arbitration is valid and irrevocable" in the following countries of the world: Africa (South)—The Cape, Natal, Transvaal (Orange Free States excluded), Australia, Austria, Belgium, Bulgaria, Czechoslovakia, Danzig, Denmark, Egypt, France, Germany, Great Britain, Greece—if submitted to the arbitration of a Greek Chamber of Commerce, Hungary, Italy, Japan, Netherlands, Norway, Poland, Portugal, Rumania, Spain, Sudan, Sweden and Switzerland. In Costa Rica, Cuba and Guatemala if special forms are used. In Brazil such agreements are reported as "not valid . . . and always revocable."¹⁸

The almost unanimous view of American judges, as set forth in their reported opinions, is one of regret for the common law rules of revocability and non-enforceability specifically of agreements to arbitrate future and existing disputes.¹⁹

As a result of this exclusion of agreements to arbitrate future

¹⁷ Volume 5, League of Nations—Official Journal 235, 236 (1924). See also Volume 7—Official Journal 568 and 1359 (1926), for progress in ratification of this Protocol.

¹⁸ Reprinted in Year Book on Commercial Arbitration pp. 1113-1142, Annex IV. (1927).

¹⁹ See the classic opinions of Hough, J., in *United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co., Limited*, 222 Fed. 1006 (D. C. S. D. N. Y.) (1915), and of Cardozo, J., in *Matter of Berkovitz v. Arbib & Houlberg*, 230 N. Y. 261, 130 N. E. 288 (1921). See also an editorial, *Opinions on Arbitration Clash*, volume 9 Journal of the American Judicature Society 76 (1925).

disputes and other departures in the Uniform Arbitration Act a substitute Uniform State Act has been drafted by the American Arbitration Association and submitted to the several state legislatures for adoption. This draft act follows the lines of the New York and Federal Arbitration Statutes. It was adopted with some changes in California and Pennsylvania in 1927. It is endorsed by such national organizations as the American Bankers Association, American Society of Certified Public Accountants, Motion Picture Producers and Distributors of America and the National Association of Credit Men.²⁰

Cases at Common Law.

The supreme court of North Carolina has had few cases involving the legal position of a future-disputes clause. It has held, however, that such a clause is revocable in the sense that it cannot be pleaded to defeat an action brought upon a cause embraced within its terms.²¹ The court has also generalized as follows: "It has been generally held that an agreement in an executory contract to submit a dispute which arises thereunder to an arbitration, the effect of which is to 'oust the courts of their jurisdiction,' is against public policy."²² It has intimated, however, that the aggrieved party is entitled to damages for breach of such future-disputes agreements.²³

Concerning the position of such agreements in courts of equity, it may be noted that the court has quoted with approval general statements to the effect that specific performance will be denied.²⁴ In *Ellington & Guy Inc. v. Currie*,²⁵ however, where the party who

²⁰ Concerning the use of future-disputes clauses by American business organizations, see Year Book on Commercial Arbitration (1927); by English business organizations, see, Rosenbaum, A Report on Commercial Arbitration in England, American Judicature Society, Bulletin XII (1916).

²¹ *Williams & Bro. v. Branning Mfg. Co.*, 154 N. C. 205, 70 S. E. 290 (1911). The clause was contained in a contract for the operation of a saw mill and provided for arbitration "in the event of any future misunderstanding or disagreement between the parties hereto as to the contract of 1 March 1901, or as to any modifications of the same herein contained . . ."—s.c. 153 N. C. 7, 69 S. E. 10 (1910).

²² *Ellington & Guy Inc. v. Currie*, 193 N. C. 610, 137 S. E. 869 (1927). In *Williams & Bro. v. Branning Mfg. Co.*, 154 N. C. 205, 70 S. E. 290, the proposition is stated as follows: "It has generally been held that an agreement to arbitrate controversies which may arise in the course of executing a contract is void, as its effect is to oust the jurisdiction of the courts." Compare the general attitude expressed by the court in *Nelson v. Atlantic Coast Line R. Co.*, 157 N. C. 194, 198, 72 S. E. 998 (1911).

²³ *Williams & Bro. v. Branning Mfg. Co.*, 154 N. C. 205, 70 S. E. 290 (1911).

²⁴ *Williams & Bro. v. Branning Mfg. Co.*, *supra*, note 21.

²⁵ *Supra*, note 22.

applied for the appointment of a receiver was in default under an arbitration clause, the court remarked that "in a court of equity, seeking to do justice, in an application for a receiver, a provisional remedy, the breaking of this solemn agreement will be considered as strong circumstance, with the other evidence, as to the right of the party who breached the agreement to have a receiver appointed."

If an arbitration has been had and an award has been duly rendered under a future-disputes clause, it is inferred that the court will hold that it is conclusive²⁶ and enforceable as in case of other awards, and this is true although the clause embraces the "entire controversy." Thus, the court has quoted, apparently with approval, the following general proposition: "that although an agreement to arbitrate the entire controversy is not enforceable, and that prior to the award either party may revoke the agreement, that if he fails to do so, and enters upon the arbitration, and an award is made, he is bound."²⁷ There should be no difficulty in arriving at this result where the party who contests the award had participated in the hearing until the award was rendered.²⁸ If the agreement to arbitrate embraces only one or more questions of fact it is clear that an award cannot be contested because it was rendered in an arbitration which was held pursuant to a future-disputes agreement.²⁹

FUTURE-DISPUTES CLAUSES CLASSIFIED—"APPRAISALS," "VALUATIONS"

A general distinction between future-disputes agreements to submit "the whole controversy" or "the right of action," and those which are limited to one or more "questions of fact" recurs in the opinions of the supreme court.³⁰ Clauses of the latter class are declared to be irrevocable, at least in the particular that they can be

²⁶ This term refers to the following propositions: (1) that the award is *res adjudicata* on the merits of the controversy submitted so that a party thereto cannot try them again by bringing an action in court; (2) that the award is *res adjudicata* on the merits of the controversy so that a party thereto cannot put them in issue when the award is sought to be enforced against him.

²⁷ *Nelson v. Atlantic Coast Line R. Co.*, 157 N. C. 194, 72 S. E. 998 (1911); *Williams & Bro. v. Bramming Mfg. Co.*, 154 N. C. 205, 70 S. E. 290 (1911).

Consult and compare *Kelly v. Trimont Lodge*, 154 N. C. 97, 69 S. W. 764 (1910). See also *Greene v. Bechtel*, 193 N. C. 94, 136 S. E. 94 (1927).

²⁸ See *N. P. Sloan Co. v. Standard Chemical & Oil Co.*, 256 Fed. 451 (C. C. A. 5th, 1918); *Penn. Plate Glass Co. v. Insurance Co.*, 189 Pa. 255, 42 Atl. 138 (1899).

²⁹ *Herndon v. Insurance Co.*, 107 N. C. 183, 12 S. E. 126 (1890)—award under appraisal clause in fire insurance policy.

³⁰ See, *supra*, notes 27 and 29.

pleaded to defeat an action brought upon a cause embraced in the agreement. Whether these clauses are irrevocable in the sense that the powers of the arbitrators can not be terminated by notice prior to award rendered has not been expressly decided. It should also be noted that the irrevocability of such clauses in the particular indicated does not determine that they are specifically enforceable, nor that a court will appoint arbitrators when a party refuses to do so or in case of other emergency. These questions remain for future decisions.³¹

Appraisal Clauses in Fire Insurance Policies

The consideration of future-disputes agreements which embrace "only questions of fact" has been most extensive in connection with appraisal clauses in fire insurance policies. The court concisely stated its position concerning these clauses in *Braddy v. New York, etc., Insurance Co.*³² as follows:

"While it is well settled that an agreement in a policy of insurance to submit to arbitration the single question of the amount of loss by fire sustained by the person insured is valid . . . it is equally well understood that a contract which would oust the jurisdiction of the courts by leaving all of the matter involved in any controversy that might arise between insurer and insured to such arbitrament is void as against public policy."

In the first case of this group which came before the supreme court,³³ the insured brought an action to recover on a policy which contained a clause that the adjustment of a "difference . . . as to the amount of loss or damage . . . shall, at the written request of either party, be submitted to two competent and impartial persons . . . but (they) shall not decide the liability of the company." The policy also provided that no action at law or in equity should be brought upon the policy until such appraisal and award were had. In this action the defendant company pleaded a denial of any liability on the ground that it had made a written request on the plaintiff to arbitrate their difference and that plaintiff

³¹ Concerning the position of such clauses under the new arbitration statutes which embrace agreements to settle by *arbitration* disputes which may arise in the future see, Sturges, *Arbitration Under the New Pennsylvania Arbitration Statute*, 76 *University of Pa. Law Review*, 345, 357, 387 (1928).

³² 115 N. C. 354, 20 S. E. 477 (1894). See also *Pioneer Mfg. Co. v. Phoenix Assurance Co.*, 106 N. C. 28, 10 S. E. 1057 (1890) and *Nelson v. Atlantic Coast Line Co.*, *supra*, note 27.

³³ *Pioneer Mfg. Co. v. Phoenix Assurance Co.*, 106 N. C. 28, 10 S. E. 1057 (1890).

refused. The irrevocability of the agreement was sustained against the argument that as a future-disputes clause it was against public policy. The court declared that it did not offend public policy "in so far as it provides for the submission to arbitration of the amount of loss or damage sustained by the assured." The court also rejected the argument that the clause was inoperative against the plaintiff since it did not contemplate the determination of the legal responsibility of the company.

It was also resolved in this first case that it was incumbent upon the defendant who relied upon the written request for arbitration and the refusal by the plaintiff, to show that a "difference" had arisen between the parties which was within the scope of the appraisal clause. It was held that the defendant had sustained this burden by showing that its adjuster had offered the plaintiff a certain sum of money for the damage and loss covered by the policy and that plaintiff refused to accept it.

"Waiver" of appraisal clauses. While these appraisal clauses are irrevocable in the sense that they can be pleaded to defeat an action on the policy it is clear from the decision in *Higson v. North River Insurance Co.*³⁴ that such a clause may be rendered inoperative in this respect in a particular case by reason of the conduct of the insurer. Thus where the defendant company in that case denied any liability on the policy after loss on the ground that the husband of the insured burned the property covered by the policy to procure the insurance money, it was held that this denial of liability waived any conditions in the policy relating to proof of loss or ascertainment of the amount of loss. On the other hand, in the first case before the court, *Pioneer Mfg. Co. v. Phoenix Assurance Co.*,³⁵ discussed above, it is settled that an announcement of a refusal to pay anything on the policy, made in consequence of the plaintiff's refusal to comply with the written request of the defendant company for an arbitration pursuant to the appraisal clause, is not such a "waiver."

The supreme court has made a general declaration of principle concerning the conduct of both parties with respect to the arbitration as follows:

"If either party acts in bad faith in order to defeat the real object of the arbitration, the other is absolved from duty in regard to it, and from any obligation to enter into a new agreement for arbitration."

³⁴ 152 N. C. 206, 67 S. E. 509 (1910).

³⁵ 106 N. C. 28, 10 S. E. 1057 (1890).

This generalization was applied in the case of *Braddy v. New York etc., Insurance Co.*³⁶ Each party appointed an appraiser; defendant's appointee proposed a certain person as umpire; plaintiff's appointee objected because that person had already been nominated by another insurance company which was liable on the same loss. The two appointees then agreed that each would name three other persons and that they would choose one from the six. Defendant's appointee named three persons outside the state. Plaintiff's appointee objected for the reason, the court expressly assumed, that they were unknown to him. The umpire was never appointed and the appraisal was not had and the insured brought an action to recover on the policy. The defendant pleaded the arbitration clause. The court allowed the plaintiff's action. It said:

"We do not think it unreasonable for an appraiser, acting with a view to secure the services of an unprejudiced, competent and honest associate, to insist that only the names of persons living in the vicinage, or in the state, or in some way known to him, at least by reputation, should be tendered to him to take the place and discharge the functions of a juror. The failure of the arbitration was evidently due to the unreasonable conduct of the appraiser selected by the defendants, and they had notice of all that was done by him. It is not necessary for us to follow the ruling of the Court of Pennsylvania in holding that, in any failure of arbitrators selected to agree, the plaintiff is left at liberty to sue, though good reasons could be given for so doing. But in this particular case . . . it is manifest that if the company did not intend or consent, by dilatory measures, to defeat the bringing of an action, the success of the stratagem adopted by Westbrook [defendant's appointee] might point out the way for an unscrupulous agent in the future designedly to accomplish what the law would declare unlawful if it were attempted by the means of the enforcement of the contract."

The following year, in *Pretzfelder v. Merchants Insurance Co.*,³⁷ the supreme court went the full way of the Pennsylvania court and held as follows:

"We think the proper rule is laid down in *Ins. Co. v. Hocking*, 115 Pa., 416, that where the arbitrators, or a majority of them fail to agree upon an award, the plaintiff (unless he is shown to have acted in bad faith in selecting his arbitrator) is not compelled to submit to another arbitration and another delay, but may forthwith bring his action in court."

³⁶ 115 N. C. 354, 20 S. E. 477 (1894).

³⁷ 116 N. C. 491, 21 S. E. 302 (1893); s. c. 123 N. C. 164, 31 S. E. 470 (1895).

Apparently it is safe to summarize as follows: that, upon demand by the company for an appraisal to be had in accordance with the appraisal clause, the insured must act as follows: (1) perform once, but only once, to the extent of appointing such appraiser or appraisers as he has agreed to appoint; (2) he shall not knowingly choose such person for an appraiser as will seek to defeat the arbitration; (3) the insured must not interfere with the appointees and their proceedings so as to prevent the appraisal and award—their failure to conduct the appraisal and to render an award must be “without his fault.”

APPLICATION OF THE STATUTE—GENERAL

(a) *Time of Taking Effect*

By Section 26 it is provided that “this act shall be in force and effect from and after its ratification.” It was ratified on March 4, 1927.

(b) *Relation of the Statute to Common Law Arbitrations*

The statute contains no express repeal of the common law rules governing arbitration agreements and arbitrations and awards had thereunder. It does not appear to imply the exclusion of common law arbitrations. As has already been pointed out Section 1 does not embrace future-disputes agreements. It is clear that common law rules governing such agreements are left intact. The same observations may be made with respect to *oral* agreements to arbitrate *existing* controversies. With respect to *written* agreements to arbitrate *existing* controversies Section 1 of the act raises some questions in this connection. It provides as follows: “That two or more parties may agree in writing to submit to arbitration, *in conformity with the provisions of this act*, any controversy existing between them at the time of the agreement to submit. . . .” (Italics are the writer’s.) Is it to be understood that a written agreement to arbitrate an existing controversy which is not “in conformity with the provisions of this act” is to be governed by common law rules? An affirmative answer seems plausible. In other words, only such written agreements to arbitrate existing controversies as are “in conformity with the provisions of this act” are embraced in the act. However, if this is true, then the question arises how do parties to a written agreement to arbitrate an existing controversy invoke the act? This question arises because the act prescribes no special formal requisites to qualify such an agreement under the act rather than under common

law rules.³⁸ That is, a written agreement to arbitrate an existing controversy may, so far as formal requisites are concerned, qualify as a common law arbitration agreement and as one "in conformity with the provisions of this act." If all common law rules affecting written agreements to arbitrate an existing controversy are not excluded by reason of the universal application of the new statute to such agreements, it remains for the supreme court to determine that the parties to such an agreement bring it under the statute unless they indicate that a common law arbitration agreement is intended, or, to determine that common law rules shall apply unless the parties clearly invoke the statute. In view of the possibility of these alternate holdings it may be noted that Section 1 lends itself to at least the following proposition: That unless the parties stipulate in their written agreement that they are to arbitrate in compliance with the provisions of the act, their agreement and proceedings thereunder may be subject to common law rules only.

Another question presents itself in connection with the general topic at hand. If all common law rules governing agreements, written and oral, to arbitrate future and existing controversies are not repealed by the new statute, are common law rules exclusively applicable to the arbitral proceedings and awards rendered therein which are had under such agreements as are not governed by the statute? In other words, are any parts of the statute to be regarded as general regulatory provisions governing alike common law and statutory arbitration agreements and the arbitral proceedings and awards? After reviewing the act in its entirety it seems scarcely plausible to construe it as a series of statutory provisions for the regulation of arbitrations generally. It purports to apply to and to regulate agreements, proceedings and awards had in compliance with its terms, and, by implication, it would seem, to those only.³⁹

(c) *Relation of the Statute to Prior Legislation Concerning Arbitration*

Section 25 of the act provides that "all laws and clauses of laws in conflict with the provisions of this act are hereby repealed."

³⁸ Section 2 of the act prescribes that "the arbitration agreement must state the question or questions in controversy with sufficient definiteness to present one or more issues or questions upon which an award may be based," but it is not clear that compliance with this section will give any distinctive appearance to the agreement.

³⁹ This conclusion does not deny that one or more of the sections of the act may be a codification of one or more common law rules.

North Carolina appears not to have had any prior arbitration statute of general application. Sections 572-579 of the Consolidated Statutes, however, provide for, and regulate in some detail, references of pending actions with the written consent of the parties, and, in certain cases, without the consent of the parties, as in a case of complicated accounts.

It seems quite clear that the new act which requires a written *agreement* to arbitrate is not applicable to those provisions of the prior statutes which deal with compulsory references. By reason of its non-applicability it does not repeal the prior statutory provisions.

In case of a reference by consent of parties by written agreement does the new act apply? If it is held to apply it is possible that it will be held to exclude the provisions of the prior law, because of "conflict," at least "difference," in several provisions. The writer will presume to do no more than state the case: Will the new act be held to exclude the old statute merely because there is a written agreement to arbitrate an existing dispute, or will it apply only if it is clearly invoked by the parties—only if they agree in writing that they are to arbitrate under the new act? It may be again noted that Section 1 provides that "two or more parties may agree in writing to submit to arbitration, *in conformity with the provisions of this act, . . .*" (Italics are the writer's.) It does not purport to be all inclusive of written agreements to arbitrate existing controversies.

Another statute in North Carolina provides that corporations, partnerships and individuals engaging as common carriers who become involved in a controversy with each other "may agree in writing to submit such controversy to the [corporation] commission as arbitrator. . . ." ⁴⁰ It would seem plausible to argue that the new act was not necessarily intended to exclude or repeal this prior statute which deals with written agreements to arbitrate these special controversies between this particular group of parties before the arbitrators specified by the statute and that where such parties agree in writing to submit a controversy to the Corporation Commission as arbitrators that it should be held that the parties thereby invoked the older statute unless they more clearly indicate an appeal to the new act. ⁴¹

⁴⁰ Consolidated Statutes, Section 1059.

⁴¹ Similar conclusion would seem plausible concerning the statutory provision quoted, *infra*, note 46.

PERSONS COMPETENT TO CONTRACT TO ARBITRATE

(a) *Provisions of the Statute.*

Section 1 provides that "two or more parties" may enter into an agreement in writing to submit an existing controversy. It provides also that such an agreement shall be valid and enforceable, and that "neither party shall have the power to revoke the submission without the consent of the other party or parties to the submission save upon such grounds as exist in law or equity for the rescission or revocation of any contract." While the term "two or more parties" is comprehensive, it seems clear by reason of the saving clause, if not otherwise, that the legal power of certain classes of persons to enter into such contracts can be put in issue as in case of other contracts. Reference is made to the special position of married women (at least at common law), minors and corporations, and to the representative position of agents, fiduciaries, partners and personal representatives.

If a party to a written agreement to arbitrate an existing controversy which invokes the statute can, in a given case, "avoid" it on his own account or for want of power of his representative to act for him questions of *mutuality* are certain to arise. Must one party perform an executory submission agreement notwithstanding it is a matter of pleasure with the other party whether he will perform? Can the former party contest an adverse award on the ground that he has ascertained since the award that the successful party could have avoided the arbitration agreement or the award if it had gone against him? Will the person who has cause to avoid the agreement "waive" the cause "to avoid" or "ratify" the agreement by participating in the arbitration with knowledge of the cause "to avoid"? The writer will not presume to attempt an answer to these and similar questions which will inevitably arise in this connection under the act.⁴²

(b) *Cases at Common Law.*

Few cases have come before the supreme court which seem important for their effect upon common law arbitration or as a background of the statute for the question at hand.

Minors. In the case of *Millsaps v. Estes*,⁴³ which involved the

⁴² See *Sturges*, *Arbitration Under the New Pennsylvania Arbitration Statute*, 76 *University of Pa. Law Review* 345, 388 (1928). See expressions concerning "Mutuality" by the Supreme Court in *Barretts v. Patterson*, 1 N. C. 126 (1799).

⁴³ 137 N. C. 535, 50 S. E. 227 (1905), s. c. 134 N. C. 486, 46 S. E. 988 (1904).

reference of a pending action under a rule of court and consent of the parties, the supreme court declared generally on the first appeal that the award and judgment entered thereon were void as to the minors, who were the plaintiffs in the action. The court said: ". . . an infant cannot give his consent to a submission of his cause to arbitration, and any attempt to do so for him is absolutely void." On the second appeal of the case, however, the court concluded that it was not required to decide whether the award and judgment were *void* or only *voidable* for they were not conclusive or enforceable on other grounds.

On the second appeal of the *Millsaps* case the court also made the following statement: "Nor has a guardian *ad litem* or next friend the power to submit for the infant, even though the submission be a rule of court." It is inferable that the court meant that such guardian did not have the power to submit for the minor so that an award thereunder would be unavoidably obligatory or conclusive against the minor.⁴⁴

Attorney-at-Law. It is settled that an attorney has the power to submit his client's cause in a pending action. That the client is not consulted and did not know of the submission is not material for "arbitration is one of the legal modes of trying disputed questions to which the client's cause may be submitted by the attorney under his general authority to prosecute or defend."⁴⁵

According to the *Millsaps* case, however, the reference by an attorney and the award thereunder are at least voidable by the client where the client is a minor.

Personal Representatives. Although there is no express decision in point it is inferred from the cases cited in the note that the personal representative of a deceased person has power by virtue of his office to submit claims affecting the estate to arbitration whether or not the claim is in a pending action.⁴⁶

⁴⁴ But consult *Ryan v. Blount et al Exrs.*, 16 N. C. 382 (1820).

⁴⁵ *Morris v. Grier* 76 N. C. 410 (1877), *Pierce v. Perkins*, 16 N. C. 250, (1832).

⁴⁶ *Clanton v. Price*, Admr. 90 N. C. 96 (1884), *Lassiter v. Upchurch*, 107 N. C. 411, 12 S. E. 63 (1890); *Flippin v. Flippin*, 117 N. C. 376, 23 S. E. 321 (1895). Section 99 of the Consolidated Statutes provides as follows: "If the executor, administrator, or collector doubts the justness of any claim so presented, he may enter into an agreement, in writing, with the claimant, to refer the matter in controversy, whether the same be of a legal or equitable nature, to one or more disinterested persons, not exceeding three, whose proceedings shall be the same in all respects as if such reference had been ordered in an action. Such agreement to refer, and the award thereupon, shall be filed

CONTROVERSIES WHICH CAN BE ARBITRATED

(a) *Provisions of the Statute.*

The act places no restrictions on the types of disputes which can be arbitrated under it. Two or more parties can submit "any controversy." (Section 1). The discussion of this matter by the Conference of Commissioners on Uniform State Laws indicates that this clause was understood to be general—to allow "all matters of controversy." Quite clearly, however, restrictions will be placed upon the clause according to the good judgment of the supreme court in the particular case.

(b) *Cases at Common Law.*

In the common law cases the supreme court has reiterated the general proposition that a cause can be submitted to arbitration if there is "bona fide difference of opinion" between the parties and regardless of whether the claim or claims involved could be made the basis of a legal or equitable proceeding.⁴⁷

THE SUBMISSION AGREEMENT

(a) *Formal Requisites—Provisions of the Statute.*

Section 1 of the Act prescribes that the agreement shall be in writing. This requirement obtains regardless of the type of controversy. Section 2 also enacts the following general matter: "That the arbitration agreement must state the question or questions in controversy with sufficient definiteness to present one or more issues or questions upon which an award may be based."

As has been noted heretofore the act does not embrace future-disputes clauses. Section 1 is concerned with a written agreement to arbitrate any controversy which exists between the parties "at the time of the agreement to submit." But suppose that parties enter into a written future-dispute clause and wish to abide by it when a controversy arises, will it be necessary for them to execute a new agreement in writing in order to submit the dispute to arbitration under the act? If the parties to such future-disputes clause do not

in the Clerk's office where the letters were granted, and shall be a lawful voucher for the personal representative. The same may be impeached in any proceeding against the personal representative for fraud therein: Provided, that the right to refer claims under this section shall extend to claims in favor of the estate as well as those against it." See *McLeod v. Graham*, 132 N. C. 473, 43 S. E. 935 (1903); *Dunn v. Beaman*, 126 N. C. 766, 36 S. E. 172 (1900).

⁴⁷ *Findlay v. Ray*, 50 N. C. 125 (1857); *Parrish v. Strickland*, 52 N. C. 504 (1860).

execute such new written agreement will they have agreed in writing "to submit to arbitration, in conformity with the provisions of this act," any controversy then existing between them? Is it a formal requisite that the parties shall agree in their writing to arbitrate pursuant to the provisions of the act? Except for the difficulty presented by this last question and the clause quoted above—it would seem that if the parties participated in arbitration pursuant to a written future-disputes clause after a controversy had arisen thereunder until award rendered, that at least the award might plausibly be given effect under the act although the paper agreement was originally executed when no controversy existed. Certainly under the Uniform Act the matter of time in physically executing the arbitration bargain can be of no controlling importance *in such case* regardless of how objectionable irrevocable and specifically enforceable future-disputes clauses may have seemed to the Commissioners. Section 2, however, adds its difficulty in this connection by prescribing that "the question or questions of controversy" shall be particularized in the agreement. However, it would seem doubtful if that section excludes a submission of "any and all disputes existing between them [the parties]" with respect to a designated contract or series of contracts or transactions. Certainly such agreement would state a question "with sufficient definiteness to present one or more issues or questions upon which an award may be based." If this is true a future-disputes clause in a general written contract embracing "any dispute arising out of this contract" or any similar general clause might well be held, it is submitted, to qualify under section 2 where the parties have subsequently become involved in such a dispute and have gone forward with an arbitration thereunder to an award. On the other hand, it will be argued that "the arbitration agreement mentioned in section 2 relates to the arbitration agreement referred to in section 1, viz., to a written agreement of two or more parties to submit "any controversy *existing between them at the time of the agreement to submit,*" and that a future-disputes clause executed prior to the existence of a controversy does not qualify under section 1. Against this argument the suggestion recurs that the mere matter of time when the paper document is physically executed cannot be deemed material if the parties in fact participate under it with respect to a dispute arising thereunder until award rendered, and that it would be plausible to hold that such award is effective according to the provisions of the act. However, the clause "in conformity with the provisions of this

act," as it stands in section 1, seems to indicate, as heretofore noted, that the parties' written agreement must stipulate or otherwise indicate quite clearly that they submit their existing controversy pursuant to the act in order to invoke the act. If this is true it may be admitted that at least if the parties do not invoke the application of the act in their future-disputes clause an award rendered under the conditions in question may not be governed thereby.⁴⁸

(b) *Cases at Common Law.*

Several cases have come before the supreme court concerning the formal requisites of a submission agreement embracing a dispute concerning land. In the leading case of *Crissman v. Crissman*,⁴⁹ it was declared that a submission agreement must be *by deed* in case of a dispute over the title to land in order to satisfy the Statute of Frauds. Whether a written submission not under seal (*i.e.* "by deed") is valid does not clearly appear.⁵⁰ Likewise it has been held that an oral submission for the partition of land is insufficient under the Statute of Frauds.⁵¹ That the award is in writing in such cases does not cure the defect of an oral submission.⁵²

An allied question of formal requisites has arisen in common law cases (none of which, however, involved an agreement to submit a controversy over a title to land), as to the admissibility of testimonial or other evidence for either of the following purposes: (1) to show what matters were actually presented to the arbitrators by the parties at the hearing so as to extend the scope of a written submission agreement of a specific controversy; (2) to establish that a certain specific matter in controversy was or was not intended by the parties to be embraced within general and comprehensive terms in a submission agreement by evidence that such matter was or was

⁴⁸ The advantages of the statutory method of enforcing an award as compared with common law methods are set forth, *infra*, under title: *Procedure to Enforce Awards—Awards Effective as Judgments—Methods of Execution.*

⁴⁹ 27 N. C. 498 (1845). The submission agreement in this case was oral. Held that the award could not be pleaded in bar of an action of ejectment because of the form of the submission. Accord *Pearsall v. Mayers*, 60 N. C. 549 (1870), (award also oral); *Cutter v. Cutter*, 169 N. C. 482, 86 S. E. 301 (1915), (the award was in writing).

⁵⁰ But see *Cutter v. Cutter*, 169 N. C. 482, 86 S. E. 301 (1915), which indicates, but without discussing the specific point, that a writing may be enough. And see *infra*, title: *Effect of an Award on Title to Land or Chattels.*

⁵¹ *Fort v. Allen*, 110 N. C. 183, 14 S. E. 685 (1892), submission must be in writing.

⁵² *Cutter v. Cutter*, *supra*, note 50. The question of the formal requisites of a submission agreement involving title to chattels was expressly reserved in *Alston v. Hamlin*, 19 N. C. 115 (1836).

not presented by the parties to the arbitrators at the hearing. In *Osborne v. Calvert*,⁵³ Ruffin, J. expressed doubt whether a plaintiff in an action to enforce an award could show that a certain matter not expressly embraced in the terms of a written submission agreement were in fact presented by the parties before the arbitrators for decision if the terms of the submission were "clear and explicit in themselves." He held, however, in the same case, that where the parties, who were partners, submitted matters of controversy "about and concerning the dealings and mutual accounts kept by themselves for the last several years . . . [and] . . . all things and considerations relating thereto" that the defendant could show that the arbitrators considered matters relating to their partnership accounts only and that a note given by the plaintiff to the defendant prior to the formation of this partnership "came neither within the scope of the original intention of the parties, nor the action of the arbitrators." In *Cheat-ham v. Rowland*⁵⁴ it was held under a submission agreement describing in general terms the matters which were submitted, that the defendant was entitled to prove that the claim sued on by the plaintiff was in fact prosecuted before the arbitrators and embraced in the award and that therefore the award was a bar to plaintiff's action. Likewise, in *Robertson v. Marshall*⁵⁵ the parties agreed to submit "certain matters of difference or disagreement . . . on account of their contractual and trade relations and their dealings with each other entered into and had . . . relating to the lumber business and all else incident thereto [and] do submit all such matters of disagreement or difference . . ." The court regarded the terms of this submission as "very broad and comprehensive," and said that "if they do not of themselves include this trade about the big mill, as we are inclined to hold, they are without doubt sufficiently definite and certain to constitute a valid submission and to permit of parol evidence to fit them to the subject matter." The evidence offered to "fit them to the subject matter" related to the matters which were in fact presented to the arbitrators at the hearing.⁵⁶

It remains to be observed whether the rule of these cases will be extended to agreements to submit disputes concerning "title to land," and to written agreements which are governed by the new statute.

⁵³ 86 N. C. 170; s. c. 83 N. C. 365 (1880).

⁵⁴ 105 N. C. 218, 10 S. E. 986 (1890).

⁵⁵ 155 N. C. 167, 71 S. E. 67 (1911).

⁵⁶ The arbitrators are competent to testify to what matters were presented before them. *Robertson v. Marshall*, *supra*, note 55. See also, *infra*, title, *Awards in Disputes Involving Land—Formal Requisites*.

(c) *Construction of the Submission Agreement—What Disputes Did the Parties Submit.*

The problem of construing an arbitration agreement is almost ever present.⁵⁷ The question generally is: what disputes did the parties in question agree to arbitrate? It is clear that the arbitrators do not have the power to decide this question—the question of their jurisdiction. The supreme court has remarked on this point as follows:

“What are the terms of the submission, what is the true construction of such terms, and what things are embraced within them, may present questions of law or of fact, and when presented the questions of law can only be decided conclusively, not by the arbitrators, but by the proper judicial tribunals of the country.”⁵⁸

In accord with the common law decisions of other states the supreme court has held that a general submission of the debts and claims of the parties gives the arbitrators no power to decide disputes which accrue *after* the submission agreement was executed.⁵⁹ However, where disputes concerning the *settlement of an estate* arose between the executor and legatee and heirs and were submitted to arbitration the court declared that “the object of the reference was to settle the estate . . . and by a proper construction of the bond it extended to all matters and things for, and on account of which, the defendant was liable, as executor, and in which the parties, who were children of the testator, were interested.”⁶⁰ It may be inferred from this statement that all matters of dispute necessary *to settle the estate*, even those arriving after the submission and up to the date of the award, are to be adjusted in each case—that the arbitrators can and should decide them.

Whether a particular matter goes to the question of the “jurisdiction” of the arbitrators is not always clear. Where the parties, who were partners, submitted “all the said matters of controversy and all matters of difference in relation to, or in any wise concerning said partnership,” the court ruled that “it would seem to be a matter of course that when arbitrators are chosen to settle a co-partnership, it is for them to say what does or does not constitute a part of the co-partnership effects.”⁶¹

⁵⁷ See *Noble v. Wiggins*, 52 N. C. 535 (1860); *Cutter v. Cutter*, 169 N. C. 482, 86 S. E. 301 (1915).

⁵⁸ *Walker v. Walker*, 60 N. C. 259 (1864).

⁵⁹ *Borretts v. Patterson*, 1 N. C. 126 (1799).

⁶⁰ *Brown v. Brown*, 49 N. C. 123 (1856). See also *Masters v. Gardner*, 50 N. C. 298 (1858).

⁶¹ *Masters v. Gardner*, *supra*, note 63.

REVOCABILITY AND ENFORCEMENT OF SUBMISSION AGREEMENTS

(a) *Provisions of the Statute.*

Section 1 provides that if parties agree in writing to arbitrate an existing controversy as therein stated that "neither party shall have the power to revoke the submission without the consent of the other party or parties to the submission save upon such grounds as exist in law or equity for the rescission on revocation of any contract." By the same section the agreement shall be "valid and enforceable." There is only this general declaration in the statute upon which to predicate the conclusion that the submission agreement is irrevocable in either of the following senses: (1) that the agreement can be pleaded to abate or to bar an action in court which is brought on a cause subject to the agreement; (2) that neither party can terminate the agreement before or after arbitrators are appointed by giving notice prior to an award rendered.

The common law power of a party to defeat an arbitration by neglecting or refusing to appoint an arbitrator or arbitrators is changed by section 4, as follows:

"That upon the application in writing of any party to the arbitration agreement and upon notice to the other parties thereto, the court shall appoint an arbitrator or arbitrators in any of the following cases:

"(a) When the arbitration agreement does not prescribe a method for the appointment of arbitrators, in which case the arbitration shall be by three arbitrators;

"(b) When the arbitration agreement does prescribe a method for the appointment of arbitrators, and the arbitrators, or any of them, have not been appointed and the time within which they should have been appointed has expired;

"(3) When any arbitrator fails or is otherwise unable to act, and his successor has not been appointed in the manner in which he was appointed. Arbitrators appointed by the court shall have the same power as though their appointment had been made in accordance with the agreement to arbitrate."

Section 7 likewise provides for an *ex parte* hearing and default award after notice so that a recalcitrant party can not, generally, at least, defeat an arbitration by refusing to participate in the arbitral hearing. This section appears to codify the prevailing common law rule of the American states.

While the foregoing statutory provisions look to the enforcement of the arbitration agreement indirectly by preventing its revocation and by authorizing substitute measures if a party refuses to perform,

it may be noted that the statute does not expressly provide a procedure by which to procure a decree for specific performance of the agreement by a party. There is, however, the general declaration in section 1 that the agreement shall be "valid and enforceable." As such statutory declaration was not necessary to make the agreement "valid and enforceable" in the sense that it would support an action for at least nominal damages at common law, it may be argued that this general provision is designed to make the agreement specifically enforceable. On the other hand, it may be argued that this general provision merely codifies the common law rule and that the new substitute measures expressly provided in sections 4 and 7 indicate that compulsory specific performance by a party is not contemplated by the act.⁶² The question remains for the future decision of the supreme court.

(b) *Cases at Common Law.*

From the earliest cases the supreme court has taken the general position that an agreement of submission is revocable in the sense that it cannot be pleaded in bar to an action brought on a cause subject to the agreement. Thus, it has said: "If the plaintiff, having agreed to arbitrate as alleged, afterwards refused to comply with the agreement such breach thereof might be a cause of action, but not one to be set up as a defense in this action."⁶³ It has likewise declared that the agreement is revocable directly by notice prior to award rendered, and has explained its ruling as follows: "Where a submission to arbitration is made by the mere agreement of the parties, beyond question, either of the parties can revoke such submission at any time before the award is made, although he may thereby render himself liable to an action for a breach of his agreement. Every naked authority, until an act be done under it, is in law countermandable by him who has granted it."⁶⁴

The case of *Williams v. Branning Mfg. Co.*⁶⁵ is a leading American case concerning direct revocation of the submission agreement by bringing an action in court on a cause which is subject to the agreement. After the submission and hearing but before award rendered, the plaintiff proceeded to bring an action in court on the same con-

⁶² Compare on this point the new arbitration statutes which follow the New York and United States Act, *Sturges, op. cit., supra*, note 42.

⁶³ *Carpenter v. Tucker*, 98 N. C. 316, 3 S. E. 831 (1887).

⁶⁴ *Tyson v. Robinson*, 25 N. C. 333 (1843)—reference of pending action under rule of court.

⁶⁵ 153 N. C. 7, 68 S. E. 902 (1910).

troversy. He caused the summons to be served in the action before the award was rendered, but neither the complaint nor any bill of particulars was filed until after the award was rendered and published. It was held that there was no revocation. The court summarized its position as follows:

"The revocation to be effective must be express unless there is a revocation by implication of law, and in case of express revocation, in order to make it complete, notice must be given to the arbitrators. It is ineffective until this has been done. . . . It is contended that commencing an action is a revocation by legal implication. Such revocations arise from the legal effect of some intervening happening after submission, either by act of God or caused by the party, and which necessarily puts an end to the business.

"The death of a party, or arbitrator, or marriage of a *femme sole*, lunacy of a party, or the utter destruction and final end of the subject matter, are of this description.⁶⁶ But whether the bringing of an action for the subject matter of an arbitration after submission and before award is an implied revocation, is a matter about which the courts differ. . . .

"Until a complaint is filed the defendant had no legal notice of the cause of action and the arbitrators had a right to proceed with the pending arbitration and to render their award."

It is inferred that these rules of revocability of a submission agreement are not different in a court of equity or in a court exercising equitable powers.⁶⁷ It has been held that where the submission was revoked by notice before award rendered that there was a sufficient defense at law so that an injunction would not issue to enjoin the enforcement of an arbitration bond given to abide an award.⁶⁸

The court has also held that equitable remedy should be denied in the following case: The defendant agreed to sell his mill to the plaintiff at its cost to him (the defendant). This price, it was agreed, should be determined by four persons then named. These arbitrators could not agree; the defendant refused to refer the question to an umpire to be selected by the arbitrators and he also refused to appoint new arbitrators. The plaintiff sought to compel the defendant to render an account of the cost of the mill to him and to convey upon

⁶⁶ And see *Tyson v. Robinson*, 25 N. C. 333 (1843), *Whitfield v. Whitfield*, 30 N. C. 163 (1847). Whether agreements which are governed by the statute will be subject to these rules remains to be determined. See *Matter of Scott*, 200 App. Div. 599, 193 N. Y. Supp. 403 (1922), *aff'd*, without opinion, 234 N. Y. 539, 138 N. E. 438 (1922).

⁶⁷ See *Norfleet v. Southall*, 7 N. C. 189 (1819).

⁶⁸ *Gardner v. Marsters*, 56 N. C. 462 (1857).

receipt of the payment by plaintiff of the amount so ascertained. *Held* that the bill was demurrable. The court assigned the following reasons for its decision: "The substance and effect, then, of Southall's agreement was: 'not that I will sell you my share of the mill upon your paying me what it cost; but I will sell it to you, provided four certain persons, to be named by us, unite in their judgment and opinion as to what it cost. If they do not concur in opinion, there is no contract between us.' The parties have made an effort towards contracting, which has terminated in an inchoate agreement; and if this court were to direct a reference to the master, or any other person, to ascertain the price, and decree upon such a report, it would be making a contract for the parties and then enforcing it."⁶⁹

As indicated by the opinions which have already been quoted, it is apparent that the revocation of a submission agreement without sufficient cause gives the aggrieved party an action for damages. Whether more than nominal damages will be allowed has not been decided.⁷⁰ However, sufficient cause for revocation may be shown so that no damages will be recovered. Thus, in *Wynne v. Lumber Co.*⁷¹ it was held that intentionally getting a material witness drunk by a party for the purpose of keeping him from testifying at the arbitral hearing was sufficient cause to revoke the agreement.⁷²

PROVISIONAL AND ANCILLARY REMEDIES

(a) *Provisions of the Statute.*

Section 12 of the act provides as follows: "That at any time before final determination of the arbitration the court may upon application of a party to the submission make such order or decree or take such proceeding as it may deem necessary for the preservation of the

⁶⁹ *Norfleet v. Southall*, 7 N. C. 189 (1819). See also *Williams v. Wood*, 12 N. C. 82 (1826).

⁷⁰ Where a penal obligation to perform and not revoke the arbitration agreement has been given apparently the full penalty can be recovered upon breach of the obligation if the penal sum is not, in the opinion of the court, "unjust or disproportionate to the damage sustained by the plaintiff by reason of the violation of the contract by the defendant." See *Pendleton v. Electric Light Co.*, 121 N. C. 20, 27 S. E. 1003 (1897), and *Wynne v. Lumber Co.*, 179 N. C. 320, 102 S. E. 403 (1920). Compare cases cited, *infra*, note 135.

⁷¹ 179 N. C. 320, 102 S. E. 403 (1920).

⁷² *Quaere* whether such matters as create a legal privilege to revoke a submission agreement at common law will give a legal power to a party to revoke an agreement which is governed by the statute. According to the statute neither party can revoke such an agreement without the consent of the other "save upon such grounds as exist in law or equity for the rescission or revocation of any contract" (Section 1).

property or for securing satisfaction of the award." In the deliberations of the Conference of Commissioners on Uniform State Laws, it appears from the expressions of certain commissioners that this section is designed "to prevent any one from disposing of the property or removing *the property that is in question* before the award takes place."⁷³ (Italics are the writer's.) Others referred to its purpose to prevent a party to a submission agreement from "clandestinely or secretly hiding out and disposing of his property which might be available when the final award should be executed, and . . . simply provides that in that event the court can entertain a proceeding to hold that property to satisfy the final award of the arbitration."⁷⁴

No common law cases have been discovered wherein a party to an arbitration agreement has sought to have the adverse party arrested or to have an attachment, an injunction, or the appointment of a receiver or a garnishment executed against him or his property and credits in order to preserve the *status quo* pending the arbitration or to assure recovery on a favorable award.

It is clear that a large number of contentious propositions are involved in attempting to reconcile section 12 of the Arbitration Act with the various statutory provisions governing the remedies in question. These questions are multiplied because of the fact that the statutes which govern the remedies in question are predicated upon the existence of an ordinary "civil action."⁷⁵ Like difficulties lie in the path of a party to a common law submission agreement who would use such remedies without resort to any action and without prejudice to the arbitration agreement.⁷⁶

REQUISITES CONCERNING ARBITRATORS

(a) *Number of Arbitrators.*

Neither the statute nor common law rules prescribe a maximum or minimum number of arbitrators. The agreement of the parties governs. Sections 4 of the statute provides, however, as heretofore noted, that upon the application in writing of any party to the arbitration agreement the court shall appoint an arbitrator or arbitrators

⁷³ Handbook, Nat'l Conference of Comrs. on Uniform State Laws, 73 et seq. (1924).

⁷⁴ Handbook, *op. cit.*, *supra*, note 73.

⁷⁵ Consult Consolidated Statutes (1919), Sections 767, 768, 798, 843-858, 860. See also deliberations of Nat'l Conference of Commissioners on this section. Handbook (1924).

⁷⁶ In this connection consult *Williams & Bro. v. Branning Mfg. Co.*, *supra*, note 65 and the report of the case in the text connected therewith.

in any of the following cases: (a) When the arbitration agreement does not prescribe *a method* for the appointment of arbitrators, *in which case the arbitration shall be by three arbitrators . . .*" (Italics are the writer's.)

A question of construing a particular arbitration agreement will frequently arise in connection with this general topic to determine how many arbitrators have been agreed upon by the parties. In *Crawford v. Orr*⁷⁷ the parties submitted a boundary line dispute "to two disinterested men [who were chosen] together with A. L. Patterson, a surveyor, with the privilege of calling in a third party in case they fail to agree . . . and to bear the expenses of the referees and surveyor equally." It was held that Patterson was not an arbitrator, but rather a designated technical assistant to the two arbitrators and that therefore the award of the two was valid within the common law rule requiring an unanimous award. Similarly, an award by A under a submission to A or B was held to be conclusive upon the parties. "The submission," said the court, "was . . . to either one."⁷⁸

(b) "*Arbitrators*," "*Third Arbitrator*" and "*Umpire*" Distinguished.

The statute does not mention any distinction; the term "umpire" does not appear in the act. In the common law cases an "umpire" is frequently distinguished from an "arbitrator" and "third arbitrator." A submission to A and B, arbitrators, with authority to choose an "umpire" or "third party" forthwith or in event that the two shall disagree, gives the third person so chosen, if an "umpire," a distinct position in arbitration law in several different instances.⁷⁹ It remains to be observed when, if ever, the supreme court will construe the term "arbitrator," as used in the act, to include an "umpire."

(c) *Qualifications of Arbitrators and Umpire.*

The act is silent on the matter. Two or more parties may agree in writing to submit "to arbitration." (Section 1).

In a single pertinent common law decision it was held that an offer to show concerning one of two arbitrators that his mind was impaired, that it was not so strong and vigorous as it had been, was properly rejected. The court also held that evidence that an arbitrator was drunk was not material unless he were shown to have been

⁷⁷ 82 N. C. 246 (1881).

⁷⁸ *Hemphill v. Gaithers*, 180 N. C. 604, 105 S. E. 183 (1920).

⁷⁹ See cases cited, *infra*, note 89.

so drunk that he did not know what he was doing—that his mind had become a “fatuity.”⁸⁰

Apparently it is the position of the supreme court that “interest” in the cause and relationship to one of the parties will not disqualify a person from acting as arbitrator or umpire if the parties submit the case to him with knowledge of the facts. If the facts were unknown to a party it is intimated that the arbitration and award can be defeated at least by that party.⁸¹ The court has stated, however, that “no relief . . . will be granted unless objection is made as soon as the aggrieved party becomes aware of the facts.” If the party discovers the disqualifying cause prior to award but continues to participate in the hearing until award without objection it is clear that he cannot contest the award.⁸²

(d) *How Elected or Appointed.*

Neither the statute nor common law rules prescribe a method of selecting arbitrators or an umpire. The parties are left to their agreement and subject to the common law rules of revocability in case of common law submissions.⁸³ Section 4 of the act provides as follows: “That upon the application in writing of any party to the arbitration agreement and upon notice to the other parties thereto, the court shall appoint an arbitrator or arbitrators in any of the following cases:

(a) When the arbitration agreement does not prescribe a method for the appointment of arbitrators, in which case the arbitration shall be by three arbitrators.

(b) When the arbitration agreement does prescribe a method for the appointment of arbitrators, and the arbitrators, or any of them, have not been appointed and the time within which they should have been appointed has expired.

(c) When any arbitrator fails or is otherwise unable to act, and his successor has not been appointed in the manner in which he was appointed.

⁸⁰ *Devereux v. Burgwin*, 33 N. C. 490 (1850).

⁸¹ See *Pearson v. Barringer*, 109 N. C. 398, 13 S. E. 942 (1891); *Nelson v. Atlantic Coast Line R. Co.*, 157 N. C. 194, 72 S. E. 998 (1911).

⁸² *Pearson v. Barringer*, *supra*, note 81.

⁸³ See *Phoenix Hosiery Co. v. Griffin Smith & Co.*, 16 Phila. 568 (Pa., 1883); *Gray v. Wilson*, 4 Watts 39 (Pa., 1835). Compare *State ex rel. Faucher v. Everett*, *supra*, note 15.

Arbitrators appointed by the court shall have the same power as though their appointment had been made in accordance with the agreement to arbitrate.”

It is readily inferred from subsection (a) that the submission agreement may qualify under the act although the arbitrators are not named therein and although no method of choosing them is set forth therein.

The section does not seem sufficiently clear upon many propositions, however, for example, the following: (1) If the parties have agreed upon a method of selecting arbitrators *but it is not set forth in the arbitration agreement can one party invoke section 4 (a) and have three arbitrators appointed by the court? Must he in such case invoke section 4 (a) and have three arbitrators appointed by the court as therein provided in lieu of the performance of the method agreed upon by the parties if the other party refuses to participate under that agreement?* (2) If the parties provide in a collateral agreement that each will appoint *an arbitrator* and that the two shall appoint *an umpire* or a *third arbitrator*, and one party refuses to appoint will the court appoint *three arbitrators* under section 4 (a) or only *two arbitrators* to act with an arbitrator appointed by the petitioning party, or will it appoint only *one arbitrator* who with the one appointed by the petitioning party shall appoint an umpire or third arbitrator? (3) When *the agreement to arbitrate does not prescribe a method* for the appointment of arbitrators and *three arbitrators* are appointed under section 4 (a) what if anything is intended by the last paragraph of the section which provides that arbitrators so appointed “shall have the same power as though their appointment had been made *in accordance with the agreement to arbitrate?*” (Italics are the writer’s.) Further examples of the ambiguity of this section would unduly extend the consideration of the topic under consideration. Perhaps it is beyond doubt that if the parties provide *in the submission agreement that they will select three arbitrators* the court can be applied to under section 4 (b) of the act and that it will act consistently with their agreement at least in the particular that all or at least part of the *three arbitrators* will be appointed when necessary to effect the arbitration under the agreement.

PROCEDURE LEADING TO THE ARBITRAL HEARING

(a) *Appointment of Time and Place of Meeting—By Whom—Notice.*

Section 6 of the statute provides as follows: "That the arbitrators shall appoint a time and place for the hearing, and notify the parties thereof . . ." Probably *all* of the arbitrators must participate and concur in fixing the time and place of the hearing and in giving the notice. Correct procedure in this respect will assume obvious importance when an *ex parte* hearing is had under section 7 which provides that "if any party neglects to appear before the arbitrators after reasonable notice the arbitrators may nevertheless proceed to hear and determine the controversy upon the evidence which is produced before them." If a party appeared and participated in the arbitral hearing presumably he would be held to "waive" irregularities in this connection.

These statutory provisions apparently codify the prevailing common law rule.

(b) *Procuring Attendance of Witnesses.*

Section 10 enacts that "the arbitrator or arbitrators, or a majority of them, may require any person to attend before him or them⁸⁴ as a witness. . . . Subpoenas shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrator or arbitrators, or a majority of them, and shall be directed to the person and shall be served in the same manner as subpoenas to testify before a court of record in this state."

If a person is duly subpoenaed and neglects or refuses to obey the subpoena, "upon petition the court may compel the attendance of such person . . . or punish said person for contempt in the same manner now provided for the attendance of witnesses or the punishment of them in the courts of the state." Whether the arbitrators and the interested party, or either, shall make the foregoing petition is not stated.

Such subpoenas may likewise issue to a person "to bring with him any book or writing or other evidence." Like compulsory process is available for failure or refusal to comply.

If the arbitrators refuse to issue subpoenas to procure testi-

⁸⁴It is not clear that the second pronoun "them" can refer to "a majority of them" in view of probable quorum-requisites. See *infra*, title, *Proceedings at the Arbitral Hearing—(a) Quorum of Arbitrators.*

monial or other evidence from a person because they do not deem it material to the case is their decision final? It seems apparent that the aggrieved party can invoke sections 13 and 16 in such case. Section 13 prescribes that the arbitrators "shall by request of a party to the arbitration: (a) At any stage of the proceedings submit any question of law arising in the course of the hearing for the opinion of the court, stating the facts upon which the question arises, and such opinion when given shall bind the arbitrators in the making of their award." If, however, the question at hand is not to be construed as "any question of law arising *in the course of the hearing,*" which, when decided by the court, would be effective to "bind the arbitrators in the making of their award," it remains to notice section 16. By that section if the party sustains an adverse award he can apply to the court to have the award vacated for the following cause: "(c) Where the arbitrators were guilty of misconduct, . . . in refusing to hear evidence pertinent and material to the controversy." If there is any doubt as to the application of section 16 to the case at hand, it lies in the proposition that a refusal to subpoena a witness or evidence is not a refusal "to hear evidence" as provided in that section.

No cases have been discovered which deal with the procurement of witnesses in a common law arbitration. It is not clear that the statutes authorize subpoenas to issue to procure witnesses or documentary evidence in such an arbitration.⁸⁵

(c) *Procuring Depositions.*

Under Section 11 "depositions may be taken with or without a commission in the same manner and for the same reasons as provided by law for the taking of depositions in suits pending in the courts of record in this state."

It is doubted if depositions can be taken for use before common law arbitrators.⁸⁶

PROCEEDINGS AT THE ARBITRAL HEARING

(a) *Quorum of Arbitrators.*

The statute has no express provision in point. Section 3949 of the Consolidated Statutes provides as follows: "(2) All words purporting to give a joint authority to three or more public officers or

⁸⁵ Consult Consolidated Statutes (1919), Section 919.

⁸⁶ Consult Consolidated Statutes (1919), Sections 900, 901.

other persons shall be construed as giving such authority to a majority of such officers or other persons, unless it shall be otherwise expressly declared in the law giving the authority." The supreme court has indicated clearly, however, that this statute applies only when the three or more persons are appointed by a statute.⁸⁷ It is, therefore, inferred that even if this statute embraces the *question of quorum*, which may be doubtful, it does not apply to arbitrators selected by the parties or to the *three arbitrators* who are appointed by the court under section 4a.

The prevailing American statutory and common law rule requires that all of the arbitrators shall meet and act together. In *Devereux v. Burgwin*,⁸⁸ however, where tenants in common agreed to divide their land and submitted the valuation of their respective parts to A and B, "the valuation to be made upon such examinations and surveys as the referees may think proper, of which they shall be the sole and exclusive judges," the supreme court held that the fact that B did not go on the land and examine it did not invalidate the award of A and B. The court relied upon the last clause of the submission for authority to the arbitrators to make the examination and survey by only one of them if they thought proper.

If an umpire is selected it is inferred that he can hear the cause alone⁸⁹ unless the terms of the submission clearly contemplate his contemporaneous sitting with the arbitrators to act as umpire between them when and as they disagree on specific questions during the progress of the hearing and in rendering their award.

However, even when an umpire is chosen to decide the whole cause, the proceedings are not affected by the participation of the arbitrators in the hearing and in signing his award. It is likewise true that the participation of an umpire in the proceedings of the arbitrators will not invalidate their action. The supreme court explained its position in such case as follows: "The award in our case is either the award of the umpire or the award of the arbitrators. Take it either way it is good."⁹⁰

(b) *Selection of an Umpire or Third Arbitrator.*

A submission agreement may authorize the originally appointed

⁸⁷ See *Oakley v. Anderson*, 93 N. C. 108 (1885).

⁸⁸ 33 N. C. 490 (1850).

⁸⁹ *Stevens v. Brown*, 82 N. C. 460 (1880); *Bryan v. Jeffreys*, 104 N. C. 242, 10 S. E. 167 (1889).

⁹⁰ See cases cited, *supra*, note 89.

arbitrators to choose a "third party," a "third arbitrator," or an "umpire." This choice may be authorized without any time being specified therefor, or there may be the usual authorization for the arbitrators to elect or appoint the third person "in case they cannot agree." If this last quoted clause is construed to authorize the appointment only "after they have disagreed" a second hearing will be necessary unless the original arbitrators are unanimous in their first decision. The supreme court has held that it is no objection that the arbitrators appointed the third person *before* they commenced the hearing—at least an award rendered in proceedings in which such third party participated without exception taken by either party was declared valid, and this was so held although the third person was necessary to the majority award which was authorized in the submission. The court said: "It matters not at what time during the progress of an arbitration the umpire is appointed. It is within the discretion of the arbitrators to appoint him before or after their disagreement."⁹¹

Apparently there are no indispensable formal requisites in appointing the third person in such cases. In *Bryan v. Jeffreys* the submission was under seal. The court indicated that the appointment of the third party was not required to be under seal, nor, apparently, even in writing. At least it was held that such a matter could not be raised after award and, in that case, a part performance thereof by the complaining party.

Reference has already been made not only to the fact that the new statute does not use the term "umpire" but also to some of the causes of uncertainty concerning the application of the statute to a submission agreement which provides for the appointment of an umpire or third arbitrator in the manner here considered.

(c) *Proceedings in Absence of a Party—Ex Parte Proceedings.*

Section 7, of the act provides as follows: "That if any party neglects to appear before the arbitrators after reasonable notice the arbitrators may nevertheless proceed to hear and determine the controversy upon the evidence which is produced before them." This section appears to codify in general terms the prevailing American common law rule.

It is certain, however, to present its difficulties in administration. If a party, after reasonable notice, refuses to attend the hearing will

⁹¹ *Stevens v. Brown, Bryan v. Jeffreys, supra*, note 89.

he be held to have "waived" such defects of procedure as he would be held to have waived if he had appeared and participated in the hearing? For example, if less than *all* of the arbitrators participate in appointing the time and place of hearing and in giving notice thereof, will the absent party be held to have "waived" the defect as he apparently would be held to do by participating in the hearing without objection? Will he "waive" the requisite for a full quorum as he might be held to do if he appeared before less than the full board of arbitrators without objection? It seems doubtful. If the absent party sustains an adverse default or *ex parte* award it would seem clear that he could attack the award on other grounds, also, as, for example, that the arbitrators determined more or less matters than the submission agreement authorized—a question of their jurisdiction—and, in general, on any other grounds provided in the act as cause for vacating awards governed thereby.

(d) *Requisite that Arbitrators and Umpire be Sworn.*

The statute does not require an oath. No common law cases in point have been discovered in North Carolina. Forms of oaths for various persons are prescribed in section 2199 of the Consolidated Statutes, but none appears for arbitrators.

(e) *Requisite that Witnesses be Sworn.*

There is no express requirement in the act that witnesses shall be sworn. No common law cases in point have been discovered. The oath prescribed by section 3199 of the Consolidated Statutes for a witness in a "civil action" is not adapted to a witness at an arbitration.

(f) *Arbitrators Powers to Examine Witnesses and Documents.*

By section 6 of the statute the arbitrators are required to give both parties reasonable opportunity to be heard before them as a board, and by section 16 they must "hear evidence pertinent and material to the controversy." Clearly their powers are coextensive with their duties in this connection. But can the arbitrators assume the rôle of inquirer and examine and cross-examine witnesses and inspect and verify documentary evidence? Presumably they have these powers. It remains to be determined whether they are restricted in the exercise of these powers to evidence which is adduced at the hearing.⁹²

⁹² See *Berizzi Co. Inc. v. Kraus*, 208 App. Div. 322 (1924), reversed 239 N. Y. 315, 146 N. E. 436 (1925). Consult *Gardner v. Marsters*, 56 N. C. 462 (1857).

Common law decisions restrain the arbitrators from examining one party's evidence privately and in the absence of the other at least when the latter participates in the hearing. The supreme court has stated the rule as follows: "The first principle of justice requires that no private instructions should be received, nor evidence heard, without giving the other party an opportunity of being present. The arbitrator may be influenced by such representations insensibly to himself; and the party has a right to know the proof, that he may object to it if improper, or answer it, if proper."⁹³

(g) *Rules Governing the Admissability of Evidence.*

While the Supreme Court has remarked that "arbitrators have great latitude of discretion; they are not bound by the strict rules of law" in admitting evidence at the hearing,⁹⁴ it was held in *Hurdle v. Stallings*⁹⁵ that where the arbitrator rejects evidence which does not appear to have been immaterial the award shall be set aside. The court explained the duty of arbitrators in this respect as follows: "Arbitrators have some power within their discretion to determine how much evidence they will hear, but it is their general duty to hear all evidence material to the case which is offered."

Under section 16 of the act an award rendered in a statutory arbitration shall be vacated if the arbitrators were guilty of misconduct "in refusing to hear evidence pertinent and material to the controversy." It seems clear from this section that the court will review the conduct of the arbitrators in refusing to hear evidence at the hearing and that it will review the question whether rejected evidence was "pertinent and material to the controversy." It remains to be observed, however, whether the court will follow the position which it took in *Hurdle v. Stallings* and hold in proceedings under section 16 that an award will be vacated as of course unless the record affirmatively shows, or it is otherwise made to appear, that the rejected evidence was *immaterial*—a matter of at least procedural importance.

It is inferred that the arbitrators in common law arbitrations are the sole judges of the weight and materiality of testimony and evidence *which is received* by them. Under the statute, however, this conclusion is subject to the considerations of the next topic.

⁹³ *Pierce v. Perkins*, 17 N. C. 250 (1832). Compare *Admrs. of M'Crae v. Robeson*, 6 N. C. 127 (1812); *Gardner v. Marsters*, 56 N. C. 462 (1857).

⁹⁴ *Admrs. of M'Crae v. Robeson*, *supra*, note 93.

⁹⁵ 109 N. C. 6, 13 S. E. 720 (1891).

(h) *Disposition of Questions of Law.*

The common law cases are uniform in holding that a general submission to arbitration authorizes and requires the arbitrators to determine the law as well as the facts of the controversy. Only if they confessedly rely upon a certain proposition as being the law when it is not is there such a "mistake of law" as is cause to vacate the award. If they do not assign reasons for their award, if they do not disclose that they undertook to decide in accordance with propositions of law which they assumed to be true, the court will not inquire into the processes of the arbitrators in rendering their award on an allegation that the award is "against the law," or that the arbitrators have made a "mistake of law." The Supreme Court has repeated the following proposition which it developed at length in the leading case of *King v. The Falls of Neuse Mfg. Co.*: "It is well settled that arbitrators are no more bound to go into particulars and assign reasons for their award, than a jury is for their verdict. The duty is best discharged by a single announcement of the result of their investigation. It is equally well settled that they are not bound to decide according to law, for they are a law unto themselves, and may decide according to their notions of right and without giving any reasons. If, however, they undertake to decide according to law, and it appears from the face of the award that they have misconceived any principle of law applicable to the case, then the award is void."⁹⁶

Section 13 of the new statute changes the law with respect to arbitrations under the act. It is there provided "that the arbitrators may, on their own motion, and shall by request of a party to the arbitration:

(a) At any stage of the proceedings submit any question of law arising in the course of the hearing for the opinion of the court, stating the facts upon which the question arises, and such opinion when given shall bind the arbitrators in making their award.

(b) State their final award in the form of a conclusion of fact for the opinion of the court on the questions of law arising on the hearing."

⁹⁶79 N. C. 360 (1878). See also *Cleary v. Caar & Hawks*, 2 N. C. 225 (1795); *Jones v. Frazier*, 8 N. C. 379 (1821); *Ryan v. Blount et al Exrs.*, 16 N. C. 382 (1820); *Pierce v. Perkins*, 17 N. C. 250 (1832); *Crisp v. Love*, 65 N. C. 126 (1871); *Leach v. Harris*, 69 N. C. 532 (1873); *Robbins v. Killebrew*, 95 N. C. 19 (1886); *Smith Admx. v. Kron*, 109 N. C. 103, 13 S. E. 839 (1891); *Henry v. Hilliard*, 120 N. C. 479, 27 S. E. 130 (1897).

Not only does the Uniform Act depart from the common law of the American states by this section, but it also departs from the arbitration statutes of all of the American states, except Illinois, which embrace only agreements to arbitrate existing disputes.⁹⁷

The section promises much litigation. Some of the more important questions which immediately arise will be stated. (1) Can parties agree to arbitrate "in conformity with the provisions of this act" (section 1) but expressly agree that the arbitrators shall decide all questions of law and fact without recourse to section 13? (2) Can the parties so agree to arbitrate but stipulate that neither of them will invoke section 13?⁹⁸ (3) What is a "question of law" as distinguished from a "question of fact" for the purposes of this act? Is the category of "question of law" for purposes of this section to be that category which is distinguished from the "question-of-fact" category which appears in pleading cases, in evidence cases, in misrepresentation cases, in reformation and rescission cases in equity, in appellate review cases? Is the construction or interpretation of a written document, the existence or non-existence of a trade practice or the significance of a trade term or symbol in a written document a "question of law" or a "question of fact" for the purposes of the statute? (4) Is the question what is the law of a certain state or country a "question of law" or a "question of fact" for the purpose at hand? When arbitrators award a purchase price to a seller on an extra-state shipment is it a "question of law" or a "question of fact" what, if any, interest shall be allowed to the seller? (5) Are questions of competency and creditability of witnesses and the admissibility and materiality of testimony in any particular "questions of law" for the purposes of this statute? (6) Will a court review the cause after the parties have presented all of their evidence before the arbitrators but before award is rendered and determine the weight of the evidence and the legal consequences thereof so that "such opinion when given shall bind the arbitrators in the making of their

⁹⁷ See Year Book on Commercial Arbitration, *op. cit.*, *supra*, note 14.

⁹⁸ It has been held by an English court that such agreement is invalid under the English law. Lord Justice Scrutton stated the matter as follows: "Without attempting precisely to define the limits within which an agreement not to take proceedings in the King's Courts is unenforceable, I think an agreement to shortcut the power of the King's Courts to guide the proceedings of inferior tribunals without legal training in matters of law before them is calculated to lead to erroneous administration of law and therefore injustice, and should therefore not be recognized by the courts." *Czarnikow & Co. Ltd. v. Roth, Schmidt & Co.* (1922), 28 Com. Ca. 29 (C. A.). Compare, *The "Cap Blanc"* [1913], P. 130; *Kirschner & Co. v. Gruban* [1909], 1 Ch. 413.

award?" (7) Is the section designed to pattern the function of the arbitrators after that of a jury or referee in a civil action?⁹⁹

(i) *Adjournments and Postponements of the Hearing.*

Section 6 of the Act provides that "the arbitrators" "may adjourn the hearing from time to time as may be necessary, and, on application of either party, and for good cause, may postpone the hearing to a time not extending beyond the date fixed for making the award." Section 16 makes it a cause to vacate an award "(c) When the arbitrators were guilty of misconduct, in refusing to postpone the hearing, upon sufficient cause shown, . . . or of any other misbehavior, by which the rights of any party have been prejudiced."

It is inferred that the arbitrators in common law arbitrations are empowered and required to postpone and adjourn hearings for sufficient cause.

(j) *Retrial Before an Umpire or Third Arbitrator—Notice.*

If originally appointed arbitrators fail to agree and pursuant to the submission agreement they choose a third arbitrator or an umpire does the cause stand for hearing *de novo* before the new board of arbitrators or before the umpire? The statute has no provision in point; and as heretofore noted the statute does not contain the term "umpire."

In *Bray v. Staples*¹⁰⁰ the submission was to M and S and provided

⁹⁹ For a criticism of a judicial technique which patterns an arbitration after a court and jury trial, see Isaacs, "Two Views of Commercial Arbitration," 40 Harvard Law Review, 929 (1927).

Concerning the provisions in the arbitration statutes which are patterned after the New York Law and the United States Arbitration Act for the reference to a court of question of law, see Sturges, *op. cit.*, *supra*, note 2.

The opinion is frequently expressed that the arbitrators should not be allowed to determine finally "the law" of the case.

It is submitted that the problem is less a matter of *what questions* shall or shall not be determined by the arbitrators and more a problem involving the following considerations: (1) Whether the parties shall be *allowed to agree* that the arbitrators shall decide *all* classes of questions affecting the case and still have the benefit of the statute; (2) whether, if *both* parties affirmatively agree therefor, they shall be allowed to have recourse to a court on *any* aspect of their controversy; (3) whether, if their agreement is silent on such recourse, it shall be denied unless *both* parties agree thereafter to have such resort to a court. Under the Uniform Statute *either* party can invoke such procedure on a "question of law," regardless of the wishes of the adverse party. The Massachusetts Act is suggestive in this connection. It provides as follows: "Any question of law may, and upon the request of *all parties* shall, be referred by the arbitrator or arbitrators to the court [and] upon application by *a party* at any time before the award becomes final under section nineteen, the superior court may in its discretion instruct the arbitrator or arbitrators upon a question of *substantive law*" (Section 20). (Italics are the writer's.)

¹⁰⁰ 149 N. C. 89, 62 S. E. 780 (1908).

that "in event the said M and S cannot agree . . . they are empowered to choose a third arbitrator, and the award of a majority of them shall be the amount to which the said Staples shall be entitled." M and S heard the case, failed to agree and chose a third arbitrator. There was no hearing before the new board and no opportunity therefor. M and S reported the evidence to the third in the presence of each other. S declined to concur in the award of M and the third arbitrator. It was held that the want of notice and opportunity to be heard before the new board was fatal to the award.

It may be noted that the third person was not designated as an "umpire" and the provision for majority award clearly contemplated that the *three* should act as the new board. Had the third person been designated an "umpire," and if the majority award provision had been omitted, it is inferred that the "umpire" would act and decide alone. In light of the instant case, however, it remains for future cases to determine whether an "umpire" as distinguished from a "third arbitrator" must hear the cause *de novo* after notice. It may be doubted if the Supreme Court will declare a distinction between an "umpire" and "third arbitrator" for the purpose of this issue.

(k) *Persons Competent to Practice Before an Arbitral Hearing.*

Section 9 of the statute contains another innovation in arbitration statutes. It provides as follows: "That no one other than a party to said arbitration, or a person regularly employed by such party for other purposes, or a practicing attorney-at-law, shall be permitted by the arbitrator or arbitrators to represent before him or them any party to the arbitration."

Perhaps the following remarks by Mr. O'Connell, Chairman of the Arbitration Committee, in the deliberations upon this section by the National Conference of Commissioners on Uniform State Laws sufficiently indicates the purpose of the section:

"Mr. Britton (Ind.): Mr. Chairman, I rise to raise the inquiry as to whether Section 9 would prevent a certified public accountant being called in for an expert opinion.

"Mr. O'Connell (Mass.): That matter was discussed at our meeting, and a public accountant there thought it would be quite desirable that they be given that permission and other members of the Chamber of Commerce said so, too. I would be inclined to regard a certified public accountant, as a witness. I refuse to elevate him to the dignity of a member of the bar unless I have to. They

are already doing a great bulk of law business that ought to belong to lawyers, and I am not one who is going to contribute to extending that field. That's my feeling in the matter. . . . It was our intention to exclude attorney in fact. In other words, the intention of the committee was to make a practice of this kind a practice for attorneys, unless the man himself wanted to try his own case or had somebody in his regular employment try it for him. In other words, we didn't want to have a school of arbitration develop outside where they were going to handle legal questions when they would not be competent to do so."¹⁰¹

RULES GOVERNING AWARDS

(a) *Time Within Which Award Must Be Rendered.*

The statute provides as follows: "That if the time within which the award shall be made is not fixed in the arbitration agreement, the award must be made within sixty days from the time of the appointment of the arbitrators, and an award made after the lapse of sixty days shall have no legal effect unless the parties extend the time in which said award may be made, which extension or ratification shall be in writing." (Section 8).¹⁰²

It would seem that if an arbitration agreement should expire by its own time limit that it would not be enforceable or irrevocable after that date. It would seem equally clear, however, that if the parties continued to participate in a hearing after that date until an award was rendered that the award should be conclusive and enforceable under the act. Section 16, however, seems to indicate a different conclusion unless the "extension or ratification" is "in

¹⁰¹ Handbook, Nat'l Conference of Comrs. on Uniform State Laws, pp. 75, 76 (1924).

In the case of *Matter of Kayser*, decided by the Supreme Court of New York (N. Y. L. Journ., January 14, 1925), Mr. Justice Wagner remarked upon the appearance of lawyers before arbitral boards as follows: "My view is that whether counsel may be heard or participate in the arbitration proceedings rests entirely in the sound discretion of the arbitrators. The very purpose of arbitration is to obtain inexpensive, expeditious and final determination of disputes on the merits, free from technical rules and legal formalities. . . . The presence of counsel fortified with 'that wilderness of single instance' and with legal maxim and some legal anachronisms would tend rather to confusion and protraction than prompt decision. Besides, if one side employs counsel, a burden is cast on the other to do likewise, with resulting added expense. To permit participation by counsel as a matter of right would be fatal to the efficiency of arbitration."

¹⁰² There are obvious difficulties with this section. For example, in the common case, where each party appoints one arbitrator with authority in the two to choose a third arbitrator or umpire forthwith, or, "if they cannot agree," clearly there will be a variety of situations wherein the question will arise as to the time of "the appointment of the arbitrators" for the purposes of this section.

writing." Moreover, under section 20, which prescribes what papers must be filed with a motion to the court to confirm, vacate, modify or correct an award, "each written extension of time, if any within which to make the award," is included. Why a writing is considered so important in such a case does not readily appear.

(b) *When Is An Award Rendered—Notice—Delivery.*

The time when a given award is made or rendered assumes importance under the statute and in common law arbitrations. Section 8 of the act, quoted under the previous topic heading, prescribes that the award "must be made" within sixty days from the appointment of the arbitrators unless the arbitration agreement provides a different time. Under common law rules the submission agreement is revocable in both senses of that term until an award is rendered, but not afterwards.

There are no common law decisions in North Carolina which determine whether publication or communication of a decision to the parties is necessary to an award-rendered. If the award in the particular case does not require special formalities, as, for example, in case of an award in a dispute over title to land, which must be in writing to be conclusive or enforceable, it would seem plausible to hold, at least for the purposes of the foregoing questions of revocability, that the arbitrators have *made* their award when they have agreed, even informally, upon their decision although it has not been communicated to the parties.¹⁰³ It has been decided in a common law case that delivery of a documentary award to the parties is not "essential to its efficacy" at least where the submission agreement does not require it.¹⁰⁴

It should be noted, however, that section 14 of the statute prescribes that the award of the arbitrators "shall be drawn up in writing and signed by the arbitrators . . ." and that "the arbitrators shall deliver a true copy thereof to each of the parties thereto, without delay." It may be argued from this provision that an award cannot be *made* for the purpose of section 8 until at least the requisite writing and signing are had—that it cannot be held that an award is *made* when the arbitrators reach a decision. In reply it may be urged that the requirement that "the award . . . shall be drawn up in writing and signed" clearly presumes something by "the award," and

¹⁰³ Consult *Zell and Sons v. Johnston*, 76 N. C. 302 (1877).

¹⁰⁴ *Crawford v. Orr*, 84 N. C. 246 (1881).

also that there seems to be nothing in the statute to indicate that the decision of the arbitrators shall have *no* effect as an award before it is "drawn up and signed." As concerns *delivery*: the arbitrators are required to deliver copies "without delay." It seems scarcely plausible to argue that the decision of the arbitrators is to have no effect as an award until such delivery of copies.

On the other hand, for purposes of proceedings to enforce or to vacate or to modify or correct an award under the statute, the prescribed writing, signing and delivery may well be prerequisites. Likewise in common law cases it would seem fair, generally at least, to condition a party's responsibility on an award upon a communication of its terms from the arbitrators. In case of a common law award in a controversy over title to land, clearly a writing is a prerequisite to its enforceability and conclusiveness.

(c) *Requisite That the Award Follow the Submission.*

Section 16 of the statute provides that it is a cause to vacate an award "(d) Where the arbitrators exceeded their powers." It is made a cause to modify or correct an award in Section 12 "(b) Where the arbitrators have awarded upon a matter not submitted to them."

It is not entirely clear what distinctions are intended by these two sections. Possibly it is to be understood that it is cause only to modify or correct an award where the arbitrators have awarded upon a matter which was not submitted to them but which can be readily separated from the matters which were submitted and which can be expurgated from the award without affecting it as a decision on the merits of the matters in issue which were submitted. Such construction would make the provisions consistent with common law decisions in such cases.¹⁰⁵

In the common law cases it is clear that the documentary award need not recite the ancient formula *de et super praemises* or that it is rendered in compliance with the submission. It is not necessary that it describe the controversy in the precise terms in which it is set forth in the submission agreement; it is sufficient if there is identity of controversy. The supreme court has outlined pertinent general regulations in the case of *Crawford v. Orr*¹⁰⁶ as follows: "The law

¹⁰⁵ See *Stevens v. Brown*, 82 N. C. 460 (1800); *Knight v. Holden*, 104 N. C. 107, 10 S. E. 90 (1889); *Robertson v. Marshall*, 155 N. C. 167, 71 S. E. 67 (1911); *Geiger v. Caldwell*, 184 N. C. 387, 114 S. E. 497 (1922).

¹⁰⁶ *Supra*, note 104; *Thompson v. Childs*, 29 N. C. 435 (1847); *Zell v. Johnston*, 76 N. C. 302; *Knight v. Holden*, 104 N. C. 107, 10 S. E. 90 (1889).

does not require that the award shall in direct terms declare a compliance with the conditions essential to its validity. This will be assumed when the contrary does not appear, and any material departure from the terms of the submission must be shown by him who alleges it and seeks to be relieved from its operation. . . . Indeed, the award should, so far as practicable and without needless recitals, be a simple and succinct response to the inquiry involved in the reference in analogy to a jury verdict, and this is all that is needful to its validity."

Although it is presumed that the documentary award follows the submission unless the contrary clearly appears when the two documents (if there are documents) are compared it is clearly settled in the common law cases that the award is neither conclusive nor enforceable if it is shown that the arbitrators decided too many¹⁰⁷ or too few¹⁰⁸ matters of controversy under the given submission. However, as heretofore noted, if the unauthorized excess can be readily separated from the authorized parts of the award it will be sustained *pro tanto*. On the other hand, if the award embraces only a part of the matter or matters submitted it is not clear that the partial award will be sustained.

Under section 14 of the statute the arbitrators are expressly authorized "in their discretion," to make "a partial award which shall be enforceable in the same manner as the final award." Since this partial award is distinguished from "the final award," it is inferred that the provision is not designed to authorize arbitrators to pick and choose what matters they will decide out of all of the matters submitted, but rather, to authorize the arbitrators, in their discretion, to return an award upon an "independent issue" without waiting for an ultimate decision of all matters in a single award. Presumably the question will always be open to court review in each case whether a given "partial award" does involve an "independent issue." Presumably "the final award" is the last "partial award" in such cases.

While it is true that the arbitrators must award upon no more and no less than is submitted to them it must be noted that the question is not one of merely construing the two documents. While the presumption of validity may be rebutted by showing that the award does not follow the submission when the two documents are compared the award may be sustained by evidence as to what matters

¹⁰⁷ *Cullifer v. Gilliam*, 31 N. C. 126. See also cases cited, *supra*, note 106.

¹⁰⁸ See *Patton v. Garrett*, 116 N. C. 847, 21 S. E. 679 (1895).

were in fact laid before the arbitrators at the hearing. The arbitrators are competent to testify at least to the point that more matters were in fact prosecuted before them than are set forth in the submission agreement in order to support the more comprehensive award.¹⁰⁹ Similar evidence to the effect that some matters enumerated in the submission were not laid before them by concurrence of both parties would seem equally competent to support a restricted award, but no cases in point have been discovered. This rule (or these rules) rest upon the thought that the award should be sustained if it decides the issues which were in fact laid before the arbitrators, rather than be defeated merely for want of harmony as a document with the submission document.

Since the topic under consideration is thought of in terms of jurisdiction of the arbitrators apparently the question can be raised at any time in the common law cases, to test the conclusiveness or enforceability of an award. No case has been found, however, where the issue has been raised after an action has been brought on the award and judgment recovered therein. The parallel question arises under the statute whether an award can be challenged because it does not follow the submission after the court has entered an order confirming the award and a judgment or decree has been entered in conformity therewith pursuant to section 19.¹¹⁰

(d) *Form, Execution and Disposition of the Award.*

Section 14 of the statute prescribes that "the award . . . shall be drawn up in writing and signed by the arbitrators or a majority of them . . . (and) . . . upon the making of an award, the arbitrators shall deliver a true copy thereof to each of the parties thereto, or their attorneys, without delay." This section and pertinent common law cases have already been discussed both as to matters of form and of delivery in another connection. (See (b) *When Is An Award Rendered—Notice—Delivery*).

Awards in General—Formal Requisites.

It is believed to be a safe generalization of the common law cases that in cases where claims for money and personal property are submitted to arbitration that an award will be conclusive and enforceable

¹⁰⁹ *Brown v. Brown*, 49 N. C. 123 (1856); *Walker v. Walker*, 60 N. C. 259; *Osborne v. Colwert*, 86 N. C. 170 (1882). Compare *Scott v. Green*, 89 N. C. 278 (1883); *Millinery Co. v. Insurance Co.*, 160 N. C. 130, 75 S. E. 944 (1912).

¹¹⁰ See *Bryant v. Fisher*, 85 N. C. 69 (1881); compare *Anders v. Anders*, 31 N. C. 214 (1848). See also *Walker v. Walker*, 60 N. C. 259 (1864).

without a writing unless the submission agreement requires it. It is not necessary that the award expressly require the losing party to pay or to otherwise perform. It is necessary, however, that his indebtedness or duty be decided and reported as distinguished from being a report of a mere calculation.¹¹¹

Awards In Disputes Involving Land—Formal Requisites.

In view of the settled rule that the submission of a controversy involving title to land must be in writing, and perhaps under seal, it seems clear that an award in such case must likewise be in writing, if not also under seal, to be conclusive or enforceable. The writing is deemed to be required by the Statute of Frauds.¹¹²

While the Statute of Frauds regulates the submission and award in such cases the extent of its application remains to be tested in the cases where testimonial evidence is offered to show what matters were in fact laid before the arbitrators in order to sustain an award which as a document is more or less comprehensive than the terms of the submission paper. If the matters of excess or deficiency do not themselves involve a matter of controversy over a title to land, it would seem plausible to argue that the evidence would be admissible. But if a title to land is involved in such matters, it remains for the supreme court to choose between applying the Statute of Frauds and admitting the evidence to sustain the award as in other cases.

While it may be doubtful whether a seal is necessary to an award rendered in a common law arbitration involving a controversy over a title to land it seems plausible to argue that section 14 of the statute resolves that uncertainty in case of statutory awards since it requires no more than a writing. On the other hand it may be argued, of course, that section 14 purports to do no more than to enumerate the minimum requirements for all statutory awards and that it does not imply that no further formalities shall be imposed in special cases.

(e) *Requisite That an Award Itemize or Particularize the Matters Decided.*

The statute prescribes that "the award shall definitely deal with all matters of difference in the submission requiring settlement."

¹¹¹ *Barretts v. Patterson*, 1 N. C. 126 (1799); and see *McKOneal v. Butler*, 14 N. C. 94 (1831); *Carter v. Samus*, 20 N. C. 182 (1838); *Cheek v. Davidson*, 36 N. C. 68 (1840).

¹¹² See *Pearnall v. Mayers*, 60 N. C. 549 (1870); and cases cited, *supra*, notes 49-52.

(Section 14). It may be doubted if this provision does more than require the general common law requisite of certainty and the general requisite that the award shall follow the submission as a matter of documents. It does not expressly require *each* matter of difference to be listed.

In the common law cases the supreme court has taken pains to reiterate its approval of lump-sum awards and awards which concisely embrace the whole controversy. In the absence of a stipulation therefor in the submission it is settled that an award need not itemize the matters of dispute and allocate to them corresponding portions of the award. It is likewise settled that it is not necessary that an award shall contain assignments of reasons for itself in whole or in part. The following statement of the supreme court in *Patton v. Baird* recurs in the opinions: "Arbitrators are no more bound to go into particulars, and assign reasons for their award, than a jury is for its verdict. Their duty is best discharged by a simple announcement of the result of their investigations."¹¹³

(f) *The Requisite of Certainty—Finality—Completeness.*

An award under the statute must "definitely deal with all matters submitted" (section 14), and it is made a cause to vacate an award that the arbitrators have "so imperfectly" executed their powers "that a mutual final, and definite award upon the subject matter submitted was not made."

From the common law cases it is clear that want of certainty, finality or completeness of an award defeats its conclusiveness and enforceability. If it is unintelligible, if it is not certain to "common intent" so that it is a decision of and end to the matter in controversy it will be disregarded.¹¹⁴

In challenging an award for uncertainty, the supreme court has declared that the uncertainty "must expressly appear on the face of the award, or by averment."¹¹⁵

The documentary award may be rendered certain by construing it in the light of the submission, or by matters pleaded in an action to enforce it, or by reference to plans and documents to which it

¹¹³ 42 N. C. 255 (1851); *Blossom v. Van Amringe*, 63 N. C. 65 (1868); *Lusk, Assignee, v. Clayton*, 70 N. C. 184 (1874); *Osborne v. Colvert*, 83 N. C. 365 (1880); *Ezzell v. Lumber Co.*, 130 N. C. 205, 41 S. E. 99 (1902); *Mangum v. Mangum*, 151 N. C. 270, 65 S. E. 1004 (1909).

¹¹⁴ *Millinery Co. v. Insurance Co.*, 160 N. C. 130, 75 S. E. 944 (1912); *Ball v. McCormack*, 172 N. C. 677, 90 S. E. 916 (1916).

¹¹⁵ *Carter v. Samus*, 20 N. C. 182 (1838)—reference of a pending action.

refers, or by testimony of the arbitrators concerning the matters which were laid before them. That the submission document is under seal does not exclude such evidence.¹¹⁶

The award may fail, however, if it *purports to be uncertain*, or, if it expressly leaves certain matters to further determination. It is then not "complete" and "final." Apparently such defect cannot be cured. Thus where parties submitted disputed accounts between the parties growing out of their business as cattle dealers, the following clause in the award was held fatal to the conclusiveness of the award: "All outstanding debts for cattle, *if any such*, are joint."¹¹⁷

Again, although the award is certain and final as a document, testimony is admissible to show that reservations were made by the arbitrators when they published the document to the parties. Thus testimony of an arbitrator is admissible to show that he consented to the award only on the condition that the law of the case was determined to be as he assumed; that if the law were otherwise he would not agree to the award as written. At least since the court declared that the law was different from what the arbitrator supposed the award was held invalid.¹¹⁸ It may be doubted if the results would have been different if the law had been otherwise.

(g) *Effect of an Award on Title to Land or Chattels.*

The statute has no express provision in point. From earliest common law cases the supreme court has shown reluctance to declare that an award rendered under a submission of a controversy over title to land operates as a "conveyance" of the title to the land.¹¹⁹ It is not clear, however, that any case has necessitated a decision of that question for no award has been discovered which has purported by its terms to presently transfer a title to the land in controversy. In some cases, however, the form of the award in this respect does not appear. The question would not seem to be involved where the award *orders a conveyance to be made*. Moreover, it is not clear that an award which purports to be a present conveyance will not be *construed* as an order to convey.¹²⁰ The question may arise also

¹¹⁶ *Bryant v. Milner*; Cameron and Norwood's Reports, 313 (1801); *Barretts v. Patterson*, 1 N. C. 126 (1799); *Moore v. Gherkin*, 44 N. C. 73 (1853); *Crawford v. Orr*, 84 N. C. 246 (1881); and see cases cited *supra*, notes 53-56.

¹¹⁷ *Patton v. Baird*, 42 N. C. 255 (1851).

¹¹⁸ *Herndon v. Insurance Co.*, 110 N. C. 279, 14 S. E. 742 (1892).

¹¹⁹ *Crissman v. Crissman*, 27 N. C. 498 (1845); *Gaylord v. Gaylord*, 48 N. C. 367 (1856); *Thompson v. Deans*, 59 N. C. 22 (1860).

¹²⁰ See *Thompson v. Deans*, *supra*, note 119.

when an issue is made as to the necessity of a seal on an award in such cases. If it were held to be a *conveyance* it is inferred that a seal would be necessary to its conclusiveness and enforceability as a common law award.

The preponderance of theory expressed by the court is that an award in such cases is analogous to an executory contract to convey; it will be specifically enforced.¹²¹ If it is in writing, but only if it is, it is conclusive of the rights of the parties so that it can be pleaded to defeat an action of ejectment which is brought in disregard of the award.¹²² Whether it will support an action of ejectment, however,—even if it is under seal—has not been determined.

In case of boundary line disputes the court has repeated a doctrine which is to the effect that the award is to be regarded as merely the ascertainment of a fact, the location of the line.¹²³ This theory is reiterated although the court has been observed to remark that “the authority to declare and establish the [boundary] line in dispute necessarily implied the right to so fix the line that *one of the parties would get less land than he claimed*”¹²⁴ (Italics are the writer’s). Clearly, however, the submission and award must be in writing in such cases to be conclusive or enforceable.

In cases of disputed ownership of personal property it is inferred that the supreme court considers that an award can and does determine title to chattels when and if it purports to do so.¹²⁵ Likewise that it can and does, if it purports to do so, effect the assignment of a chose in action.¹²⁶

(h) *Awards Requiring Future Action by the Parties.*

The cases are few where the award does not contemplate future action by at least one of the parties. Even in an award on a money claim the future payment of the award is contemplated. But is an award to be sustained which requires other future conduct than the payment of money? The question suggests the possibility of an award for such conduct as may require the processes of a court of equity to enforce it.

¹²¹ *Thompson v. Deans*, 59 N. C. 22 (1860).

¹²² See cases cited, *supra*, note 119.

¹²³ *Gaylord v. Gaylord*, 48 N. C. 367 (1856). Compare *Crawford v. Orr*, 84 N. C. 246 (1881); *Mayberry v. Mayberry*, 121 N. C. 248, 28 S. E. 349 (1897).

¹²⁴ *Pearson v. Barringer*, 109 N. C. 398, 13 S. E. 942 (1891)—reference of a pending action.

¹²⁵ See *Torrence v. Graham*, 18 N. C. 284 (1835).

¹²⁶ See *Scott v. Green*, 89 N. C. 278 (1883).

Section 19 of the statute provides that upon the granting of an order confirming, vacating, modifying or correcting an award that "judgment or decree shall be entered in conformity" with the order. It seems clear therefore that a statutory award will be confirmed under the statute although it requires performance other than the payment of money, and that a "decree" may be procured if necessary to enforce its terms.

In a common law case specific performance was ordered in an equitable action to enforce the award as follows: The award directed the defendant to return to the plaintiff two certain notes which the defendant had hypothecated with a bank as collateral security for a loan. The court remarked as follows: "Undoubtedly it is one of the requisites of a valid award that its performance be possible, but . . . this principle is only held to exclude awards impossible of performance in the nature of things, as 'a direction to execute a conveyance on or before a day that has already passed,' or 'to do or obtain something which the party had no legal right to procure or enjoin,' as to 'give some third person as surety' on whom the party had no claim . . . but in this case, as shown, the notes, with other collateral, were only hypothecated to the bank to secure an indebtedness of \$500. The defendant, . . . had the legal right to redeem the notes, and the award, in this instance, is no more impossible than an order to pay a sum of money or do any other lawful act within the power of the defendant."¹²⁷

Since the arbitrators are *functi officio* after the award is rendered it seems clear that awards of future conduct should not be predicated upon the satisfaction or further review of the arbitrators as such. Likewise it seems clear that such awards must satisfy the general requirements of certainty, finality and completeness concerning what performance is required.

(i) *Alternative Awards.*

The statute does not mention alternative awards. It is not readily gathered from the statute whether an arbitration agreement authorizing such an award would be "in conformity with the provisions of [the] act" as provided in section 1.

The following award, however, was sustained against an attack

¹²⁷ *Robertson v. Marshall*, 155 N. C. 167, 71 S. E. 67 (1911). See also *Thompson v. Deans*, 59 N. C. 22 (1860), cited, *supra*, note 121; *Bryant v. Fisher*, 85 N. C. 69 (1881). Compare *Cutter v. Cutter*, 169 N. C. 482, 86 S. E. 301 (1915).

that it was uncertain and lacked finality in the common law case of *Bryant v. Milner*.¹²⁸ "We . . . having been chosen to arbitrate a certain matter of controversy between James Milner, of the one part, and James Bryant, of the other part, do award, that the said Milner shall pay unto the said Bryant fifty dollars, or secure the same to be paid, on or before Christmas next, by giving his bond with security."

(j) *Default Awards*. Consult Proceedings in Absence of a Party—*Ex Parte* Proceedings, *supra*.

(k) *Partial Awards*.

The question of partial awards has already been discussed in connection with the general requisite that an award must follow the submission. As then noted section 14 of the act authorizes the arbitrators, "in their discretion," to "first make a partial award which shall be enforceable in the same manner as the final award." The Uniform Act and the Illinois arbitration act are the only American statutes which authorize such awards. It seems clear that this provision will become involved with the general requisite that an award must follow the submission and the provision of section 16 which provides that it shall be cause to vacate an award where the arbitrators have "so imperfectly executed them [their powers] that a mutual, final, and definite award upon the subject matter submitted was not made."

(l) *Majority Award*.

Section 14 expressly contemplates an award by a majority of the arbitrators. It is not clear, however, that a majority award is authorized by the section unless the parties provided therefor. The section reads as follows: "That the award of the arbitrators, or a majority of them, shall be drawn up in writing and signed by the arbitrators or a majority of them" and "the arbitrators may, in their discretion first make a partial award which shall be enforceable in the same manner as the final award. . . ." Does it authorize a majority award without regard to the agreement of the parties or is it predicated upon an agreement of the parties which authorizes a majority award? If the parties provide for a unanimous award in

¹²⁸ Cameron and Norwood's Reports 313 (1801). With *Waugh v. Mitchell*, 21 N. C. 510 (1837); compare section 13 of the new statute, discussed *supra* under topic heading—*Proceeding at the Arbitral Hearing*—Disposition of Questions of Law.

the arbitration agreement can they bring it within the act? Will a majority award be valid under such a submission agreement? In view of the common law rule it would seem that the statute should have been more specific and explicit on these points.

In the common law cases it is settled that the award must be unanimous unless the parties authorize an award by a lesser number of the arbitrators, and in such case the number so authorized must join.¹²⁹ However, if a third arbitrator is authorized to serve with two others, but only when and as the two disagree, such third arbitrator is not a necessary party to the award,—at least it was so held in a case where the two had had no disagreements.¹³⁰

That more of the quorum than is necessary participate in making the decision and in executing the documentary award is held to be immaterial. Thus, where a reference was to six named arbitrators with a majority award authorized, it was held that the award was valid although more than a majority participated in making it.¹³¹

(m) *Awards of an Umpire.*

As already pointed out the statute does not mention an umpire.

In the common law cases it is apparently settled that an umpire has power to render the award alone where he is appointed as an umpire of the whole controversy when and after originally appointed arbitrators have failed to agree upon an award.¹³² In such cases, however, as in the other cases noted in the preceding section, it is no objection to his award that the original arbitrators participate with him at the hearing and in making the decision and join with him in executing the paper award.

PROCEDURE TO ENFORCE AWARDS—AWARDS EFFECTIVE AS
JUDGMENTS—METHODS OF EXECUTION

Provisions of the Statute.

The statute provides a summary method for the enforcement of a statutory award which probably is in lieu of the common law method of bringing an action in court to enforce the award. The following procedure is prescribed: (1) Motion to the court "for an order confirming the award" upon five days written notice served upon the adverse party, or his attorney. This procedure may be initiated at

¹²⁹ *Oakley v. Anderson*, 93 N. C. 108 (1885).

¹³⁰ *Geiger v. Caldwell*, 184 N. C. 387, 114 S. E. 497 (1922).

¹³¹ *Carter v. Samus*, 20 N. C. 182.

¹³² See *Stevens v. Brown*, 82 N. C. 460 (1880).

“any time within three months after the award is made, unless the parties shall extend the time in writing.” (2) If the order is granted “judgment or decree shall be entered in conformity therewith.” (3) Upon filing the above motion, the moving party shall file with the clerk of the court the following papers: “(a) The written contract or a verified copy thereof containing the agreement for the submission; the selection or appointment of the arbitrator or arbitrators, and each written extension of the time, if any within which to make the award. (b) The award. (c) Every notice, affidavit and other paper used upon an application to confirm, modify or vacate the award, and each order made upon such an application.” (Sections 13, 19 and 20.)

Award Effective as a Judgment

When the foregoing judgment or decree is entered it “shall be entered (or docketed) as if it were rendered in an action,” and where so entered (or docketed) “shall have the same force and effect . . . as if it had been rendered in the court in which it is entered.” (Section 21.)

Methods of Execution.

When the judgment or decree is entered, as provided in Section 21, such judgment or decree “shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to a judgment or decree; and it may be enforced, as if it had been rendered in the court in which it is entered.” (Section 21.)

Two matters of special importance seem to be made sufficiently clear by this section as follows: (1) That a “decree” shall be entered in conformity with an order confirming an award although it may require such conduct as would not be compelled by a court of equity under general equity practice; for example, an award that one party deliver to the other certain designated but non-unique chattels. (2) That executions which are allowed on a judgment or decree which is rendered in a civil action are available for the enforcement of a judgment or decree which is entered under the statute.

An award rendered in a common law arbitration, other than in a reference of a pending action under a rule of court, cannot be entered
Cases at Common Law.

directly as a judgment of a court.¹³³ The successful party must bring an action in court to enforce the award. Apparently this is his only remedy unless an arbitration bond was given to abide and perform the award.¹³⁴ When such a bond has been given the plaintiff's recovery is limited to his actual damages—at least where plaintiff's damages are shown to be less than the penal sum.¹³⁵

When the successful party sues to recover on an award, apparently the submission agreement as well as the award and the defendant's default is a necessary part of his cause of action for purposes of pleading and proof of a cause of action. In the case of *Ball v. McCormack* the court summarized the matter as follows: "The averment and proof of the making of an agreement of submission and its contents constitute necessarily the first step towards enforcing the award. The validity of the award is primarily and essentially dependent upon the agreement of the parties. Ordinarily this will be easily proved by a production of the paper, if it was written; but if no submission be produced, and there be no evidence of it, the mere fact of the existence of an instrument purporting to be an award, though ancient, will not be allowed to have any effect."¹³⁶

The case of *Sprinkle v. Sprinkle*¹³⁷ should also be noted in this connection. It involved the application of the Statute of Limitations to an action brought to recover on the following money award: "That J. H. Sprinkle shall pay to T. Sprinkle. (Sums of money therein stated.)

"This 28 January, 1898.

P. T. Lehman

W. S. Martin

J. F. Griffith (seal)."

¹³³ *Metcalf v. Guthrie*, 94 N. C. 447 (1886); *Derule v. Scott*, 53 N. C. 73 (1860); *Hoover v. Neighbors*, 64 N. C. 429 (1870); *Lusk, Assignee v. Clayton*, 70 N. C. 184 (1874); *Robbins v. Killebrew*, 95 N. C. 19 (1886); *Peele v. No. & So. Carolina Ry. Co.*, 159 N. C. 60, 74 S. E. 592 (1912).

¹³⁴ See, however, *Thompson v. Childs*, 29 N. C. 435 (1847); *Patton v. Garrett*, 116 N. C. 847, 21 S. E. 679 (1895); *Simpson v. M'Bee*, 19 N. C. 229 (1837).

¹³⁵ *Henderson v. Canler*, 65 N. C. 542 (1871). Compare *Barretts v. Patterson*, 1 N. C. 126. Compare cases cited, *supra*, note 70. Consult *Pass v. Critcher*, 112 N. C. 405, 17 S. E. 9 (1893), concerning the extent of the financial responsibility of surety on a bond to abide an award.

¹³⁶ 172 N. C. 677, 90 S. E. 916 (1916); *Millinery Co. v. Insurance Co.*, 160 N. C. 130, 75 S. E. 944 (1912). Consult *Clanton v. Price, Adm.*, 90 N. C. 96 (1884). And consult cases cited, *infra*, note 139.

¹³⁷ 159 N. C. 1, 74 S. E. 454 (1912).

A partial payment was made on the award March 10, 1903.

The summons was issued January 20, 1911. There was no evidence of the submission; whether it was pleaded does not appear. Defendant pleaded a three and ten years statute applicable to "an action upon a contract, obligation, or liability arising out of a contract, express or implied." The three year term applied to a simple "contract." The ten year limitation applied to a sealed "contract." It was held that the three year statute applied and barred the plaintiff's action. The court said:

"If he (plaintiff) relied on the fact that the *submission* to arbitration was under seal, or that the arbitrators, Lehman and Martin, adopted the seal, following the name of the arbitrator Griffith, it was incumbent on him to offer evidence of these facts, and having failed to do so, we must consider the case as upon a submission and an award, not under seal, and in so considering it, the nature of the obligation imposed on the defendant will aid in determining whether the statute of limitations of three years or of ten years applies. . . . We conclude, therefore, that the cause of action by the plaintiff is one arising out of a contract, not under seal, and as more than three years elapsed after the date of the alleged payment, before the commencement of this action, that the right of recovery is barred." (Italics are the writer's.)

It is inferred that the plaintiff lost under the three year statute because he did not base his cause of action on a *submission* under seal. Some doubts are left by the opinion, however, as follows: (1) If the *award* had been under seal, would the three year statute have applied although the *submission* were not under seal? (2) When does the cause of action arise: on the date of the award, or at a date fixed therein for performance, or does it arise at some prior time? As respects the last question, however, it would seem quite clear that it would be held that an action for non-performance of an award does not arise prior to the date of the award or the date stated therein for performance, and that a statute of limitations would not begin to run prior to that date.

Where an award requires such conduct of a party as courts of equity are in the habit of compelling specific performance the successful party can appeal to a court of equity for such relief.¹³⁸

In asserting an award as a bar to an action brought upon a cause which has been arbitrated, apparently the same general rules apply

¹³⁸ See *Thompson v. Deans*, 59 N. C. 22 (1860); *Crawford v. Orr*, 84 N. C. 246 (1881); *Metcalf v. Guthrie*, 94 N. C. 447 (1886).

with respect to pleading and proof of the submission and award by the defendant as apply to a plaintiff who seeks to recover on an award.¹³⁹ Non-performance of the award by the *plaintiff* in such case, however, would not seem to be a necessary part of the defendant's defense. Moreover the supreme court has intimated that the defendant's default on the award is not material.¹⁴⁰

PROCEDURE AND CAUSES TO VACATE, MODIFY OR CORRECT AN AWARD,
DISPOSITION OF CASE: IF APPLICATION GRANTED—IF
APPLICATION DENIED

Provisions of the Statute.

The statute provides a summary procedure for vacating and for modifying or correcting an award which is governed by the statute, as follows: (1) Motion to the court to vacate, modify or correct the award, on notice to the adverse party, or his attorney, "which shall be served . . . within three months after an award is filed or delivered, as prescribed by law for service of notice of a motion in an action." An order of stay of any proceedings to enforce the award may also be had at such time. (2) The moving party shall file with the clerk of court the same papers as are required of a party who proceeds to have an award confirmed, "unless the same have theretofore been filed."

If an order is granted that the award be vacated or modified or corrected "judgment or decree shall be entered in conformity therewith," which, when so entered (or docketed), "shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to a judgment or decree; and it may be enforced, as if it had been rendered in the court in which it is entered." However, "when an award is vacated, and the time, within which the agreement required the award to be made, has not expired, the court may, in its discretion, direct a rehearing by the arbitrators." Where the award is to be modified or corrected the order of the court "must modify and correct the award, so as to effect the intent thereof." (Sections 16, 17, 18, 19 and 20.)

Causes to vacate an award which is governed by the statute are set forth in Section 16, as follows:

¹³⁹ *Ball v. McCormack*, 172 N. C. 677, 90 S. E. 916 (1916); and see *Torrence Exrs. v. Graham*, 18 N. C. 284 (1835); *Power Co. v. Navigation Co.*, 159 N. C. 393, 75 S. E. 29 (1912).

¹⁴⁰ See *Moore v. Austin*, 85 N. C. 179 (1881); *Cheatham v. Rowland*, 105 N. C. 218, 10 S. E. 986 (1890).

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

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

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

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

Causes to modify and correct an award which is governed by the statute are set forth in Section 17, as follows:

“(a) Where there was an evident miscalculation of figures, or an evident mistake in the description of any person, thing or property, referred to in the award.

“(b) Where the arbitrators have awarded upon a matter not submitted to them.

“(c) Where the award is imperfect in a matter of form, not affecting the merits of the controversy.”

Cases at Common Law.

Few cases have dealt with a direct attack upon an award by a bill in equity to have it vacated. In most of the common law cases the conclusiveness of the award has been challenged by the defendant in an action brought to enforce it, or its conclusiveness has been put in issue by a plaintiff who has attempted to bring an action to recover on the original cause in disregard of the award.

An equitable action to vacate an award will not lie where the matters in contest can be asserted as a legal defense to an action to enforce the award. Matters going to the jurisdiction of the arbitrators, such as a denial of an opportunity to be heard, failure or refusal to decide all matters submitted, or a decision of matters which were not submitted, the revocation of the submission before award rendered, an insufficient quorum, an award rendered by an insufficient number of arbitrators, award uncertain, and like causes are valid legal defenses and apparently cannot be made the basis of an equitable action to vacate the award.¹⁴¹ Matters of “fraud,”

¹⁴¹ See *Gardner v. Marsters*, 56 N. C. 462 (1857); *Eaton v. Eaton*, 33 N. C. 490 (1850); see 43 N. C. 102 (1851); *Jones v. Frazier*, 8 N. C. 379 (1821).

“undue means,” and “partiality” or “corruption” of the arbitrators are sufficient cause for affirmative action to vacate an award.¹⁴²

APPELLATE REVIEW

Section 22 of the statute provides that “an appeal may be taken from the final judgment or decree entered by the court.”

Some uncertainty obviously attaches to the term “final judgment.” For example, it may be doubted if an appeal will lie where a judgment or decree is entered on an order vacating an award and the court in its discretion directs a re-hearing by the arbitrators, as it is authorized to do under section 16.¹⁴³

EXPENSES, FEE AND COSTS

The statute has no provision in point except that “fees for such attendance [by witnesses at the arbitral hearing] shall be the same as the fees of witnesses in the Superior Court.” (Section 10.)

The rule is settled in common law cases that the costs are to be borne equally by the parties unless the award provides otherwise.¹⁴⁴ Whether the arbitrators have power, without express authorization by the parties, to award the entire expenses of an arbitration, including their own fees, to one party seems doubtful.¹⁴⁵

¹⁴² See *Devereaux v. Burgwin*, 33 N. C. 490 (1850); *Eaton v. Eaton*, 43 N. C. 102 (1851). Concerning the plaintiff's burden of proof in such cases, see *Perry v. Insurance Co.*, 137 N. C. 402, 49 S. E. 889 (1905); and see *Hemphill v. Guither*, 180 N. C. 604, 105 S. E. 183 (1920).

For generalizations in the common law cases concerning the conclusiveness of awards with respect to unethical conduct and mistake on the part of arbitrators, see: *Williams & Bro. v. Branning Mfg. Co.*, 153 N. C. 7, 68 S. E. 902 (1910); *Mayberry v. Mayberry*, 121 N. C. 248, 28 S. E. 349 (1897); *Lumber Co. v. Briggs-Shaffner Co.*, 186 N. C. 347, 119 S. E. 484 (1923); *Eaton v. Eaton*, 43 N. C. 102 (1851); *Perry v. Insurance Co.*, 137 N. C. 402, 49 S. E. 889 (1905); *Ezzell v. Lumber Co.*, 130 N. C. 205, 41 S. E. 99 (1902); *Leach v. Harris*, 69 N. C. 532 (1873); *Ryan v. Blount et al Exrs.*, 16 N. C. 382 (1820); *Pierce v. Perkins*, 17 N. C. 250 (1832); *Crissman v. Crissman*, 27 N. C. 498 (1845); *Gardner v. Marsters*, 56 N. C. 462 (1857); *Walker v. Walker*, 60 N. C. 259 (1860); *King v. The Falls of the Neuse Mfg. Co.*, 79 N. C. 360 (1878); *Patton v. Garrett*, 116 N. C. 847, 21 S. E. 679 (1895).

It is not clear whether arbitrators are competent witnesses to impeach their award in such cases. See *Jones v. Frazier*, 8 N. C. 379 (1821). The statement recurs in the opinions that the mistake must appear on the face of the award. *Ryan v. Blount et al Exrs.*, 16 N. C. 382 (1820); *Wyatt v. The Lynchburg etc. Ry. Co.*, 110 N. C. 245, 14 S. E. 683 (1892); *Patton v. Garrett*, 116 N. C. 847, 21 S. E. 679 (1895). Compare *Herndon v. Insurance Co.*, *supra*, note 118.

¹⁴³ See *Warren v. Stancill*, 117 N. C. 112, 23 S. E. 216 (1895).

¹⁴⁴ *Derule v. Scott*, 53 N. C. 73 (1860)—reference of a pending action; *Harralson v. Pleasants*, 61 N. C. 365 (1867), same. *Gardner v. Marsters*, 56 N. C. 462 (1857).

¹⁴⁵ See *Stevens v. Brown*, 82 N. C. 460 (1880)—reference of pending action. Compare *Blossom v. Van Amringe*, 63 N. C. 65 (1868), same. See also *Kelly v. The Lynchburg etc. Ry. Co.*, 110 N. C. 431, 15 S. E. 200 (1892), same.