

ARBITRATION UNDER THE NEW PENNSYLVANIA ARBITRATION STATUTE*

WESLEY A. STURGES

(Continued from February Issue)

CONTROVERSIES WHICH CAN BE ARBITRATED

(a) Provisions Of The Statute

The statute applies to provisions in written contracts, except contracts for personal services, to settle by arbitration "a controversy thereafter arising out of such contract, or out of the refusal to perform the whole or any part thereof," and to agreements in writing to submit "any controversy existing between them" at the time of the agreement to submit. The statute embraces future-disputes agreements which involve controversies concerning the performance or non-performance of the main contract. Parties cannot, under the statute, agree to arbitrate *any* controversy which may thereafter arise between them. They can, however, agree in writing to arbitrate "any" *existing* controversy. Probably this generality will be held to include at least all common commercial disputes. As heretofore noted the statute does not exclude questions arising in connection with a contract for personal services if the controversy is existing when the written agreement to submit is entered into.¹¹⁴

*AUTHOR'S NOTE. The substance of the article, of which this is the second and concluding installment, 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, New York City. This advance publication is by their courtesy.

¹¹⁴The New York Law provides with reference to submission agreements of *existing* disputes that they cannot be made "either as prescribed in this article or otherwise" if a controversy "respecting a claim to an estate in real property, in fee or for life" is involved, but "this section does not prevent the submission of a claim to an estate for years, or other interests for a term of years, or for one year or less, in real property: or of a controversy respecting the partition of real property between joint tenants or tenants in common: or of a controversy respecting the boundaries of lands other than the admeasurement of dower." The Oregon Act embraces "any controversy, suit or quarrel, except such as respect the title to real estate." The Massachusetts Act reads: "Con-

(b) *Cases At Common Law*

Few pertinent common law cases have been found. In *Noble v. Peebles*¹¹⁵ the court declared that it was not contrary to law to submit claims arising out of assaults and batteries to arbitration. In *Kurniker v. Kurniker*¹¹⁶ the Superior Court expressly declined to determine whether husband and wife can submit to arbitrators their family disputes, property rights, mutual obligations and rights of custody of the children and maintenance of wife for determination upon the basis that they should in the future live apart. A dispute as to what are the terms of a certain contract and what is the intent of the parties in using them can be submitted to arbitrators.¹¹⁷ Controversies involving boundaries and titles to land are also permissible subjects of arbitration.¹¹⁸

THE SUBMISSION AGREEMENT

(a) *Formal Requisites—Provisions Of The Statute*

The statute requires the agreement to be in writing. The type of dispute is not material. No other formalities are prescribed.

(b) *Cases At Common Law—Money Claims*

Where a claim for money for goods sold was submitted to arbitration pursuant to an oral submission agreement the award was held to be a bar to an action on the original cause. The

troveries which might be the subject of a personal action at law or of a suit in equity."

The statutes of California, Hawaii and New Jersey provide as follows: "Two or more persons may submit in writing to arbitration any controversy existing between them at the time of the agreement to submit, which arises out of a contract or the refusal to perform the whole or any part thereof or the violation of any other obligation."

The United States Act embraces commerce, interstate and foreign, and matters in admiralty.

¹¹⁵ 13 Serg. & R. 319 (Pa. 1825).

¹¹⁶ 54 Pa. Super. 196 (1913).

¹¹⁷ *Worden v. Connell*, 196 Pa. 281, 46 Atl. 298 (1900).

¹¹⁸ See *Calhoun's Lessee v. Dunning*, 4 Dall. 120 (Pa. 1792); *Davis v. Harvard*, 15 Serg. & R. 165 (Pa. 1827). Compare *Duer v. Boyd*, 1 Serg. & R. 165 (Pa. 1814).

court advanced the following general statements: "No technical, or set form of words are required to constitute a submission; it is sufficient, if it appears from what has passed between the parties, that they mutually agreed to submit the matter in dispute between them, to the decision of the person or persons named and mutually agreed on by them for that purpose."¹¹⁹ Again, where the money claim in dispute involved a determination of whether a bond—an instrument under seal—had been paid, the court expressed an opinion in passing that no special formality was necessary. It said: "But if the only matter in dispute between the parties were, whether a bond which the one holds against the other has been paid or not, I have no doubt but that they may agree, even by parol, to submit it to arbitrament . . . and the award, when fairly made, will be binding and conclusive upon them."¹²⁰ Again, although the submission agreement is in writing and under seal the parties may enlarge or restrict its operation by actually presenting more or less claims before the arbitrators.¹²¹ Similarly, in order to establish that a party agreed to an alleged oral submission of a money dispute, proof of that party's participation at the hearing of the claims alleged to have been orally submitted is competent evidence, for "her previous agreement is to be inferred from her participation in the trial."¹²²

(c) *Disputes over boundaries and titles to land*

The broad rule has been declared by the supreme court that a dispute over the boundary line of land involves no question within the Statute of Frauds and that, therefore, neither the submission agreement nor a delegation of authority to an agent to enter into such agreement need be in writing.¹²³ Where, on the

¹¹⁹ *M'Manus v. M'Culloch*, 6 Watts 357 (Pa. 1837). *Accord*: *Gay v. Waltham*, 89 Pa. 453 (1879)—holding that an oral award under such an oral submission will support an action to enforce it.

¹²⁰ *Kennedy, J.*, in *Young v. Shook*, 4 Rawle 299 (Pa. 1833).

¹²¹ *Graham v. Graham*, 9 Pa. 254 (1848); *South v. South*, 70 Pa. 195 (1871).

¹²² *Lobe v. Lobe*, 26 Pa. 327 (1856).

¹²³ *Bowen v. Cooper*, 7 Watts 311 (Pa. 1838); *Evans v. Kamphaus*, 59 Pa. 379 (1868).

other hand, controversies involve the ownership of land and parties agree to arbitrate them in order to have a partition awarded, the submission agreement must be in writing to satisfy the Statute of Frauds. The court stated its position as follows: "Now, as a submission is in the nature of an authority granted to the arbitrators, can that authority be deemed sufficient to authorize them to dispose of the interest of the parties, or of either of them, in real estate, consistently with the act against frauds, unless that authority, or, in other words, the submission, be in writing? . . . I think that the arbitration, without a submission in writing from the parties, could neither make a partition of the property between the parties, nor yet award a partition of it to be made, so as to pass the interest of each party to the other in his respective share, as is done in partition by operation of law, or by act of the parties in making mutual releases, or so as to conclude the parties from asserting their former rights and manner of holding the land." ¹²⁴

(d) *Requisite of an express promise to abide award, or of a provision that award shall be final and conclusive.*

A promise to abide the award, or a provision that the award shall be final and conclusive, contained in a submission agreement, serves no purpose in determining the revocability or irrevocability of agreements of submission of existing disputes, nor in determining the finality and conclusiveness of an award. They add nothing to the effect or enforceability of the award. In *M'Manus v. M'Culloch* ¹²⁵ the court said: "And though, at one time it would seem that when the award was for any collateral act, and not for the payment of money, as if an express promise to perform it, was deemed requisite to enable the party, in whose

¹²⁴ *Gratz v. Gratz*, 4 Watts 411 (Pa. 1834). It should be remembered that this theory concerning the "nature" of the submission is relative and is employed when it is deemed to be useful to describe results. Compare *Green & Coates Street Ry. v. Moore*, 64 Pa. 79 (1870).

¹²⁵ 6 Watts 357 (Pa. 1837). See also *Bowen v. Cooper*, 7 Watts 311 (Pa. 1838); *Somerset Borough v. Ott*, 207 Pa. 539, 56 Atl. 1079 (1904). See cases cited *supra* note 67 holding that such promises and provisions are ineffective to render "general" future-disputes clauses irrevocable.

favor the award was given, to maintain an action for the non-performance of it, yet it has long since been held, and taken, that in either case, the very act of submission, implies a promise by the party to abide by the determination of the person to whom the matter is referred."

(e) *Requisite concerning number of parties determined by kind of dispute submitted.*

Where a submission to arbitration is entered into for the purpose of partitioning an estate all parties in interest must join as parties, for if one person in interest in the estate is not a party "it is void as to all; . . . partition would be impossible were the undivided interest of one to pervade the several portions of the rest."¹²⁶

(f) *Construction of the submission agreement—What disputes did the parties submit.*

The problem of construing or interpreting future-disputes clauses has already been discussed. A similar problem arises in connection with submission agreements of existing disputes. That this question is not within the jurisdiction of the arbitrator unless the partes have clearly so agreed is apparently settled; the question is open to court review as in case of future-disputes agreements.¹²⁷

A submission of "all matters in variance between the parties" speaks as of its date and does not authorize an award upon disputes which have accrued between the parties after its date.¹²⁸ But the submission may be extended by actually prosecuting further matters before the arbitrators.¹²⁹ And where parties submit "their differences" to arbitration those matters which are in fact

¹²⁶ *Power v. Power*, 7 Watts 205 (Pa. 1838); *Miller v. Moore*, 7 Serg. & R. 164 (Pa. 1821).

¹²⁷ *Hamilton v. Hart*, 125 Pa. 142, 17 Atl. 473 (1889); and see *Connor v. Simpson*, 104 Pa. 440 (1883); *Kaun v. Bennett*, 234 Pa. 12, 82 Atl. 1111 (1912). Compare *McNally v. Montour R. R. Co.*, 33 Pa. Sup. 51 (1907). See cases involving future-disputes agreements cited *supra* note 80 *et seq.*

¹²⁸ *Gratz v. Gratz*, 4 Rawle 411 (Pa. 1834).

¹²⁹ *Graham v. Graham*, 9 Pa. 254 (1848); *South v. South*, 70 Pa. 195 (1871); and see *Lobe v. Lobe*, 26 Pa. 327 (1856).

prosecuted before the arbitrators will be construed to be such "differences."¹³⁰

The apparent purpose of a given submission and arbitration is influential when this question of construction arises.¹³¹

(g) *Revocability of Submission Agreements*

Common law cases. In considering agreements to arbitrate future disputes it was noted that the court has distinguished between such agreements as name an arbitrator or arbitrators and those which leave the arbitrators to subsequent election. This distinction was noted in case of direct revocation by notice and in connection with revocation as put in issue where an action was brought in court in disregard of the arbitration agreement. Where the agreement sufficiently names the person who shall act as arbitrator, it is held to be irrevocable; if the arbitrator is not so named, it is revocable.

In case of submission agreements of existing controversies, it might be expected that by analogy they would have been held irrevocable since they ordinarily name the arbitrator. The foregoing distinction, however, has not been taken with respect to them and while there is little authority as matter of decision holding that such submission agreements are revocable in either of the two senses above mentioned, many general statements may be observed in the opinions declaring that they are revocable at any time prior to award rendered. Thus, it is said: "Even a nomination of an arbitrator, under a submission of existing controversies, may be revoked, and though the party may forfeit his bond, the jurisdiction of the courts remains." "A submission, whether by deed, parol, or rule of court, like any other naked authority, is countermandable before execution of it, though expressed to be irrevocable."¹³²

¹³⁰ Hackestein & Co. v. Kaufman, 173 Pa. 199, 33 Atl. 1028 (1896). See also Kaufman v. Meyerk, 6 Watts 134 (Pa. 1837) for the comprehensive meaning given to the terms "demands" and "claims" when used in a submission agreement.

¹³¹ See Thornburgh v. West Penn. Ry. Co., 254 Pa. 246, 98 Atl. 894 (1916); Smith v. Wilksburgh Borough, 172 Pa. 121, 33 Atl. 371 (1895).

¹³² Gray v. Wilson, 4 Watts 39 (Pa. 1835). The case involved a "general" future-disputes clause. Power v. Power, 7 Watts 205 (Pa. 1838). The case

In case of the death of the arbitrator without provision for substitution, it has been held that the submission is revoked so that the parties are free to resort to the court forthwith.¹³³ Likewise, in case of death of a party, it may be so far revoked that consent of and participation by the personal representative in further proceedings before the arbitrators will be of no legal effect.¹³⁴ The court reviewed the question at length as follows: "Death is clearly a revocation where there is not an express stipulation that the submission shall survive; as was held in *Rhodes v. Haigh*, (3 Dow & Ry. 610.)^{134a} and many other cases. And such a stipulation must be explicit. In *Bendell v. Brettargh*, (17 Ves. 232)^{134b} the parties had agreed for themselves, their heirs, executors, administrators, or assigns, to pay the value of certain property when ascertained by the award of particular arbitrators delivered to the parties by a day mentioned; and Lord Eldon held that as the delivery was to be to themselves, the true construction of the agreement was that they themselves would do such acts as should be prescribed by an award then delivered; or that if they happened not to live long enough after the delivery to do them in person, then their representatives should do them in their stead; not that the binding of their representatives made them parties to the submission. It will be perceived, therefore, that such binding does not extend the duration of the submission beyond the joint life of the parties where the award is to be delivered to themselves; but the law undoubtedly allows it to be further extended by an agreement for delivery to the parties or their representatives; as in *Tyler v. Jones*. (1 Barn. & Cr. 144; s. c. 4 Dow & Ry. 740.)^{134c} But in the agreement before us, there is not a word

involved death of a party prior to award rendered. See reference to this case in *Zehner v. Lehigh Coal Co.*, 187 Pa. 487, 41 Atl. 464 (1898); *Johnson v. Crawford*, 212 Pa. 502, 508, 61 Atl. 1103, 1104 (1905). Compare statements in *Snodgrass v. Gavit*, 28 Pa. 221 (1857); *Johnson v. Andres*, 5 Phila. 8 (C. P. Pa. 1862), seems to be a decision in point—revocation by notice.

¹³³ *Shreiner v. Cummins*, 62 Pa. 374 (1869); *Huggins v. Niell*, 2 Pa. Sup. 103 (1896).

¹³⁴ *Bailey v. Stewart*, 3 Watts & S. 560 (Pa. 1842), and see *Power v. Power*, 7 Watts 205 (Pa. 1838).

^{134a} 3 Dow & Ry. 608, 610 (Eng. 1823).

^{134b} 17 Ves. 232 (Eng. 1810).

^{134c} 1 Barn. & Cr. 144; s. c. 4 Dow & Ry. 740 (Eng. 1824).

about delivery to representatives; nor is it even provided that they should do an act of performance. They are not so much as named; and the submission was exclusively between the parties themselves. The death of Fiske, therefore, was a revocation of it. . . ." But according to this same case since the revocation is by act of God it is not a breach of a bond given by the deceased to abide award.

In *Wolf v. Augustine* one of the two arbitrators refused to act. The court said: "It is very clear that where the submission makes no provision for filling vacancies in the board of arbitration, the occurrence of a vacancy by death or otherwise revokes the submission."¹³⁵ This result followed, although the agreement in the instant case was irrevocable so far as any act of the parties was concerned, since it was a voluntary reference of a pending action which was discontinued¹³⁶ and was made per rule of court.

There is a class of cases, however, in which the submission agreement has been held irrevocable by act of parties—irrevocable, so far as the issue in these cases goes, in the sense that notice of revocation prior to award rendered has been held ineffective. The cases referred to are those where a pending action in court has been discontinued and substituted by a submission of the cause to arbitrators chosen by the parties. In these cases the court has relied upon the "change of position" of the parties, and the submission is said to be "a contract upon sufficient consideration" and not a "mere naked authority."¹³⁷ The cases within this rule have not extended beyond those where there has been a discontinuance of a pending action but no case has been found which expressly decides that the rule is so limited.

¹³⁵ 181 Pa. 576, 37 Atl. 357 (1897). See also *Shreimer v. Cummins*, 62 Pa. 374 (1869); *Boswell's Appeal*, 3 Pennypacker, 305 (Pa. 1883); *Huggins v. Neill*, 2 Pa. Sup. 103 (1896).

¹³⁶ See cases cited, *infra*, note 137. *McGheehan v. Duffield*, 5 Pa. 497 (1847); *Shisler v. Keavy*, 75 Pa. 79 (1874); *Paist v. Caldwell*, 75 Pa. 161 (1874).

¹³⁷ *White's Appeal*, 108 Pa. 473 (1885); *McKenna v. Lyle*, 155 Pa. 599, 26 Atl. 777 (1893); *Zehner v. Lehigh Coal, etc., Co.*, 187 Pa. 487, 41 Atl. 464 (1898); *McCune v. Lytle*, 197 Pa. 404, 47 Atl. 190 (1900), and see *Johnson v. Crawford*, 212 Pa. 502, 508, 61 Atl. 1103, 1104 (1905).

Form of "direct" revocation—To whom communicated. In connection with the rules concerning revocation of submission agreements by serving notice of revocation, some rules have been made concerning the formal requisites of the notice and upon whom it shall be served. According to *Dickerson v. Rorke*¹³⁸ when the submission is in writing, "it cannot be directly revoked except by a written instrument given to the arbitrators, or a majority of them." "If the submission is under seal the notice of revocation must be under seal for the revocation must be of the same dignity as the submission."¹³⁹ Service of the notice upon less than a majority is ineffective.¹⁴⁰ Notice to the "third referee" only, in a case where the submission is to two arbitrators chosen by the parties with authority in the arbitrators to elect a "third party" in case they disagree, and the third referee is elected, is likewise not effective.¹⁴¹

Provisions of the statute. It should be noted that the foregoing common law rules of revocability are materially changed when the submission agreement is governed by the new statute. As in case of future-disputes clauses, section 2 requires the stay of any action which is brought by a party upon a cause subject to the agreement; section 3 makes available a court order for specific enforcement of the agreement and section 4 provides for the appointment of an arbitrator or arbitrators by the court upon application in a proper case. The following provisions of section 4 are especially important when compared with the foregoing common law cases: "if a method be provided therein for naming arbitrators, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of

¹³⁸ 30 Pa. 390 (1852).

¹³⁹ *Horne v. Welch*, 35 Pa. Sup. 569 (1908). The court remarked that revocation after arbitrators appointed was not favored by the court. Compare *Johnson v. Andres*, 5 Phila. 8 (C. P. Pa. 1862).

¹⁴⁰ *Shisler v. Keavy*, 75 Pa. 79 (1874).

¹⁴¹ *Ralston v. Thomsen*, 204 Pa. 588, 54 Atl. 365 (1903). It may be inferred from a statement by the court in this case (p. 593) that notice to the adverse party is necessary, but *quare*. It is also intimated that if reasons are given for the revocation in the notice which are not "valid" the notice may be ineffective. The position of the court on these points is not clear.

arbitrators or an umpire or in filling a vacancy, or if any such arbitrators be disqualified to sit, then, upon the application of either party to the controversy, the court shall designate and appoint arbitrators, or an umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein, and, unless otherwise provided in the agreement, the arbitration shall be by a single arbitrator."

Although the statute does not expressly deal with revocation by notice before award rendered, it is readily inferred that section 1, which declares that the agreement shall be irrevocable, and the enforcement provisions of sections 2, 3 and 4, render such notice ineffective.

PROVISIONAL AND ANCILLARY REMEDIES—ARREST, ATTACHMENT, INJUNCTION—GARNISHMENT

Can a party to either a common law arbitration agreement or to such as is made "valid, irrevocable, and enforceable" under the statute resort to these special remedies for protective purposes? Can such a party use them, or any of them, for such purposes without instituting further proceedings? Will such proceedings be stayed when section 2 of the statute is invoked? Will recourse to such remedies by further proceedings, if any are necessary, prejudice such party's rights under the arbitration agreement?

The answers to these questions are almost wholly a matter of conjecture. On reference to the statutes governing these remedies it seems clear, however, that no one of these remedies is available to a party to a future-disputes clause prior to the accrual of a controversy thereunder. If such a dispute has arisen it is doubtful if any of them are available to a party unless further proceedings are instituted. *Arrest.* Under the statute the prothonotary shall issue a special writ of *capias ad respondendum* "in any personal action, commenced by summons" upon affidavit of the plaintiff "that the defendant is about to quit the commonwealth . . . without leaving sufficient real or personal estate

therein to satisfy the demand.”¹⁴² *Attachment*. The issuance of a writ of domestic attachment by the court of common pleas is authorized “if such debtor shall have absconded from the place of his usual abode within the same, or shall have remained absent from this commonwealth . . . with design . . . to defraud his creditors.” Such writ shall be issued only “upon oath or affirmation, previously made, by a creditor of such person, or by some one in his behalf, of the truth of his debt and of the facts upon which the attachment shall be founded which oath or affirmation shall be filed on record.”¹⁴³ *Injunctions*. Apparently it is necessary to initiate a suit in a court of common pleas or in the supreme court to procure any injunctive relief. *Garnishment*. It likewise seems clear that a garnishment can be effected only by recourse to a court, either as part of a writ of domestic attachment,¹⁴⁴ referred to above, or as part of a writ of attachment when it is employed to commence an action.¹⁴⁵

If a party to an arbitration agreement which is governed by the arbitration statute attempts to institute any such proceedings with a view of protecting himself against the other party when the latter would dispose of his assets and absent himself, will such proceedings be subject to section 2 of the statute which requires the court in which “any suit or proceeding be brought upon any issue referable to arbitration” to “stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement”? It would seem clear that this section is primarily concerned in staying the *trial* of the action so that the parties shall proceed according to their agreement. It may be argued, however, that one of the ends of arbitration is to adjust a controversy without publicity incident to court proceedings, and that section 2 is designed to operate preventatively in this respect. In reply, it may be urged that the defendant’s claim

¹⁴² Act of 1836, P. L. 568 § 24, PA. STAT. (West. 1920) § 17124. Consult Act of 1836, P. L. 568, and Act of 1919, P. L. 102, PA. STAT. (West. 1920) § 17100 *et seq.* concerning commencing an action by *Capias*.

¹⁴³ Act of 1836, P. L. 606 §§ 1, 2, PA. STAT. (West. 1920) §§ 9242, 9243. Consult PA. STAT. (West. 1920) § 17160 *et seq.* concerning commencing an action by Attachment.

¹⁴⁴ Act of 1836, P. L. 606 § 4, PA. STAT. (West. 1920) § 9245.

¹⁴⁵ Act of 1869, P. L. 8 § 2, PA. STAT. (West. 1920) § 17161.

to privacy should not extend to such proceedings when initiated *bona fide* for such protective purposes.

Another question arises as follows: Will the institution of such proceedings to the extent and for the purposes indicated forfeit the plaintiff's rights under the arbitration agreement? Can he still have recourse to the enforcement proceedings provided in sections 2, 3 and 4 of the statute? It is submitted that there is no good reason for imposing such forfeiture; and, as somewhat analogous to this position, those cases at common law may be cited, wherein it has been held that the commencement and discontinuance of an action brought upon a cause referable to arbitration under a future-disputes clause to named arbitrators, does not prejudice the plaintiff's rights to an arbitration according to the agreement.¹⁴⁶

REQUISITES CONCERNING ARBITRATORS

(a) *Number Of Arbitrators*

Provisions of the statute. The statute leaves this matter to the agreement of the parties. If section 4 of the statute is invoked the court shall appoint an arbitrator, arbitrators or an umpire according to the arbitration agreement. If that agreement does not specify the number the same section provides that "the arbitration shall be by a single arbitrator."

Cases at common law. None.

(b) *"Arbitrator" or "Third Arbitrator" and "Umpire" distinguished*

Provisions of the statute. The statute mentions "arbitrators" and "an umpire" but it defines nor describes neither. Section 14a refers to the selection or appointment of an "additional arbitrator or umpire." See also sections 4, 8 and 18.

¹⁴⁶ See cases cited *supra* note 73. It should be noted that Section 2 directing a stay of trial can be invoked "providing the applicant for the stay is not in default in proceeding with such arbitration." (See, *supra*, note 57 for similar *proviso* in the statutes of the other states). This clause does not expressly appear in sections 3 and 4. May a party proceed with one or more of the remedies in question for the purposes stated, without thereby putting himself "in default in proceeding with" the arbitration even under section 2?

Cases at common law. A distinction between "arbitrator" or "third arbitrator" and "umpire" recurs in the language of the opinions in a variety of cases. It is clear that in several instances rules of law which regulate one do not apply to the other.¹⁴⁷ No case has been found, however, which expressly prescribes a test between the two. A process of elimination has been used to ascertain if there is a test. It has been noted that the term "umpire" ordinarily is not used by the court where only one person has been agreed upon to make the award; such person is referred to as the sole or single "arbitrator." Where parties agree to appoint *all* of the "arbitrators," there being more than one, no one of them is referred to as an "umpire." If the parties agree that each shall appoint "an arbitrator" and that the two so appointed shall appoint "a third," a "third person," "a third party" or "a third arbitrator" the courts refer to such third person as a "third abritrator" or "third person." Where, on the other hand, in this last method of selection, the parties designate "the third" and "umpire," the courts so refer to him and apparently regard him as different from a "third arbitrator." Whether this distinction is intended by them and whether it will be declared to exist in cases of other method of selection, remains to be determined by the supreme court.

(c) *Qualifications Of Arbitrators And Umpire*

Provisions of the statute. The statute prescribes no qualifications for arbitrators or for an umpire. Section 4 inferentially contemplates some disqualifications, however, by providing for the choice of a substitute arbitrator or umpire in such case.¹⁴⁸

¹⁴⁷ See *Boyer v. Aurand*, 2 Watt 74 (Pa. 1833); *Bayne v. Gaylord*, 3 Watt 301 (Pa. 1834); *Graham v. Graham*, 9 Pa. 254 (1848); *Quoy v. Westcott*, 60 Pa. 163 (1869); *Ralston v. Thomson*, 204 Pa. 588, 54 Atl. 365 (1903). See also *Hartford Fire Insurance Co. v. Bonner Co.*, 44 Fed. 151 (C. C. Mont. 1890), s. c. 56 Fed. 378 (C. C. A. 9th, 1893); *Tenn. Lumber Co. v. Clark Bros. Co.*, 182 Fed. 618 (C. C. A. 3d, 1910).

¹⁴⁸ The Massachusetts Act has the following provision: "If a party to this contract be named as arbitrator, or the agent or agents or employee or employees of any one party to the contract be named in the contract or selected by the method therein defined as sole arbitrator or as a majority of the arbitrators under such agreement, the provisions of this act shall not apply."

Cases at common law. It has been indicated that coverture does not disqualify a woman as an arbitrator.¹⁴⁹ That the engineer designated as arbitrator in a building contract is a stockholder of one of the parties does not disqualify him nor his estimate-award, if the parties agreed upon him with knowledge of this relationship.¹⁵⁰ That he is an employee of or partner with one of the parties is likewise not a disqualification if the other party knew of the relationship when the agreement to arbitrate was executed.¹⁵¹ It is inferred that the question of qualification of an arbitrator may be raised at any time if a party proceeds punctually upon ascertaining an adequate cause of disqualification.

(d) *How Elected or Appointed.*

Provisions of the statute. The statute prescribes no method. The matter is left to agreement by the parties. It does not appear that their choice must be recorded in writing. Section 1 deals with agreements in writing to submit "to arbitration;" it does not require named arbitrators. Section 14 (a) seems to contemplate a writing in case of the selection or appointment of an "additional arbitrator or umpire," but no provision is made as to when such paper shall be accomplished. If an appointment is made by the court in proceedings under section 4, probably there will be a written order of such appointment, but it is not required.

As heretofore pointed out, section 4 of the statute changes the rules of common law, where it is applicable, with respect to the appointment of arbitrators when a party fails or refuses to appoint. Under that section the proper court shall appoint in such case, upon application by the other party. The same pro-

¹⁴⁹ See *Evans v. Ives*, 15 Phila. 635 (C. P. Pa. 1881).

¹⁵⁰ *Monongahela Navigation Co. v. Fenlon*, 4 Watts & S. 205 (Pa. 1842). See also *Reynolds v. Caldwell*, 51 Pa. 298 (1865).

¹⁵¹ *Kann. v. Bennett*, 234 Pa. 12, 82 Atl. 1111 (1912). In *Connor v. Simpson*, — Pa. —, 7 Atl. 161 (1886) the court said: "If Culver [the engineer-arbitrator] and Simpson [one of the parties] were partners in the work let under the contracts, and concealed that fact from the defendant until after the hearing, the award cannot stand. It was competent for Culver, though a silent partner in the transaction of one of the parties, to act as arbiter, provided the other party so agreed with full knowledge of the fact. Good faith required both Culver and Simpson, before any hearing, to inform the defendant of that fact, if it existed."

cedure is available, if necessary, in case of the death, disqualification, resignation, or refusal to act of an arbitrator or umpire or if for any other reason there is a lapse in naming a person to decide, and for filling any vacancy in a panel of arbitrators. Consult PROCEEDINGS AT ARBITRAL HEARING, (b) *Selection or Appointment of a Substitute Arbitrator*, and (c) *Election or Appointment of an Umpire or Third Arbitrator*, *infra*.

Cases at common law. None.

PROCEDURE LEADING TO THE ARBITRAL HEARING

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

Provisions of the statute. The statute has no provision in point. Presumably the arbitrators alone have the power to fix the time and place of meeting. Whether *all* the arbitrators must concur in settling the time and place of meeting is not clear. Under section 6 "*all*" the arbitrators "*shall sit at the hearing.*"

Cases at common law. No cases concerning who can appoint the time and place of meeting have been found.

Concerning notice: It is clear from the common law decisions that a reasonable notice of time and place of the hearing goes to the jurisdictional power of the arbitrators and of an umpire. A party is entitled to reasonable opportunity to be heard and to prepare therefor. The question has been raised most frequently in cases involving future-disputes clauses in building contracts, where the parties have agreed to refer disputes to the architect or engineer in charge in order that they may be readily adjusted—often while the work is in process. Indeed, in such cases it has been argued that such arbitrator should not be required to accord any hearing at all because of the nature of the case. The supreme court, however, has consistently adhered to the rule that a hearing and reasonable notice thereof is necessary. An award rendered in disregard of this rule is neither conclusive nor enforceable.¹⁵²

¹⁵² North Braddock Borough v. Corey, 205 Pa. 35, 54 Atl. 486 (1903); Curran v. Philadelphia, 264 Pa. 111, 107 Atl. 636 (1919); Graham v. Graham, 9 Pa. 254 (1848); s. c. 12 Pa. 128 (1849); and see Monongahela Navigation Co.

No formalities have been prescribed for the notice of hearing which is required by these cases, nor has it been decided that any particular person is required to serve the notice. It is the *want of a reasonable notice* which is fatal.

If the agreement of the parties prescribes a time limit for commencing the hearing the arbitrators are without power to start the hearing at a later date unless both parties consent to participate in the delayed hearing.¹⁵³

(b) *Procuring Attendance of Witnesses*

Provisions of the statute. Section 6 of the statute contains a general provision for this matter. "The arbitrators," selected "either as prescribed in this act or otherwise," may summon in writing any person to attend before "them or any of them." The summons shall issue in the name of "the arbitrators" and shall be served the same as are subpoenas to appear and testify before a court. Whether *all* of the arbitrators must issue the summons in the names of *all* of them is not entirely clear. Section 18 does not clear the uncertainty by providing that "wherever the word arbitrators is used in this act it shall mean a single arbitrator, if there be but one, or at least a majority of the arbitrators if there be more than one."

The occasion for summoning a witness to appear before "anyone" of the arbitrators is not clear since section 6 requires that where more than one arbitrator is agreed to, "all the arbitrators shall sit at the hearing of the case" unless the parties agree in writing to proceed with less.

If any person is duly summoned and fails or refuses to obey, the court of common pleas of the county in which the arbitrators are sitting, shall, "upon petition" and proof that the witness could be compelled to appear were the arbitration an action in court, compel his attendance or punish him as in a case pending in court. Whether the arbitrators and the adverse party, or either, shall make the foregoing petition is not stated in the statute.

v. Fenlon, 4 Watts & S. 205, 212 Pa. 1842, which should be read in connection with the doctrine in *Hamilton v. Hart*, 125 Pa. 142, 17 Atl. 473 (1889). Compare *Ketcham v. Odd Fellows Hall Assn.*, 59 Pa. Sup. 213 (1915).

¹⁵³ See *Johnson v. Crawford*, 212 Pa. 502, 61 Atl. 1103 (1905).

Such subpoenas may likewise issue to a person to bring with him, "in a proper case," "any book, record, document or paper which may be deemed material evidence in the case." Compulsory process is available for failure or refusal to comply.

If the arbitrators refuse to subpoena any such witness or evidence because *they* do not deem the possible testimony or evidence "material to the case," question will arise whether their decision is final. In this connection it should be noted that if an adverse award follows, apparently the interested party may procure a review of their ruling by a motion to vacate the award under section 10, which makes it sufficient cause to vacate an award if the arbitrators "were guilty of misconduct in refusing . . . to hear evidence pertinent and material to the controversy." Under section 17 also, "the arbitrators," or "the parties with the approval of the arbitrators," can apply to "the court" for a determination of the question, if it is a "legal question," pursuant to the *Uniform Declaratory Judgments Act*.

It is assumed that by "a proper case" is meant such documents as do not fall within that category of the law of evidence called "privileged communications."

Cases at common law. None.

(c) *Procuring Depositions.*

By section 7 "upon petition, approved by the arbitrators," the court may direct depositions to be taken in behalf of any party "in accordance with existing law in respect to depositions," for use before "the arbitrators." Apparently, the term "the arbitrators," as it first appears, means "at least a majority of the arbitrators, if there be more than one," according to section 18, whereas the term in its second appearance means *all* of the arbitrators, as prescribed in section 6.

A party to an agreement to arbitrate a future dispute, wherein no arbitrators have been appointed clearly cannot file his petition "upon approval of the arbitrators." He must be prepared to argue that their approval is not a condition precedent, in such case, or fail in his petition.

Cases at common law. None.

PROCEEDINGS AT THE ARBITRAL HEARING

(a) *Quorum Of Arbitrators*

Provisions of the statute. Section 6 of the statute requires that, "all the arbitrators shall sit at the hearing of the case, unless, by consent in writing, all parties shall agree to proceed with the hearing with a less number."

Cases at common law. The requirement that all the arbitrators shall sit at the hearing is also found in the common law cases, and this is true although a majority award is expressly authorized.¹⁵⁴ There is, however, the following limitation on this rule: "It was said in *Robinson v. Bickley*, 6 Casey 384, and again in *Painter v. Kistler*, 9 P. F. Smith, 331,^{154a} that it is not necessary that it should appear on the face of the award to have been so done; but if a majority have power to make an award and do make one the presumption is that the hearing, consultation and execution were regular. This is a presumption only of a fact. Like other presumptions of fact it may be overcome by competent evidence."¹⁵⁵ Where a submission was to two named referees, "together with such third person as the two should select," but they selected no third person the court held as follows: "It is decisive against the award, that it was made but by the two original arbitrators and without the concurrence of a third to have been appointed by them."¹⁵⁶ But where the reference was to two named referees, "with liberty in case of disagreement, to choose an umpire," it was held that when the two disagreed and selected the umpire it was no objection that one and only one of the original referees and the umpire were present. "The award in the case of an umpirage is the act of the umpire, and here we have it The joinder of the arbitrators is but surplusage at best. . . . As to the allegation that the interference of the arbitrator who signed [the award] may have had undue

¹⁵⁴ *Backus' Appeal*, 58 Pa. 186 (1868); *Bartolett v. Dixon*, 73 Pa. 129 (1873); and inferences to be drawn from *State Road, etc.*, 60 Pa. 330 (1869). Compare *Dickerson v. Rorke*, 30 Pa. 390 (1858).

^{154a} *Robinson v. Bickley*, 30 Pa. 384 (1858); *Painter v. Kistler*, 59 Pa. 331 (1868).

¹⁵⁵ *Bartolett v. Dixon*, 73 Pa. 129 (1873).

¹⁵⁶ *Bayne v. Gaylord*, 3 Watts 301 (Pa. 1834).

influence in the absence of the others, it is enough to say, that it is the joinder in signing and delivering the award, and not the joinder in consultation which, was at one time, deemed material; and even that is now disregarded.”¹⁵⁷ In *Ralston v. Ihmsen*.¹⁵⁸ the submission was to two arbitrators named by the parties and it provided that if the two could not agree “then they shall call in a third party . . . to assist them as an arbitrator or referee in said matter.” The submission required the valuation of the interest of a partner in a partnership and involved an appraisal of physical assets. The two original appointees appraised everything except certain furnaces and ovens and thereupon selected a third person, because of his expert knowledge, to appraise the latter items. He accepted their valuation on the other items, but only one of the original arbitrators accepted his valuation on the furnaces and ovens. This arbitrator and the third person selected by the two original arbitrators signed an award. *Held*: “The objection that all the referees did not pass on the value of each item of property in establishing the value of the interest is without merit. . . . He accepted the appraisal made as far as it went, and it was not a subject of dispute.” The court does not further clarify its position.¹⁵⁹

(b) *Selection or Appointment of a Substitute Arbitrator*

Provisions of the statute. There is nothing in the statute to indicate that the arbitrators have the power to fill a vacancy in their panel, whether it occurs before or at the hearing. On the other hand, section 6 expressly provides that “when more than one arbitrator is agreed to, all the arbitrators shall sit at the hearing of the case, unless, by consent in writing, all parties shall agree to proceed with the hearing with a less number.” Similarly, if the vacancy occurs after the hearing has commenced, section 4 provides that “unless the parties agree to proceed with

¹⁵⁷ *Boyer v. Aurand*, 2 Watts 74 (Pa. 1833). See also *Dickerson v. Rorke*, 30 Pa. 390 (1858).

¹⁵⁸ 204 Pa. 588, 54 Atl. 365 (1903).

¹⁵⁹ Compare *Backus' Appeal*, 58 Pa. 186 (1868). Consult *Ketcham v. Odd Fellows Hall Assn.*, 59 Pa. Sup. 213 (1915).

the remaining arbitrators, if any, or to proceed by adding a new arbitrator to fill the vacancy, the said arbitration shall be considered void. . . ., and the parties shall proceed *ab initio*." According to the wording of a prior part of this section, this last quoted provision applies "if one of the arbitrators dies, or if for any reason he becomes incapacitated." The reason for this apparent restriction is not clear. Presumably the word "incapacitated" is to be interpreted broadly.

As heretofore noted, section 4 provides for application to the court, if necessary, to procure an appointment by the court of an arbitrator or umpire in case of the death, disqualification, resignation, or refusal, to act of an arbitrator or umpire, or in any other case when there is a vacancy. Consult: REQUISITES CONCERNING ARBITRATORS. (d) How elected or appointed, *supra*.

Cases at common law. The cases at common law are in accord that "it is most true that arbitrators assembled and sworn, have not power to supply a vacancy in their number; but they may supply it with the express or implied assent of the parties";¹⁶⁰ where the submission was to three persons named by the parties with provision that "if either of the referees aforesaid do not attend at the time and place appointed another or others are to be chosen in their room," it was held that authority to select the substitute was not given to the arbitrators, but was confined to the parties themselves.¹⁶¹

If the arbitrators appoint a substitute to the panel without authority of a party, such party will waive the want of authority if he participates at the hearing before the new board; and this is true although he expressly takes exception to their action in making the appointment, and stipulates with the adverse party that his participation at the hearing shall not be a waiver of his exception. The supreme court explained its position as follows: "Here the party proceeded with his defense *protestando*, but intending to take his chance before the arbitrators, and thus obtain the advantage of being loose or bound at his election. . . But he was

¹⁶⁰ Christman v. Moran, 9 Pa. 487 (1848).

¹⁶¹ Potter v. Sterrett, 24 Pa. 411 (1855)—the contesting party did not participate in the hearing.

bound to give up his chance or his objection, for they could not exist together."¹⁶²

(c) *Election Or Appointment Of An "Umpire" Or "Third Arbitrator*

Provisions of the statute. Where a written arbitration agreement provides that each party shall choose an arbitrator and that the two so chosen shall select a "third person," "third arbitrator" or "an umpire," or that the two shall make such choice "if they disagree," the statute requires that "such method shall be followed," and if there be a lapse in naming such third arbitrator or an umpire, the court shall do so, on application by either party. (Section 4.)

Cases at common law. Where the original appointees are authorized to appoint a third member "if they disagree," it has been held that they have the power to choose the third member before they disagreed.¹⁶³ Where there are two appointees, "to whom, together with such third person as the two should select," it was to be submitted, it has been held that an award by the two, without ever having selected the third, is unenforceable.¹⁶⁴

Quorum when a third arbitrator or umpire is selected. When the third person who is selected is an "umpire" question has arisen regarding the office of the original arbitrators in the subsequent arbitral proceedings. The general statement appears in the case of *Graham v. Graham*¹⁶⁵ that "the arbitrators are not *functi officio* by the appointment of an umpire; for they may still go on and award." But whether they may "go on and award" without the participation of the umpire is not decided. Some of them, however, may participate with the umpire while others do not without affecting his award. Thus where the ref-

¹⁶² *Christman v. Moran*, 9 Pa. 487 (1848).

¹⁶³ *Ralston v. Thomsen*, 204 Pa. 588, 54 Atl. 365 (1903)—there had been no "waiver" of the question by participating before the board of three.

¹⁶⁴ *Bayne v. Gaylord*, 3 Watts 301 (Pa. 1834). It is inferable that the parties participated in presenting their claims to the two. See *Graham v. Graham*, 12 Pa. 128 (1849).

¹⁶⁵ 9 Pa. 254 (1848); s. c. 12 Pa. 128 (1849).

erence was to two referees named by the parties "with liberty, in case of disagreement, to choose an umpire," it was held that it was not material that one of the original arbitrators did participate with him and that one did not.¹⁶⁶ Although the original arbitrators do not "go on and award" it has been stated by the supreme court that "it is their business to give information and assistance to the umpire. At least they may do so."¹⁶⁷

If the third member is a "third" or "additional arbitrator," it is inferred that the general common law requirement of a quorum consisting of *all* of the members of the board must be satisfied.

(d) *Proceeding In Absence Of A Party—Ex Parte Proceedings Provisions of the statute.* The statute has no express provisions in point. The notable case of *Bullard v. Grace* decided under the *New York Arbitration Law* by the New York Court of Appeals in 1925 is of importance, however, in this connection. In that case one of the parties *and one of the three arbitrators* withdrew from the hearing on the ground that the parties did not, by the terms of the submission agreement, agree to arbitrate a certain matter which the adverse party sought to present to the arbitrators. The court held that the majority of the arbitrators did not have power to decide the question over this exception by proceeding to an award in *ex parte* proceedings. It is clear that the case might have been rested on the single point that there was no longer a quorum of arbitrators after the one withdrew. The court indicated clearly, however, that such award would not have been sustained even if all of the arbitrators had participated. It took this position in view of the type of issue which was raised by the withdrawing party, namely, the determination of what questions the parties agreed to arbitrate. The court said: "If a *bona fide* question arises as to the proper construction of the submission agreement a party may raise the question by withdrawing from the arbitration. If the party aggrieved then desires to

¹⁶⁶ *Boyer v. Aurand*, 2 Watts 74 (Pa. 1833).

¹⁶⁷ *Graham v. Graham*, 9 Pa. 254 (1848).

go on with the arbitration he must apply to the court and the court will determine whether or not the withdrawing party was in default in refusing to proceed to arbitrate a question covered by the submission. . . .

Arbitration should be encouraged but arbitration tribunals may not determine for themselves, over the objection of a party, to include within the scope of the arbitration questions which were never submitted to arbitration."¹⁶⁸

If *Bullard v. Grace* is to be followed in Pennsylvania, proceedings must be brought by the aggrieved party under section 3 to procure an order of specific performance when a party denies the jurisdiction of the arbitrators and withdraws from the hearing. This order will issue when and as the question of "the making" or construction of the contract of arbitration is decided in his favor. If, however, after reasonable notice, a party does not appear before arbitrators who have been duly appointed and are regularly assembled for the hearing, it does not appear from that case that he will not be bound by their *ex parte* proceedings and award, if their proceedings and award are pursuant to the terms of the arbitration agreement.

Cases at common law. Under common law rules, if a party has notice of the hearing and fails to attend, an award rendered by the arbitrators in proper quorum upon the evidence of the plaintiff as against the defendant, or by default without hearing if the plaintiff does not appear is conclusive and enforceable—at least it has been so held where the record was silent as to why the party did not appear.¹⁶⁹ It may be noted, however, that in

¹⁶⁸ 240 N. Y. 398, 148 N. E. 562 (1925). Compare *Bankers & Shippers Insurance Co. v. Liverpool Ins. Co.*, 21 Lloyd's List Rep. 86, New York Law Journal, March 4, 1925 (Eng. Ct. of App. 1925), 24 Lloyd's List Rep. 85 (H. of L. 1926). Note (1925) 35 YALE L. J. 369. See also *American Eagle Fire Insurance Co. v. New Jersey Insurance Co.*, 240 N. Y. 398, 148 N. E. 562 (1925); *Christman v. Moran* cited, *supra*, note 160.

The Massachusetts Act expressly provides that "if any of the parties neglects to appear before the arbitrators after due notice is given to him of the time and place appointed for hearing, the arbitrator or arbitrators shall proceed in his absence."

¹⁶⁹ *Gowen v. Pierson*, 166 Pa. 258, 31 Atl. 83 (1895). See *Graham v. Graham*, 9 Pa. 254 (1848); s. c. 12 Pa. 128 (1849). The hearing must be at least commenced on the day stated in the notice. *Weir v. Johnston*, 2 Serg. & R. 459 (Pa. 1816).

these common law cases no issue was raised, at any time, as to the making or construction of the arbitration agreement, or that the arbitrators decided issues beyond the submission. It is clear that under common law rules arbitrators do not have power to determine their own jurisdiction; it is a matter of court review and can be raised at any time unless the complaining party "waives" the exception by continuing to participate at the hearing, or otherwise. Accordingly, it is apparent that awards rendered in *ex parte* proceedings are not conclusive on this question. To this extent, at least, the rule in *Bullard v. Grace Co.* and common law rules are not at variance.

(e) *Requisite that Arbitrators and Umpire be Sworn*

The statute does not require an oath. Neither does it appear to be necessary under common law rules unless the parties' agreement requires it. Thus, where the engineer-arbitrator in a building contract returned his award without having been sworn and it was challenged for that reason, the court ruled: "We cannot believe that this formality was within the contemplation of either party."¹⁷⁰

(f) *Requisite that Witnesses be Sworn*

The statute prescribes that "all testimony shall be taken under oath or affirmation, as is now provided in suits at law." No common law cases in point have been discovered.

(g) *Arbitrators' Powers to Examine Witnesses and Documents*

By sections 6 and 10 of the statute the arbitrators must afford the parties an opportunity to be heard before them and they must hear pertinent and material evidence. Their powers, of course, are coextensive with their duties. But can they assume the role of inquirer and examine witnesses and inspect documentary evidence? Presumably these powers follow. It remains for the court to determine whether they are restricted in the exercise of these powers to evidence adduced at the hearing.

¹⁷⁰ *Monongahela Navigation Co. v. Fenlon*, 4 Watts & S. 205 (Pa. 1842).

A common law regulation requires the arbitrators not to receive the evidence of one party privately in the absence of the other party when he participates in the hearing. Because of such misconduct their award is neither conclusive nor enforceable.¹⁷¹

(h) *Rules Governing the Admissibility of Evidence*

Under section 10 of the statute it is cause to vacate an award if the arbitrators refuse to hear "pertinent and material" evidence. It is clear that the arbitrators are not the final judges of the pertinency and materiality; the court will review the question on a motion to vacate the award pursuant to section 10. In common law cases the rule is established that the arbitrators are the final judges of the weight and materiality of evidence which is adduced at the hearing.¹⁷²

(i) *Disposition of Questions of Law*

The statement recurs in common law cases that unless the parties provide otherwise the decision of the arbitrators is final and conclusive as to questions of law as well as of fact.¹⁷³ The arbitration statute, however, provides in section 17 for recourse to the court, under the *Declaratory Judgments Act*, for its determination of "any legal question" as follows: "The arbitrators, or the parties to the arbitration with the approval of the arbitrators, shall have the right to apply to the court, at any time during the arbitration proceedings, for the determination of any

¹⁷¹ *Speer v. Bidwell*, 44 Pa. 23 (1862). Compare *Graham v. Graham*, 9 Pa. 254 (1848); *Ketcham v. Odd Fellows Hall Assn.*, 59 Pa. Sup. 213 (1915).

In the noted case of *Berrizzi v. Krauz*, 239 N. Y. 315, 146 N. E. 436 (1925), the New York Court of Appeals held that it was misconduct for the arbitrator to carry on an independent investigation of his own concerning the matters in dispute between the parties after the parties had presented their case and the hearing was closed. Compare the opinion of the court below, 208 App. Div. 322, 203 N. Y. Supp. 442 (1924); and see Note (1925) 34 YALE L. J. 905 adversely criticizing the *Berrizzi* case.

¹⁷² See, for example, *Reynolds v. Caldwell*, 51 Pa. 298 (1865); *March v. Lukens*, 214 Pa. 206, 63 Atl. 427 (1906).

¹⁷³ See *Gratz v. Gratz*, 4 Rawle 411 (Pa. 1834); *Connor v. Simpson*, 104 Pa. 440 (1883)—holding that a submission of "all and every question of difference between the parties growing out of this contract" requires the arbitrators to pass on questions of law as well as of fact, and that his award, which reserved the question of law for a court, was unenforceable.

legal question in accordance with the terms of the Uniform Declaratory Judgments Act." Apparently both parties must concur and procure the arbitrators' approval before they can cause this step to be taken.¹⁷⁴ The section also provides that such proceedings shall not stay the arbitration proceedings unless the arbitrators consent.¹⁷⁴

(j) *Adjournments And Postponements Of The Hearing*

The statute makes it a cause to vacate an award "where the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown." Here again, apparently the decision of the arbitrators as to the sufficiency of the "cause shown" is open to review by the court upon a motion to vacate, pursuant to section 10.

Apparently the arbitrators have power to postpone or adjourn the hearing under common law rules.¹⁷⁵

(k) *Retrial Before An Umpire Or Third Arbitrator—Notice Provisions of the statute.* Where the originally appointed arbitrators fail to agree and pursuant to the terms of the arbitration agreement select a third arbitrator or an umpire does the cause stand for trial *de novo* before the new board? Section 4 of the statute provides as follows: "If one of the arbitrators dies, or if for any reason becomes incapacitated,

¹⁷⁴ Section 11 also provides that an award shall be modified or corrected, upon application, "where the award is against the law, and is such that had it been a verdict of the jury the court would have entered different or other judgment notwithstanding the verdict."

This section is peculiar to the Pennsylvania statute. It is similar to the older "amicable action" statute. See PA. STAT. (West. 1920) §§ 602, 604. See also N. Y. Civ. Practice Act, Section 1458.

Corresponding to section 17 of the Pennsylvania statute, the Massachusetts Act 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 to which the report is to be made. Upon application by a party at any time before the award becomes final . . . the superior court may in its discretion instruct the arbitrator . . . upon a question of substantive law." The Oregon Act, section 7, provides that a party, subject to an adverse award, can file exception thereto because "the arbitrators or umpire committed error in fact or law." Under section 10, however, "the arbitrators, or a majority of them, shall have power; . . . (d) to decide both the law and the fact that may be involved in the cause submitted to them."

¹⁷⁵ Becker v. Werner, 1 Woodward's Decisions 202 (Pa. 1861).

after a partial submission of the matter in controversy to the arbitrators, then, unless the parties agree to proceed with the remaining arbitrators, if any, or to proceed by adding a new arbitrator to fill the vacancy, the said arbitration shall be considered void and of no effect, and the parties shall proceed *ab initio*." It is clear that this statutory provision was not drafted in contemplation of the type of question here presented. It remains for the Supreme Court to aid the apparent objective of the provision. Apparently the end of the provision is to secure a new trial before the full board, where a new arbitrator comes into the hearing after it has been begun, unless the parties agree to proceed with the remaining arbitrators. Why this objective should not be sought other than in the case where "one of the arbitrators dies, or becomes incapacitated" is not clear. If an arbitrator fails or refuses to act or misbehaves or becomes disqualified, the same question of policy arises.

If the parties have agreed in advance that the originally appointed arbitrators shall elect a third arbitrator and he is accordingly elected, it is also open to question whether that is an agreement by the parties "to proceed by adding a *new arbitrator*." Again it may be asked: is there a filling of a "vacancy" in such case within the meaning of that section? It remains for the supreme court to determine how far the policy insufficiently particularized by the section shall be made applicable to the case where a "third arbitrator" is so chosen by the original arbitrators.

It should be noted further that the foregoing section expressly deals with the selection of a "new arbitrator." It does not mention an "umpire." Section 14 (a), on the other hand, does contemplate "the selection or appointment . . . of an *additional arbitrator or umpire*." It may be intended that no trial *de novo* before the full board shall be necessary if the person so appointed is an "umpire."

Cases at common law. According to the common law rule if the third party is an "umpire" as distinguished from a "third arbitrator" no retrial or hearing *de novo* before the full board is re-

quired. In *Graham v. Graham*¹⁷⁶ an umpire was chosen by the two named arbitrators pursuant to the submission after they had disagreed. The court outlined the rules of conduct of the original arbitrators and umpire respectively as follows: "It is true that arbitrators are not *functi officio* by the appointment of an umpire; for they may still go on and award; and where they do not, it is their business to give information and assistance to the umpire, at least they may do so. But though it was their province to give notice to the parties of their own meetings in the first instance, and of the appointment of the umpire in the second, it became his, having the duties to perform which had before rested on them, to appoint the time and place of his sitting and to warn the persons concerned. . . . Before an umpire has made an award, he is bound to examine the witnesses, if a party require it; but not without request, or afterwards. . . . Now though the umpire, in the present case, did not examine the witnesses, no one requested him to do so. He examined the testimony taken by the arbitrators, who laid the whole of it before him, making explanations without stating their points of difference." Such procedure was approved by the court.

RULES GOVERNING AWARDS

(a) *Time Within Which Award Shall be Rendered*

Provisions of the statute. No time-limit is expressly placed upon the arbitrators where the parties have not done so. It is conceivable that an award rendered after excessive delay might be vacated under section 10, which prescribes that it shall be cause to vacate an award when the conduct of the arbitrators is "misbehavior by which the rights of any party have been prejudiced." Clearly *both* parties can terminate their arbitration agreement by contract and thereby terminate the powers of the arbitrators.

¹⁷⁶ 9 Pa. 254 (1848). And see cases cited *supra* note 147. The above-quoted provision from section 4 of the statute is found in the Pennsylvania statute only. The New York Law, however, provides as follows: "An additional arbitrator or umpire must sit with the original arbitrators upon the hearing, if testimony has been taken before his selection or appointment, the matter must be reheard, when a rehearing is waived in the submission or by the subsequent written consent of the parties or their attorneys."

As heretofore noted, section 17 provides that proceedings under the *Declaratory Judgments Act* to procure a court determination of a legal question, do not stay the arbitration proceedings unless the arbitrators consent. Question remains, however, whether delay incident to such proceedings, with or without a "stay," will be held to extend any time limit set by the parties in their submission agreement. No cases at common law have been found.¹⁷⁷

(b) *When is an Award Rendered—Notice—Delivery*

Provisions of the statute. There is no provision in point.

Cases at common law. This question arises most frequently where the revocability of the arbitration agreement by notice is put in issue. When the arbitrators in proper quorum have agreed, although only informally, upon their award, the submission agreement is no longer revocable.¹⁷⁸ If the submission agreement authorizes a majority award the document can be subsequently accomplished by a majority of the arbitrators; the requisite of a full quorum is lifted at the time of the agreement; the document need not be signed in the presence of each other.¹⁷⁹ A "reporting out" or delivery of the award is not necessary to an award rendered unless the submission agreement so provides; award is rendered when there is agreement of the requisite number of arbitrators.¹⁸⁰ Although an award in documentary form is still retained by the arbitrators to supply further matters of form the arbitration agreement is no longer subject to revocation.¹⁸¹

¹⁷⁷ See, however, *Johnson v. Crawford*, 212 Pa. 502, 61 Atl. 1103 (1905).

¹⁷⁸ *Robinson v. Bickley*, 30 Pa. 384 (1858). And see *American Eagle Fire Insurance Co. v. New Jersey Ins. Co.*, 240 N. Y. 398, 148 N. E. 562 (1925).

¹⁷⁹ *Robinson v. Bickley*, 30 Pa. 384 (1858); *Dickerson v. Roche*, 30 Pa. 390 (1858).

¹⁸⁰ *Gardner v. Lincoln*, 5 Phila. 24 (1862); *Thomas v. Heger*, 174 Pa. 345, 34 Atl. 568 (1896); *Buckwalter v. Russell*, 119 Pa. 495, 13 Atl. 310 (1888). Compare *Malone & Son v. R. R. Co.*, 157 Pa. 430, 27 Atl. 756 (1893).

¹⁸¹ *Buckwalter v. Russell*, 119 Pa. 495, 13 Atl. 310 (1888).

(c) *Powers of Arbitrators to Revise Their Awards—With or Without Further Hearing*

Provisions of the statute. No provision.

Cases at common law. When the arbitrators, in proper quorum, have agreed upon their decision, their powers are confined to the following matters: (1) the correction of mistakes in integrating their informal award in a paper document.¹⁸² They have no power to try the case *de novo*. Incorrect basis or calculation in accounting does not authorize a "supplementary" award further than to correct errors which appear upon the face of the document as clerical mistakes in the matter of addition, subtraction or division of figures; (2) the publication of their award. Thus, after an accountant who was selected by the parties to adjust their disputed partnership accounts reported his award, one of the parties pointed out to him an alleged error in the amount of the award due to the fact that he twice entered the same item of credit under different headings. He thereupon re-examined the accounts and changed his award. The court held that the new award was unenforceable. It explained its position as follows: "In bringing the account of the different branches of the business together into one statement he overlooked the duplication of credits. The correction which he made was not of an error in addition or in writing down the result of his examination of the books. No error appeared on the face of the report. To ascertain whether one existed it was necessary for him to examine again the books and accounts. This he did, and being satisfied that he had overlooked the double credit he made a new calculation and arrived at the result set out in the second report. This was a change of judgment based on evidence which he had overlooked. . . . After having delivered his report he could not at the instance of one of the parties and without the assent of the other reconsider his finding and make a new one for the reason that he had overlooked something in the accounts. If he could do it for the reason that he had overlooked items of the

¹⁸² *Robinson-Rea Mfg. Co. v. Mellon*, 139 Pa. 257, 21 Atl. 91 (1891); *English v. School District*, 165 Pa. 21, 30 Atl. 506 (1894); *Frederick v. Margworth*, 221 Pa. 418, 70 Atl. 797 (1908).

evidence, why could he not for the reason that he had given undue weight to testimony, or been deceived by witnesses, or had pursued a wrong plan in seeking facts, or had erred in the inferences drawn from them?"¹⁸³

(d) *Requisite that the Award Follow the Submission*

Provisions of the statute. Section 10 provides that it shall be cause to vacate an award "(d) where the arbitrators exceeded their powers." It is made a cause to modify or correct an award by section 11 "(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matters submitted."

Cases at common law. The ancient requirement that the paper award should recite that it is made "*de et super praemisis*" is apparently no longer necessary.¹⁸⁴ Admitting that in a particular case the arbitration agreement embraces a given dispute among others, it is clear that the arbitrators or an umpire have no legal power to render an award which expressly reserves such dispute from their award.¹⁸⁵ Thus a submission of "all and every question of difference between the parties, growing out of this contract," does not permit the arbitrator to return an award on the facts only and reserve the questions of law for a court.¹⁸⁶ An award may also be attacked where it shows, when compared with the submission agreement, that some matter has not been determined, although the arbitrator has not expressly excepted it. The attack in such case, however, must be supported by the fact that the omitted matters were actually presented to the arbitrator, "for the intendment is that the arbitrators acted on all that was laid before them."¹⁸⁷ An award is also objectionable if it embraces matters not within the submission; the matter of the surplus to be specially pleaded and proved, where it is not evident on the

¹⁸³ *Hartley v. Henderson*, 189 Pa. 277, 42 Atl. 198 (1899).

¹⁸⁴ See *Buckley v. Ellmaker*, 13 Serg. & R. 71 (Pa. 1825).

¹⁸⁵ *Johnston v. Boeckbill*, 1 Penrose & Watts 364 (Pa. 1830); *Hamilton v. Hart*, 125 Pa. 142, 17 Atl. 473 (1889); *Kann v. Bennett*, 234 Pa. 12, 82, Atl. 1111 (1912). Compare *Artwood v. Wanamaker*, 26 Pa. Sup. 591 (1904).

¹⁸⁶ *Connor v. Simpson*, 104 Pa. 440 (1883).

¹⁸⁷ *Hewitt v. Furman*, 16 Serg. & R. 135 (Pa. 1827); and see cases *supra* note 185.

face of the award when it is compared with the submission.¹⁸⁸ Such proof must also negative the fact that the alleged unauthorized question was laid before the arbitrators.¹⁸⁹ If the surplus can be readily separated from the authorized portion of the award, the latter part of the award will be conclusive and enforceable *pro tanto*.¹⁹⁰

If an award is in writing the question of its construction or interpretation is for the court; it is error to leave to the jury "what was the intentions of the referees."¹⁹¹

(e) *Form, Execution And Disposition of the Award*

Provisions Of The Statute. Section 8 prescribes that "the award shall be in writing, and shall be signed by the arbitrators, or a majority of them, and a signed copy delivered to each party to the arbitration."

Cases at common law

Money awards—formal requisites. An oral award on a money claim is conclusive and enforceable.¹⁹² It has also been held that where a dispute involved the right of the obligee to his claim on a money bond, an instrument under seal, that an oral award adverse to the obligee could be pleaded in bar to an action brought by him to recover on the bond.¹⁹³

Awards in disputes involving land—formal requisites. It has been held that a submission agreement for the settlement of a dispute concerning ownership of land, except a "boundary line" dispute, must be in writing.¹⁹⁴ No decision has been found, however, which determines that a written award is necessary in such cases.¹⁹⁵ It is inferred that an oral award in a "boundary

¹⁸⁸ Noble v. Peebles, 13 Serg. & R. 319 (Pa. 1825).

¹⁸⁹ See South v. South, 70 Pa. 195 (1871)—and this even though the submission agreement is under seal.

¹⁹⁰ South v. South, 70 Pa. 195 (1871).

¹⁹¹ Moore v. Miller, 4 Serg. & R. 279 (Pa. 1818).

¹⁹² McManus v. McCulloch, 6 Watts 357 (1837); Gay v. Waltham, 89 Pa. 453 (1879). See also Malone & Son v. R. R. Co., 157 Pa. 430, 27 Atl. 756 (1893).

¹⁹³ Young v. Shook, 4 Rawle 299 (Pa. 1833).

¹⁹⁴ See *supra* note 124.

¹⁹⁵ See, however, Gratz v. Gratz, 4 Rawle 411 (Pa. 1830).

line" dispute is valid by analogy to the rule that the agreement of submission of such a dispute does not concern the Statute of Frauds.¹⁹⁶

Formal requisites determined by the submission agreement. Explicit provisions in the submission agreement concerning the form of the award have been held to be mandatory, at least where such formality involves any particular legal consequences. Thus, an award in writing only is fatally defective where the submission calls for an award under seal. The court made the following statement: ". . . if the parties who submit to an arbitration think proper to agree that the award shall be under seal, I know not why the court should contradict them, or render their agreement a nullity by declaring a seal was a matter of no importance."¹⁹⁷

Necessity that award particularize matters decided. It is no objection to the conclusiveness or enforceability of an award that it does not itemize the matters which are decided. Thus, a lump sum rendered under a submission of disputed accounts is valid and enforceable.¹⁹⁸ But if the submission agreement provides for such itemization non-compliance is fatal.¹⁹⁹

Concerning Execution and Disposition of the award see *supra* (b) *When is an Award Rendered—Notice—Delivery.*

(f) *The Certainty Requisite*

Provisions of the statute. Section 10 (d) makes it a ground to vacate an award where the arbitrators have "so imperfectly executed them [their powers] that a final and definite award upon the subject-matter submitted was not made."

Cases at common law. Whether the conclusiveness or enforceability of an award is contested it may be stated as a broad prin-

¹⁹⁶ See *supra* note 123.

¹⁹⁷ *Rea v. Gibbons*, 7 Serg. & R. 204 (Pa. 1821). See also *Weaver v. Powell*, 148 Pa. 372, 23 Atl. 1070 (1892); *Faber v. Balkur*, 1 Grant 393 (Pa. 1856).

¹⁹⁸ *Graham v. Graham*, 12 Pa. 128 (1849); and see *Buckley v. Ellmaker*, 13 Serg. & R. 71 (Pa. 1825). But where the arbitrator is to decide "as to the true construction and meaning of the drawings and specifications," his award "must, to be effective, be more than mere restatement of the language of the contract." *Riegert v. Lebanon School District*, 71 Pa. Sup. 269 (1919).

¹⁹⁹ *Fobes v. Backus*, 1 Grant 393 (Pa. 1856).

principle that the terms of an award must be not only intelligible and indicate to a reviewing court that the arbitrators have *decided* the controversies submitted, but also they must make clear what performance is necessary for compliance.

Illustrative cases. An award in favor of the defendant for a sum certain to be paid by plaintiff "deducting an unsettled account of the plaintiff's against the defendant" was not conclusive because of uncertainty as to the amount—that is to say the award was no bar to plaintiff's action on the original cause.²⁰⁰ On August 16, 1902, arbitrators to whom disputed partnership accounts were submitted, awarded a sum certain and "to this sum are to be added one-half of any amount received by the surviving and liquidating partner . . . since February 11, 1901, for account of the old firm, together with one-half of any book accounts and municipal claims owned by the firm." *Held*, Award not enforceable because of its uncertainty as to amount.²⁰¹

An award of a sum certain in money and that defendant "give security" for payment thereof "if required" was held not to be a valid award—an action brought on defendant's bond to abide award. The court considered it fatally uncertain concerning the amount and kind of security required and concerning the terms thereof.²⁰²

An award that certain land in dispute "be equally divided by a line through the center, giving each party one-half of the land in dispute" was held fatally defective for uncertainty for, "where is it (the line) to begin, and what direction drawn? Which half is for plaintiff, and which for defendant? Is it to be divided into squares or triangles?"²⁰³

An award may also be contested for uncertainty, notwithstanding that its terms are definite and clear, by evidence that

²⁰⁰ *Zerger v. Sailer*, 6 Binn. 24 (Pa. 1813). See also *Stanley v. Southwood*, 46 Pa. 189 (1863).

²⁰¹ *Real Estate Co. v. McMichael*, 217 Pa. 545, 66 Atl. 768. (1907).

²⁰² *Burnett v. Gibson*, 3 Serg. & R. 340 (Pa. 1817); see also *Etnier v. Shope*, 43 Pa. 110 (1862).

²⁰³ *McCracken v. Clarke*, 31 Pa. 498 (1858). See also *Etnier v. Shope*, 43 Pa. 110 (1862); *Gratz & Gratz*, 4 Watts 411 (Pa. 1834); *cf.* *Hewitt v. Furman*, 16 Serg. & R. 135 (Pa. 1827).

what is required to be done by it becomes uncertain after performance is commenced as, for example, where the rights of third persons have intervened since the award or where their rights antedated the submission agreement but they were not parties thereto.²⁰⁴

If an uncertain award is set forth in a pleading the objection may be taken by demurrer or by exception to admitting it in evidence;²⁰⁵ but the court has sounded this warning in passing: "if we can suppose a state of facts on which an award would be good, I think we would, on demurrer, be bound to suppose such facts existed, and overrule such demurrer."²⁰⁶

It is apparently settled that the arbitrators can not be called to testify as to what they intended by their award in order to support its certainty. "Their meaning must be collected from the face of the award itself except 'when the words of the award have relation to things certain out of the award, these may be averred, for that is the express mind of the arbitrators, which they have expressly referred to.'"²⁰⁷

(g) *Parties Bound By An Award—Parties Entitled To the Benefits of An Award*

Provisions of the statute. No provision.

Cases at common law. It is apparent that a given award may be effective against certain persons and in favor of certain other persons although, as a matter of law and fact, they were not "parties to" the submission agreement and had no notice of the hearing or opportunity to be heard. Thus, it has been held that an award fixing a boundary line to land is conclusive upon persons who "claim through" a party to the submission agree-

²⁰⁴ See *Hewitt v. Furman*, 16 Serg. & R. 135 (Pa. 1827); *Miller v. Moore*, 7 Serg. & R. 164 (Pa. 1821).

²⁰⁵ *Stanley v. Southwood*, 45 Pa. 189 (1863); *Hewitt v. Furman*, 16 Serg. & R. 135 (Pa. 1827).

²⁰⁶ *Hewitt v. Furman*, 16 Serg. & R. 135 (Pa. 1827).

²⁰⁷ *Gratz v. Gratz*, 4 Rawle 411 (Pa. 1834); *Stanley v. Southwood*, 45 Pa. 189 (1863). If award is certain and complete on its face the arbitrators can not testify that the award in question was intended to be only temporary. *M'Dermott v. U. S. Ins. Co.*, 3 Serg. & R. 604 (Pa. 1818).

ment.²⁰⁸ It does not appear, however, whether the award was duly recorded or whether recording was possible or whether or not these persons were entitled to any protection thereby. This category of persons has not been further determined by the Pennsylvania cases.

(h) *Effect of An Award of Title to Land And Chattels*

Provisions of the statute. No provision.

Cases at common law. The theory is reiterated in the cases involving awards in arbitrations of disputes concerning ownership of land that "an award cannot make an actual transfer of the title to land."²⁰⁹ An award of the title to land, however, is conclusive upon the parties and enforceable.²¹⁰ The leading case of *Davis v. Havard*²¹¹ states, moreover, that such an award will be specifically enforced, and speaking at a time when there was no court of equity in Pennsylvania, remarked that "with us who have no chancery, a decree of specific performance is considered as made in all cases where a chancellor would make it."

Where parties submit a dispute over a boundary line of their land the court has held that the award bars an action of ejectment or of trespass brought by the losing party against the successful party in defiance of the award.²¹² In these cases the theory is stated to be that "the dividing line being fixed the title follows of course. The award is conclusive evidence of the boundary, and, consequently, conclusive evidence that the title of each party always extended to that boundary and no further." The

²⁰⁸ *Davis v. Havard*, 15 Serg. & R. 165 (Pa. 1827); *Calhoun's Lessee v. Dunning*, 4 Dall. 120 (Pa. 1792). In the latter case the person is stated to have been "a trustee" of one of the parties.

²⁰⁹ *Calhoun's Lessee v. Dunning*, 4 Dall. 120 (Pa. 1792); *Duer v. Boyd*, 1 Serg. & R. 203 (Pa. 1814); *Miller v. Moore*, 7 Serg. & R. 164 (Pa. 1821); *Davis v. Havard*, 15 Serg. & R. 165 (Pa. 1827); *Hewitt v. Furman*, 16 Serg. & R. 135 (Pa. 1827); *Rank v. Hill*, 2 Watts & S. 56 (Pa. 1841); *Merrick's Estate*, 5 Watts & S. 9 (Pa. 1842); *Speer v. McChesney*, 2 Watts & S. 233 (Pa. 1841); *Babb v. Stromberg*, 14 Pa. 397 (1850); *Brower v. Osterhout*, 7 Watts & S. 344 (Pa. 1844).

²¹⁰ See *Speer v. McCluney*, 2 Watts & S. 233 (Pa. 1841); *Brower v. Osterhout*, 7 Watts & S. 344 (Pa. 1844).

²¹¹ 15 Serg. & R. 165 (Pa. 1827).

²¹² *Davis v. Havard*, 15 Serg. & R. 165 (Pa. 1827); *Babb v. Stromberg*, 14 Pa. 397 (1850).

court seems to have been disposed to construe a submission agreement as calling for the fixing of a boundary line rather than as calling for an award of title. Thus, in *Brower v. Osterhout*²¹³ where the parties submitted the question of "the title of a strip of land four feet in width and the same in length," the court held that the award was a bar to the losing party's action of ejectment, and notwithstanding plaintiff's argument that "a question of title" was submitted, the court remarked "that a question of boundary may be settled by arbitration, is no longer doubtful."

In case of an award for the partition of land the view is taken that the parties have thereby "settled the right and interest in the premises."²¹⁴

In the case of *Miller v. Moore*²¹⁵ the opinion contains statements that an award of land should take the form of ordering one party to convey and the other who is to receive to pay or otherwise perform in exchange. But the court was there discussing the issue of the mutuality of the particular award. An award which by its own terms purports to presently fix a boundary line or allot certain land to a party has been sustained. It is apparently regarded in theory as analogous to an executory agreement by the parties to so perform and is enforceable accordingly. At the same time, however, it is "an award" which is conclusive of "the right" of the parties respecting the land.²¹⁶

It seems clear that the theory that an award of title to land can not and does not "actually transfer" the title to the land, does not require the submission agreement or the award to be drafted in any particular form. It is settled that an award which is pursuant to the submission agreement will conclude the parties and those that "claim through" them, in the dispute so that the matter cannot be retried by any action in court. It likewise seems to be settled that the award will be enforced specifically if the relief asked for is otherwise consistent with general equity practice.

²¹³ 7 Watts & S. 344 (Pa. 1844). And see the concluding part of the opinion in *Bowen v. Cooper*, 7 Watts 311 (Pa. 1838).

²¹⁴ *Hewitt v. Furman*, 16 Serg. & R. 135 (Pa. 1827).

²¹⁵ 7 Serg. & R. 164 (Pa. 1821).

²¹⁶ See *Davis v. Havard*, 15 Serg. & R. 165 (Pa. 1827); *Speer v. M'Chesney*, 2 Watts & S. 233 (Pa. 1841).

Whether it can be *enforced* by a law action, for example, an action of ejectment or trespass, has not been determined. Perhaps the theory in question has concrete meaning and significance, when referred to this question.

In the case of chattels the problem has not been extensively considered. It has been held, however, that an award of chattels to the defendant is properly pleaded under the plea of Property, to bar an action of replevin by the plaintiff who was a party to the arbitration.²¹⁷

(i) *Awards Requiring Future Action by One or Both Of The Parties*

Provisions of the statute. Section 12 prescribes that where a motion to confirm, modify or correct an award is granted, "judgment shall be entered in conformity therewith" in the court wherein the motion is granted. By section 14 (d) such judgment "shall have the same force and effect . . . and be subject to, all the provisions of law relating to a judgment in an action at law." It remains for the Supreme Court to determine whether an award can be made effective under these provisions as an equitable decree and by its terms require performance in the future by one or both of the parties, or whether a strict law judgment only is available under rules of law governing the judgments of a law court.²¹⁸ The statute might well have been more specific.

Cases at common law. An award which directs future performance to the satisfaction of the arbitrator is fatally defective. The court expressed its position as follows: "It is not intended to say that an award is necessarily bad because it involves future action by the parties. Every award involves payment or some other future act by one or both parties. But an award which leaves something still to be done by the arbitrator himself, before the exist-

²¹⁷ *Murray v. Paisley*, 1 Yeates 197 (Pa. 1792); and see *Peter's Appeal*, 38 Pa. 239 (1861).

²¹⁸ See *Shoemaker v. Meyer*, 4 Serg. & R. 452 (Pa. 1818); *Hunners v. Meyer*, 4 Whart. 358 (Pa. 1839); *Pennington v. Bowman*, 10 Watts 283 (Pa. 1840); *M'Khillip v. M'Khillip*, 2 Serg. & R. 489 (Pa. 1816); *Benjamin v. Benjamin*, 5 Watts & S. 562 (Pa. 1843) decided under prior statutes.

ing controversy is terminated, cannot be said to be final."²¹⁹ It is also clear that if the provisions for the future performance are not sufficiently certain, mutual, and within the power of the party to perform that the award is void.²²⁰ But if these requirements are satisfied and the award is pursuant to the submission agreement apparently the objection that future conduct other than payment of money is directed, cannot, of its own merit, defeat the award.²²¹

(j) *Alternative Awards*

Provisions of the statute. Consult last preceding subsection.

Cases at common law. If the alternative provisions are certain in themselves and if they do not reverse further control in the arbitrators as such and if the award is pursuant to the submission the award will apparently withstand the objection that its requirements are in the alternative. In *Brock v. Lawton*²²² the award required the defendant to transfer to plaintiff eighty shares of stock in a certain corporation, or, if that was impossible because of prior transfer to innocent purchasers then defendant should pay to plaintiff a certain sum of money. The court stated: "that an award may be in the alternative is well settled."

(k) *Default Awards*

Consult *Ex parte Proceedings, supra*.

(l) *Majority Awards*

Provisions of the statute. Section 8 authorizes a majority award. Although the section does not say so it is inferred that the parties can control the matter by their agreement.

²¹⁹ *Hamilton v. Hart*, 125 Pa. 142, 17 Atl. 473 (1889). Compare *Hewitt v. Furman*, 16 Serg. & R. 135 (Pa. 1827).

²²⁰ *Barnet v. Gibson*, 3 Serg. & R. 340 (Pa. 1817).

²²¹ See *Miller v. Moore*, 7 Serg. & R. 164 (Pa. 1821); *Buckley v. Ellmaker*, 13 Serg. & R. 71 (Pa. 1825); *Hewitt v. Furman*, 16 Serg. & R. 135 (Pa. 1827); and see *Hosie v. Gray*, 71 Pa. 198 (1872). Compare *Pennington v. Bowman*, 10 Watts 283 (Pa. 1840).

²²² 210 Pa. 195, 59 Atl. 997 (1904). Compare *Hunness v. Meyer*, 4 Whart. 358 (Pa. 1839)—a case of a reference under the Act of 1836. See *Connor v. Simpson*, 104 Pa. 440 (1883).

Cases at common law. It appears to be settled that only an unanimous award is valid unless the parties consent to a lesser number. And if a submission agreement prescribes that the award shall be signed and sealed, it is necessary that all of the arbitrators comply; it is not sufficient that only part of them do so although the award is expressly approved by the rest.²²³ This requirement of an unanimous award obtains not only where the parties themselves choose all of the arbitrators but also where the original arbitrators elect an "additional arbitrator." Thus, in *Weaver v. Powell*,²²⁴ where the arbitration agreement provided that "each choose one person, and the two so chosen should choose a third," the unanimous award of the three was held necessary. . . . On the other hand, where the submission was to two arbitrators "and in case of disagreement, they shall select a third arbitrator" an award by a majority only was sustained. The court took the following position: "The object in providing for the choice of a third man was to prevent the reference failing on account of inability of the two to agree. This aim would only be successful by an award of two, if the disagreement continued. There was no sense in the provision for a third man, if this was not the consequence of it . . . a persistent disagreement was provided against." The court took its position so earnestly that it also advanced the following proposition in passing: "Had all joined in the award it is not clear that it would not have been in excess of the submission. . . . The disagreement was the only legal ground for bringing in a third man. If therefore they had agreed on an award it might have disproved the occasion and necessity for a third man; and this would be just as fatal to an award when made by too many as it would be if made by too few."²²⁵

(m) *Awards Of An Umpire*

Provisions of the statute. Section 8 expressly provides that "if there be more than one arbitrator, an award shall require the con-

²²³ *Weaver v. Powell*, 148 Pa. 372, 23 Atl. 1070 (1892); and see *Welty v. Zentmyer*, 4 Watts 75 (Pa. 1835).

²²⁴ 148 Pa. 372, 23 Atl. 1070 (1892).

²²⁵ *Quay v. Westcott*, 60 Pa. 163 (1869).

currence of a majority of the arbitrators, but unanimous concurrence shall not be necessary unless there be less than three arbitrators." It is noticeable that an "umpire" is not mentioned in this provision, although an "umpire" is mentioned in section 4 of the statute and although an "umpire" and an "additional arbitrator" are mentioned disjunctively in section 14a. If two arbitrators are appointed by the parties and they are to elect an "umpire" if they cannot agree, or they are to elect an "umpire" before hearing with nothing said about their disagreement, will the foregoing regulation of section 8 govern?

Cases at common law. Apparently at common law the umpire renders his own award. Participation by any of the original arbitrators has been held neither necessary nor fatal to his award; at least they need not join in his award where his office is not confined to umpiring merely those questions upon which the arbitrators disagree in the course of reaching and rendering their award.²²⁶

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

(a) *Provisions Of The Statute*

The statute provides a summary method of enforcement as a substitute for the common law method of bringing an action in court upon the award. The following procedural steps are prescribed: (1) Motion to the court having jurisdiction "for an order to confirm the award, upon five days' written notice served upon the adverse party or his attorney. These proceedings must be commenced within one year after the award is made. (2) If the order is granted, "judgment shall be entered in conformity therewith in the court wherein the order was granted." (3) Upon filing their order with the prothonotary for the entry of judgment the moving party is required by section 14 to file the following papers for record: (a) the agreement, the selection or appointment, if any, of an additional arbitrator or umpire, and each written extension of the time, if any, within which to make

²²⁶ See *Boyer v. Aurand*, 2 Watts 14 (Pa. 1833).

the award; (b) the testimony, if taken stenographically; (c) the award; (d) each notice, affidavit, or other paper, used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

Award effective as a judgment. When the foregoing judgment is entered it "shall have the same force and effect, in all respects as, and be subject to, all the provisions of law relating to a judgment in an action at law, and it may be enforced as such in accordance with existing law." (Section 15.)

Methods of execution. Section 15 expressly prescribes that the judgment shall be effective as a judgment in an action "at law."²²⁷ It remains for the supreme court to determine if it may not also be made effective as an equitable decree where the award requires such relief as courts of equity customarily grant in general equity practice. By section 12, upon granting an order confirming the award, "judgment shall be entered in conformity therewith." If the award requires equitable relief by way of execution, it is arguable that the statutory provision contemplates that such relief shall be given.

Substantially identical provisions appear in the recent arbitrations statutes of New York, New Jersey, Massachusetts, Oregon, Territory of Hawaii, California and in the United States Act.

(b) *Cases At Common Law*

Where an award is rendered for the payment of a sum of money it is enforceable by action. Apparently this is the only method of enforcement.²²⁸ It has been held, however, that a judgment entered upon an award pursuant to a power of attorney to confess judgment which was contained in the submission agreement was valid.²²⁹ If an arbitration bond or other express

²²⁷ Likewise, section 14(d) provides that "the arbitration shall be docketed in the prothonotary's office as if it were *an action at law* . . ." (Italics are the writer's.)

²²⁸ Richardson v. Cassidy, 3 Watts 320 (Pa. 1834); and see M'Khillip v. M'Khillip, 2 Serg. & R. 489 (Pa. 1816); Climenson v. Climenson, 163 Pa. 451, 30 Atl. 148 (1894).

²²⁹ Atwood v. Wanamaker, 26 Pa. Sup. 591 (1904).

obligation were entered into to abide the award, of course an action can be brought for breach of such undertaking.

If the award properly requires other relief than the payment of money—such relief as would be granted by a court of equity in other cases—recourse can be had to the courts having equity powers.²³⁰

Plaintiff's cause of action. The plaintiff must plead the submission agreement and the award.²³¹ Proof of each of these will be necessary unless the defendant admits their execution, but while “regularly proof of the submission should precede the award . . . the order in which the evidence shall be given . . . is within the discretion of the courts.”²³² When the question arises under the statute of limitations it is readily inferable that the action is not on the *original contract which created the claims* which were submitted to arbitration. But is this action on the *contract of submission* as well as the award so that a statutory period barring actions on “a contract” affects this action? In *Rank v. Hill*²³³ the court expressed itself as follows: “An award at common law seems to be considered rather as a judgment than as an agreement of the parties made through the authorized agency of others. Yet one would suppose the submission to be an engagement to abide by what the arbitrator should direct, and a promise to perform it. The remedy, however, in a case like this, is not on the submission but on the award.” The court held that the six year statute of limitations on actions on “a contract” did not apply. It is inferable from the facts of the case that the statutory period had also elapsed since

²³⁰ See *Miller v. Moore*, 7 Serg. & R. 164 (Pa. 1821); *Robinson v. Buckley*, 30 Pa. 384 (1858).

²³¹ In *Green & Coates Streets Ry. Co. v. Moore*, 64 Pa. 79, 90 (1870), Mr. Justice Sharswood remarks as follows: “In an action on an award to go back and set out the cause of action which was submitted to the arbitrators, would manifestly be improper: surplusage and immaterial, if not bad.” This statement appears, however, on reference to the case, to be manifest dictum, if it really refers to pleading the submission agreement. Consult *Hart v. Hamilton*, 109 Pa. 629 (1885); s. c. 125 Pa. 142, 17 Atl. 473 (1889).

²³² *Collins v. Freas*, 77 Pa. 493 (1875); and by this case a recital of the submission in the award is no proof of its execution where defendant pleads, as here, “no submission and no award.”

²³³ 2 Watts & S. 56 (Pa. 1841). Compare the statements made in *M'Manus v. McCulloch*, 6 Watts 357 (Pa. 1837).

the award was rendered. If this is true it is clear that the court must have relied upon the first point of its opinion which analogizes an award to a judgment, for otherwise the position that the action was *not* on the submission agreement scarcely answered the defense.²³⁴

The plaintiff has the burden of establishing that the arbitrators acted within the submission and according to rules of law *Pleading an award to bar an action*. Apparently a defendant who governing arbitral hearings when any such matter can be and is put in issue by the pleadings of the defendant.²³⁵ seeks to rely upon an award to defeat an action on any cause of action must plead the submission agreement and the award. If these pleadings do not show that the plaintiff's cause of action is embraced within the submission and award his pleadings are demurrable.²³⁶ It is inferred that the defendant's procedural position in such case is, in general, similar to that of the plaintiff in an action to enforce an award.²³⁷

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

(a) *Provisions Of The Statute*

Summary procedure to vacate an award is provided in sections 10, 11, 12, 13, and 14 as follows: Motion to vacate made to the proper court with notice thereof filed in the prothonotary's office for service upon the adverse party or his attorney according to the law prescribing service of notice of motion in an action. Such proceeding must be commenced within three months after the award is filed or delivered.

The same procedure is prescribed when it is sought to have

²³⁴ See also Sharswood, *J.*, in *Green & Coates Streets Ry. Co. v. Moore*, *supra* note 231, stating that an action on a money award is not an action "upon any lending or contract without specialty," but holding that an action on a sole contract with price to be fixed by appraisers, and which had been so fixed, was different because it was a *mere appraisement* and not an *award*.

²³⁵ See *Monogahela Navig. Co. v. Fenlon*, 4 Watts & S. 205 (Pa. 1842); *Burtolett v. Dixon*, 73 Pa. 129 (1873).

²³⁶ *Young v. Shook*, 4 Rawle 299 (Pa. 1833).

²³⁷ See *Gratz v. Gratz*, 4 Rawle 411 (Pa. 1834).

an award modified or corrected. In such case, however, the moving party must also be prepared to file with the prothonotary the same file of papers as is required in case of proceedings to confirm an award.

In case the motion to vacate is granted the court may, in its discretion, direct a rehearing before the arbitrators provided any time limit in the arbitration agreement has not expired.

If a motion to modify or correct an award is granted the court may re-submit the case to the arbitrators or render judgment with the modifications or corrections. If such a judgment is entered it "shall have the same force and effect, in all respects, and be subject to, all the provisions of law relating to a judgment in an action at law, and it may be enforced as such in accordance with existing law." (Section 14.)

Causes to vacate an award are set forth in section 10 as follows: (a) award procured by "corruption, fraud or undue means"; (b) "where there was evident partiality or corruption" of the arbitrators, or where they 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 any other misbehavior by which the rights of any party have been prejudiced"; (c) where the arbitrators "exceeded their powers or so imperfectly executed them that a final and definite award was not made."

Causes to modify or correct an award are specified in Section 11, as follows: (a) where there is "evident material miscalculation of figures, or evident material mistake in the description of any person or thing, or property referred to in the award"; (b) where the arbitrators "have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matters submitted"; (c) where "the award is imperfect in matter of form not affecting the merits of the controversy"; (d) "where the award is against the law, and is such that had it been a verdict of the jury the court would have entered a different or other judgment notwithstanding the verdict."

Substantially the same provisions are made in the recent arbitration statutes of New York, New Jersey, Massachusetts, Ter-

ritory of Hawaii, California, Oregon and in the United States Act.

(b) *Cases At Common Law*

Few reported cases deal with a direct attack by a bill in equity to set aside an award. Almost all of the cases have concerned the "conclusiveness" of an award when it has been challenged by the defendant in an action brought on the award to enforce it, or where a plaintiff has sought to maintain an action on the original cause in disregard of an award rendered thereon.

In case the matter of complaint goes to the jurisdiction of the arbitrators under the submission it has been held that a bill in equity will not lie to set aside an award because the plaintiff has an adequate remedy at law by way of legal defense. Thus, where the arbitrators were alleged to have proceeded without notice to the plaintiff or opportunity to be heard his bill to set aside the award was dismissed because he had adequate legal defense to any action to enforce it.²³⁸ Where, on the other hand, partiality of the arbitrators, fraud and collusion between arbitrator and party, or mistake by the arbitrator is involved, a bill in equity to set aside the award is well brought for the award, in such cases, is "vitiating in law *and* equity."²³⁹

Conclusiveness of awards. There are many comprehensive generalizations in the cases concerning the "conclusiveness" of awards which serve as warnings that courts will not readily review the proceedings or the conduct of the arbitrators by any procedure. In the recent case of *March v. Lukens*²⁴⁰ the supreme court remarks as follows: "They (the arbitrators) were constituted by the parties the ultimate judges of the competency of the witnesses and of the admissibility, weight and relevancy of the evidence; they were the tribunal to which the parties sub-

²³⁸ North Braddock Borough v. Corey, 205 Pa. 35, 54 Atl. 486 (1903).

²³⁹ Chambers v. McKee & Bros., 185 Pa. 105, 39 Atl. 822 (1898) (mistake). Concerning the practice in Pennsylvania prior to the establishment of courts of equity see: Wikoff v. Coxe, 1 Yeates 353 (Pa. 1794); Exrs. of Fisher v. Paschall's Heirs, 3 Yeats 564 (Pa. 1803); Taylor v. Coyrell, 12 Serg. & R. 243 (Pa. 1824).

²⁴⁰ 214 Pa. 206, 63 Atl. 427 (1906); and see Reynolds v. Caldwell, 51 Pa. 298 (1865).

mitted for final judgment the law and the facts of the case, and plain mistake of law or fact not having been made to appear their award must in this collateral proceeding [action on original cause, award pleaded in bar] be regarded as final and conclusive." In the notable case of *Hostetter v. City of Pittsburgh*²⁴¹ the court made the following statements: "The award, like a judgment, may undoubtedly be impeached for fraud, which avoids all judicial acts. The frauds, however, must be actual and intentional, and not constructive, such as flows from an erroneous or unjust judgment. Partiality and some improper conduct of the arbitrator in making the award will not impeach it unless the party benefited thereby be implicated in that misconduct." In *McCally v. Montour R. R. Co.*,²⁴² the superior court generalized as follows: "The decision is open to impeachment for fraud, but such fraud must be actual and voluntary and is not implied from an erroneous or unjust decision. Partiality of the arbitrator in making the award will not impeach it unless the party benefited be implicated. Nor does a mistake as to conclusions drawn from the evidence nor the erroneous application of the law to the facts avoid the decision."

Partiality, Fraud or Misconduct of the Arbitrators. These general causes to set aside an award are operative only if the adverse party is in collusion with the arbitrators in such conduct; the cooperation of the adverse party is a necessary part of the cause. The court first explained its position in the case of *Reynolds v. Caldwell*,²⁴³ decided in 1865, as follows: "If the engineer [arbitrator in a building contract] undertook to act as umpire and fraudulently injured the plaintiff, he had a remedy by action against the guilty agent, but not by suit on the contract. He cannot punish the defendant for a fault of which they are innocent."

Mistakes of the arbitrators. It is no cause to contest an award that the court or contesting party or some third person would

²⁴¹ 107 Pa. 419 (1884).

²⁴² 33 Pa. Sup. 51 (1907).

²⁴³ 51 Pa. 298 (1865). *Accord*: *Speer v. Bidwell*, 44 Pa. 23 (1862); *Hostetter v. Pittsburgh*, 107 Pa. 419 (1884); and see *Frederic v. Margworth*, 200 Pa. 156, 49 Atl. 881 (1901).

have found the facts differently from what the arbitrators found them. Likewise it is immaterial that the arbitrators' decision on the facts is different from what the court would have decided because of known rules of law. The prophesy as to what would have been the conduct of some other fact-finding body or as to what would have been the decision of some court according to law cannot be invoked to measure the correctness and validity of an arbitrator's award. Admitting the truth of the prophesy and that the results thereunder would be different that difference is not a *mistake* of fact or of law such as is ground to set aside an award in law or equity.²⁴⁴

If, on the other hand, it is made to appear that one or more of the arbitrators *assumed* certain facts to be different from what they were or *assumed* certain rules of law to be different from what they were, and relied on those assumptions as being correct and made his or their decision or some part thereof according to such measure the award can be disregarded or set aside in law and in equity. This is more than "mere" mistake of law or fact.²⁴⁵

Pleading and Proof of Causes to Set Aside Award. It is settled that the pleadings of fraud, misconduct or mistake in general terms without specification of the facts relied on to warrant those conclusions or any one of them are fatally defective.²⁴⁶ Testimonial evidence must likewise go directly to the fact-details of the behavior of the parties concerned.²⁴⁷ That the arbitrators are competent to testify to such details or other causes to set aside an award seems now to be settled.²⁴⁸ Their unsworn de-

²⁴⁴ *Romans v. Robertson*, 3 Yeates 584 (Pa. 1803); *Ellmaker v. Buckley*, 16 Serg. & R. 72 (Pa. 1827); *Hackestein v. Kaufman*, 173 Pa. 199, 33 Atl. 1028 (1896); *Pittsburgh Constr. Co. v. Ry. Co.*, 227 Pa. 90, 75 Atl. 1029 (1910).

²⁴⁵ *Chambers v. McKee & Bros.*, 185 Pa. 105, 39 Atl. 822 (1898); and see *Speer v. Bidwell*, 44 Pa. 23 (1862).

²⁴⁶ *Hostetter v. Pittsburgh*, 107 Pa. 419 (1884); *Kann v. Bennett*, 234 Pa. 12, 82 Atl. 111 (1912); *M'Closkey v. Marks*, 263 Pa. 441, 106 Atl. 729 (1919); and see *Evens v. Gunning*, 48 Pa. Sup. 192 (1911); *McNally v. R. R. Co.*, 33 Pa. Sup. 51 (1907); *Frederic v. Margrath*, 200 Pa. 156, 49 Atl. 881 (1901).

²⁴⁷ *Taylor v. Coyrell*, 12 Serg. & R. 243 (Pa. 1824); *Romans v. Robertson*, 3 Yeates 584 (Pa. 1803); *Kann v. Bennett*, 234 Pa. 12, 82 Atl. 111 (1912).

²⁴⁸ *Roop v. Brubacker*, 1 Rawle 304 (Pa. 1829); *Graham v. Graham*, 9 Pa. 254 (1848); and see *Chambers v. McKee & Bros.*, 185 Pa. 105, 39 Atl. 822 (1898). Compare *Ellmaker v. Buckley*, 16 Serg. & R. 72 (Pa. 1827); but see *Perit v. Cohen*, 4 Whart. 81 (Pa. 1838).

larations, however, are apparently not admissible as admissions.²⁴⁹ It is also settled that the award will be reviewed by the court and the conduct of the proceedings measured only on the evidence which was presented before the arbitrators. "You cannot judge of mistake by what was not before the referees, but might possibly have been proved by witnesses not examined; this must be done from the proof and facts that were before them."²⁵⁰

Correction of Awards. The court has indicated that it would correct manifest miscalculation which appears on the face of an award—this is an action for money where an award was pleaded in bar thereto.²⁵¹

Disposition of case when award is vacated or corrected. The foregoing cases have not determined whether the cause will be referred back to the arbitrators when an award is set aside. Judgments therein have been for or against the complaining party.

APPELLATE REVIEW

Provisions Of The Statute.

Section 15 provides that "appeal may be taken from an order confirming, modifying, correcting, or vacating an award, or from a judgment entered upon an award, in accordance with the existing law in respect to appeals to the superior and supreme courts."

Cases At Common Law.

Appeals lie from the judgments of the lower courts to the higher courts as in other cases.

EXPENSES, FEES AND COSTS

Provisions Of The Statute.

The statute makes no provision.

²⁴⁹ *Brower v. Osterhout*, 7 Watts & S. 344 (Pa. 1844). Consult *Graham v. Graham*, 9 Pa. 254 (1848).

²⁵⁰ *Neal v. Shields*, 2 Penrose & Watts 300 (Pa. 1830); *English v. School Dist.*, 165 Pa. 21, 30 Atl. 506 (1894), and see *Ellmaker v. Buckley*, 16 Serg. & R. 72 (Pa. 1827).

²⁵¹ See *Cornogg v. Cornogg's Exrs.*, 1 Yeates 84 (Pa. 1791). *Executors of Fisher v. Paschells Heirs*, 3 Yeates 564 (Pa. 1803). These cases were decided before a court of equity was established in the state.

Cases At Common Law.

If the amount of the costs is stated by the arbitrators they have power to award same equally or to either party.²⁵² Allowance by the arbitrators of the rental of the room for the hearing can be sustained on "ancient practice."²⁵³

²⁵² *Young v. Shook*, 4 Rawle 299 (Pa. 1833); *Hewitt v. Furman*, 16 Serg. & R. 135 (Pa. 1827). Consult *Buckley v. Ellmaker*, 13 Serg. & R. 71 (Pa. 1825).

²⁵³ *Butcher v. Scott*, 1 Clark 311 (C. P., Pa. 1843).