1985

C and A Development Co., an Arizona corporation and C and A Enterprises, an Arizona Partnership v. Worthington and Kimball Construction Company, a Utah general partnership, Gary Worthington and Edwin N. Kimball, general partners and Otto Buehner and Co. : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

20676

C & A DEVELOPMENT CO., an Arizona corporation and C & A ENTERPRISES, an Arizona partnership,	)	NO. 20676
Appellants,	)	
vs.	)	
WORTHINGTON & KIMBALL CONSTRUCTION COMPANY, a Utah general partnership GARY WORTHINGTON and EDWIN N. KIMBALL, general partners,	)	
Plaintiffs and Appellees,	)	
and	)	
OTTO BUEHNER & CO.,	)	
Defendant and Appellee.	)	

APPELLANT'S BRIEF

Appeal from the Judgment of the 2nd
District Court for Weber County
The Honorable Ronald O. Hyde

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Plaintiffs and Appellees,	)	
and	)	
OTTO BUEHNER & CO.,	)	
Defendant and Appellee.	)	

STATEMENT OF ISSUES PRESENTED ON APPEAL

This is an action arising out of construction of a manufacturing plant. Plaintiffs seek confirmation of an arbitration award and enforcement of a mechanics lien. Defendant, Otto Buehner & Company, seeks enforcement of its mechanics lien and damages in contract against Plaintiffs. Defendant, Joseph Smith Plumbing, seeks damages in contract against Plaintiffs. Defendants, C & A Enterprises and C & A Development Co. seek vacation of the arbitration award and Defendant, C & A Enterprises, seeks damages from Defendant, Otto Buehner & Company, for its negligence.

DISPOSITION IN LOWER COURT

The arbitration award was confirmed on Plaintiffs' Motion. The District Court held that the cross-claim of C & A Enterprises against Otto Buehner & Company was barred by collateral estoppel. The mechanics lien of Otto Buehner & Company was granted but the lien of Plaintiffs was denied. Joseph Smith Plumbing was awarded damages in contract against Plaintiffs.

RELIEF SOUGHT ON APPEAL

Appellants herein seek reversal of the judgment and remand to the District Court with instructions to vacate the arbitration award and to permit Appellant, C & A Enterprises, to pursue its cross-claim against Otto Buehner & Company.

STATEMENT OF FACTS

On January 12, 1984, the District Court for Weber County confirmed an arbitration award in favor of Appellee, Worthington & Kimball Construction Co. Record at pp. 160-161. Said Appellee had moved to confirm the award (Record at 41-43) within the time provided by statute. The motion had been opposed by Appellants who also moved the court to vacate the award. Record at 69-70. Trial was held with respect to additional claims of the parties which were not concluded by confirmation of the arbitration award. The trial resulted in the Corrected Findings of Fact and Conclusions of Law (Record at 1116-1137) and a Corrected Order, Judgment and Decree of Foreclosure (Record at 1108-1115) on April 18, 1985.

The arbitration award provided for "interest" to Appellee, Worthington & Kimball Construction Co. (referred to as

the contractor in the award) at fifteen percent (15%) from December 1, 1982. Record at 48-49, paragraph 7. The District Court refused to enforce the fifteen percent (15%) "interest" award made by the arbitrators because it found that that portion of the award, while denominated by the arbitrators as "interest", was apparently intended as a penalty. Record at 722 and 1130, paragraph 33. The District Court therefore granted Appellee, Worthington & Kimball Construction Co., interest at the rate of ten percent (10%) per annum on their Judgment against Appellants. Record at 1109-1110, paragraph 1.

The arbitrators had specified in the award that the fifteen percent (15%) "interest" was in part a measure of damages to Worthington & Kimball Construction Co. for the unreasonable withholding of the balance of the contract price. Record at 48-49, paragraph 7. The District Court's determination that the "interest" was in fact a penalty was based on the language of the award itself. Record at 1227, lines 8-9.

By its terms, the arbitration award was not payable by Appellants (referred to as the owner in the award) until Appellee, Worthington & Kimball Construction Co., filed with the American Arbitration Association lien waivers from the contractor and all its subcontractors. Record at 49, paragraph 9. The contract between Worthington & Kimball Construction Co. and C & A Development Co. ("Contract") specifies with respect to the date payments are due thereunder:

> 11.7 No payment shall be made under Article 11 unless Contractor shall have attached to the

> Application for Payment Lien Waivers, from Contractor and Sub-Contractors, as the Owner and Interim Lender shall require.

Record at 60. It further indicates with respect to the final payment:

> 11.5 Before issuance of Final Payment, the Contractor shall submit satisfactory evidence that all payrolls, materials bills and other indebtedness connected with the Project have been paid or otherwise satisfied.

Record at 60.

Under the Contract, interest was payable on payments due but unpaid "provided Contractor shall have timely furnished Owner all documentation required for such payment." Record at 60, paragraph 11.1.4. The arbitrators had indicated to the parties that they believed that any award to Appellee, Worthington & Kimball Construction Co., should be conditioned upon delivery of lien waivers or release. Record at 97, paragraph 8. The District Court did not find nor does the record reflect that lien waivers were ever provided.

In a letter specifying issues the arbitrators wished the parties to address in their post-hearing briefs, the arbitrators indicated they were considering imposing a penalty. Among the questions they asked the parties to address were:

> 4.a. Did C & A withhold an unreasonable amount on contractor's request for final payment?
>
> b. If so, what penalty, if any, should be assessed against C & A?

Record at 96.

With respect to arbitration, the Contract provides:

> 16.1 All claims, disputes and other matters in questions arising out of or relating to this agreement or the breach thereof, except with respect to the Architects/Engineers decision on matters relating to an artistic effect, and except for claims which have been waived by the making or acceptance of Final Payment shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining unless the parties mutually agree otherwise. . . .
>
> . . .
>
> 16.4 Unless otherwise agreed in writing, the Contractor shall carry on the Work and maintain the Contract Time Schedule during any arbitration proceedings and the Owner shall continue to make payments in accordance with this Agreement

Record at 65-66.

The Construction Industry Arbitration Rules referred to in paragraph 16.1 of the Contract provide with respect to the scope of an award made pursuant thereto:

> The arbitrator may grant any remedy or relief which is just and equitable and within the terms of the agreement of the parties. . . .

Record at 82, Rule 43.

The arbitrators stated in the award that the arbitration was "to resolve disputes between the parties arising out of the performance and interruption of a contract . . . for the design and construction of a factory building . . . . " Record at 44. The arbitrators awarded Appellee, Worthington & Kimball Construction Co., "the unpaid balance of the contract price as adjusted by change orders . . . subject to such deductions therefrom as the arbitrators find to be warranted under the terms of the contract and the evidence received with respect to the claims of the owner." Record at

47, paragraph 4. Among the reasons stated for denial of other claims of the owner are:

> a. Not the responsibility of the contractor;
>
> . . .
>
> c. Not authorized by or barred by the terms of the contract between the parties, including the plans and specifications;
>
> . . .
>
> e. Not included within the scope of work to be performed by the contractor;. . . .

Record at 48, paragraph 6. Among the reasons given by the Arbitrators for denial of other claims of the contractor are:

> a. Not the responsibility of the owner;
>
> . . .
>
> c. Not authorized by the contract or barred by the terms of the contract, including the plans and specifications;
>
> d. Already covered in change orders executed by owner and contractor; . . . .

Record at 49, paragraph 8.

With the exception of the reference to a penalty, all of the issues which the arbitrators requested the parties to consider in the post-hearing briefs dealt with claims grounded in the contract between the parties. Record at 95-98.

Seventeen days of hearings were held in connection with the arbitration. Record at 44. At the close of the hearings, counsel for Appellants and counsel for the Appellee, Worthington & Kimball Construction Co., both indicated that they had no further witnesses. Record at 131, line 18 through 132, line 8. The

arbitrators and the parties had previously agreed on dates for submission of briefs and reply briefs, (Record at 130) and agreed that the arbitrators would meet thereafter and declare the hearings closed, (Record at 132, line 14-133, line 1). The hearings were closed by the arbitrators September 2, 1983 and an award was to be made on or before October 2, 1983. Record at 83-84.

On August 30, 1983, after the evidence taking portion of the hearing had concluded and the time for filing briefs had passed, Appellee, Worthington & Kimball Construction Co., moved to reopen the hearing. Record at 85-88. Appellants had argued in their arbitration reply brief that no claim had been established against two of the respondents in the arbitration, C & A Enterprises and C & A Companies, Inc. Record at 85, 89-91.

In its motion to reopen the hearings, Appellee, Worthington & Kimball Construction Co., claimed assignment of the Contract by C & A Development Co. to C & A Enterprises, but did not cite testimony in the arbitration of any assignment or consent thereto nor did it refer the arbitrators to an assignment of the contract or a consent thereto which had been made an exhibit to the arbitration. Record at 85, numbered paragraph 1 and 2. Appellee, Worthington & Kimball Construction Co., by its motion, supplemented its briefs by proposing theories upon which the joint and several liability of all the arbitration respondents could be based. Record at 85-88.

With respect to presentation of evidence, the Construction Industry Arbitration Rules specified by the Contract provide in part:

> All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where any of the parties is absent in default or has waived his or her right to be present.

Record at 81, Rule 31.

There is no evidence in the record of any default by Appellants or either of them at the time the motion to reopen the hearings was submitted nor of any waiver of the right to be present at such time.

The arbitration hearings were reopened (Record at 92) over the objection of Appellants, (Record at 89-91). An additional hearing was noticed for the purpose of taking additional evidence regarding the claims of Appellee, Worthington & Kimball Construction Co., Record at 93. Appellants objected to the hearing and to any proceedings which permitted Appellee, Worthington & Kimball Construction Co., to further support its claims without also permitting Appellants to present additional evidence in support of their claims. Record at 94. When the hearing was held despite their objection, Appellants stipulated that the Contract had been assigned by Appellants, C & A Development Co., to Appellant, C & A Enterprises. Record at 45.

Appellee asserted in its motion to reopen the hearings that reopening the hearings should not delay making the award. Record at 88. No award was made as of October 2, 1983, the date thirty days from close of the hearings set for making the award.

Record at 83-84. The award was not made until November 7, 1983. Record at 50.

The Contract does not fix a date by which any arbitration award must be made thereunder. Record at 51-66. It does provide that the Construction Industry Arbitration Rules of the American Arbitration Association apply unless the parties otherwise agree. Record at 65-66, paragraph 16.1. The record does not reflect any other agreement by the parties regarding the time for making an arbitration award.

The Construction Industry Arbitration Rules provide with respect to time for making an award:

> The award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties, or specified by law, not later than thirty days from the date of closing the hearings, or if oral hearings have been waved, from the date of transmitting the final statements and proofs to the arbitrator.

Record at 82, Rule 41.

There is no evidence in the record of any agreement by the parties for extension of the time for making the award. The Construction Industry Arbitration rules provide:

> The hearings may be reopened by the arbitrator at will, or upon application of a party at any time before the award is made. If the reopening of the hearing would prevent the making of the award within the specific time agreed upon by the parties in the contract out of which the controversy has arisen, the matter may not be reopened unless the parties agree upon the extension of such time limit. When no specific date is fixed in the contract, the arbitrator may reopen the hearings, and the arbitrator shall have thirty days from the closing of the reopened hearing within which to make an award.

The District Court ruled that Appellant, C & A Enterprises were barred by collateral estoppel from maintaining its cross-claim (Record at 307-315) against Otto Buehner & Company for negligence. Record at 44. Otto Buehner & Company was not a party to the contract or the arbitration. Record at 711-713. The contract provides:

> 4.3 No contractual relationship shall exist between the Owner and any Subcontractor and the Contractor shall be responsible for the management of the Subcontractors in the performance of their Work.

Record at 55.

The confirmation of the arbitration award (Record at 160-161) and the Order and Judgment signed by the District Court in connection therewith (Record at 166-167) did not adjudicate all the claims, rights or liabilities of all the parties to the action. Retrial Order, Record at 726 et seq. The District Court did not make a determination that there was no just reason for delay or direct entry of judgment confirm in the award. Record at 166-167.

SUMMARY OF ARGUMENT

I. The District Court found that a portion of the arbitration award was a penalty and refused to enforce that portion of the award. The arbitration agreement between the parties did not give the arbitrators the authority to award punitive damages. Applicable law limits contractual damages to compensatory damages. In exacting a penalty which was noncompensatory, the arbitrators

exceeded their power and the award should have been vacated rather than confirmed in part.

II. The award was not made within the time set by agreement of the parties or by statute, whichever is applicable. The arbitrators' reopening of the hearing which prevented making the award in the required time was improper as the parties had not agreed to extend the time limit. The powers of the arbitrators to make an award terminated when the time limit passed. In making the award after their powers terminated, the arbitrators exceeded their powers and the award should have been vacated. Appellants did not waive their right to rely upon the time limit for making the award but objected to reopening of the hearings and additional proceedings.

III. The cross-claims of Appellant, C & A Enterprises, against Otto Buehner & Company were not barred by collateral estoppel. There was no final judgment on the merits with respect to such claims nor was there an actual determination of the issues. The only judgment was the "Order and Judgment" confirming the arbitration award in this case. The "Order and Judgment" was non-final as it did not dispose of all the issues or parties in this case and the District Court did not direct entry of the "Order and Judgment". Confirmation of the arbitration award did not constitute a determination of the issues. The arbitrators only determined contractual issues between the parties to the contract. They did not make any determination regarding the common law issues which were the subject of the cross-claim.

STATEMENT OF POINTS

I.

The District Court erred in refusing to vacate the arbitration award although it found that the award included an improper penalty which the court would not enforce.

II.

The District Court erred in failing to vacate the arbitration award which was not made within the time required and with respect to which the arbitrators improperly reopened the hearing.

III.

The District Court erred in ruling that the claims of Appellant, C & A Enterprises, against Appellee, Otto Buehner & Company are barred by collateral estoppel.

ARGUMENT

POINT I. The District Court erred in refusing to vacate the award although it found that the award included an improper penalty which the court would not enforce.

This court has recognized the public policy in favor of arbitration. Lindon City v. Engineers Construction Co., 636 P.2d 1070 (Utah 1981). The Court has noted that arbitration is a practical and inexpensive means of settling disputes and easing court congestion. Robinson and Wells, P.C. v. Warren, 669 P.2d 844 (Utah 1983). However, the legislature has enacted statutes which govern the arbitrability of claims, the procedure to be followed and the court's powers and responsibilities with respect thereto. Utah Code Annotated 1953, Section 78-31-1 through 78-31-22. This court has

recognized that judicial authority with respect to arbitration is limited by statute. Robinson & Wells, P.C. v. Warren, supra at p. 846. In fact, the court has stated that judicial review of arbitration awards "should be strictly limited to statutory grounds and procedures for review." Id. Clearly, the function of the court is to consider the award and the arbitration in accordance with the statutes.

When the District Court found that the arbitration award included an improper penalty, it should have vacated the award pursuant to Utah Code Annotated 1953, Section 78-31-16 rather than confirming the award but refusing to grant a judgment which enforced the offending provision.

The District Court found that the award on its face included a penalty. Record at 1227, lines 8-9. The award which by its terms was not yet payable included "interest" as a measure of damages for unreasonable withholding of the balance of contract price. Punitive damages are not appropriate damages for contract claims. Highland Construction Company v. Union Pacific Railroad Company, 683 P.2d 1040 (Utah 1984), Jorgensen v. John Clay and Company, 660 P.2d 229 (Utah 1983).

As indicated in the award, the arbitrators perceived their responsibility was to resolve disputes arising out of the performance and interpretation of the contract. Except for the "interest" found by the District Court to be a penalty, the award clearly evaluates the claims and defenses of the parties based upon the Contract. The amount of the award is the amount due under the

Contract as adjusted by change orders and reduced by the contractual claims of Appellants. Many of the other claims of Appellants and of the Appellee, Worthington & Kimball Construction Co., were disposed of by the arbitrators by reference to the terms of the Contract between them. Clearly, the arbitrable claims were those sounding in contract.

Even if the court looked beyond the four corners of the arbitration award, it would have properly concluded that only contractual damages were to be included in the award. The rules agreed upon by the contracting parties provided that the scope of award was limited to remedies and relief "within the terms of the agreement of the parties". Record at 82, Rule 43. There is no provision in the Contract for assessment of any penalty from a party.

There was sufficient evidence beyond the face of the award to support the District Court's finding that the "interest" which the arbitrators awarded was not intended to compensate the Contractor but was intended as a penalty. No interest was payable by the terms of the Contract until all documentation required for payment was furnished to the Owner. Among the documentation required was lien waivers from the contractor and subcontractors. Payments were not due until these documents had been provided. The final payment was not due until satisfactory evidence that all payrolls, material bills and other indebtedness connected with the project had been paid or otherwise satisfied. The arbitrators recognized the contractual requirement of supplying these documents prior to payment

and provided in the award that the award was not payable and would not be until lien waivers were provided. There is no evidence in the record that the required lien waivers were ever obtained or provided, nor that other evidence that payrolls, materials bills and other indebtedness connected with the project had been paid or satisfied was supplied. The arbitrators had indicated to the parties that they felt that any award to Appellee, Worthington & Kimball Construction Co. should be conditioned upon delivery of lien waivers or release of liens.

Since lien waivers had not been provided, the final payment was not due; no interest was accruing thereon under the Contract. Thus, the withholding of the final payment was not wrongful or malicious and would not have supported a claim grounded in tort for which punitive or exemplary damages could be awarded had the claim been brought in a judicial forum rather than in arbitration. Jorgensen v. John Clay and Company, 660 P.2d 229 (Utah 1983).

Since the "interest" awarded was not intended as compensatory damages but was a measure of damages for "unreasonable withholding", it was punitive. Behrens v. Raleigh Hills Hospital, Inc., 675 P.2d 1179, 1186 (Utah 1983). However, in a private proceeding such as an arbitration, punitive damages do not serve societal interests. Arbitrators who are called upon to resolve contractual disputes and make awards within the terms of the parties' agreement derive their authority from the agreement and statute and, absent agreement by the parties or statutory authority, have no power to award punitive damages. One court has even held that an arbitration

award of punitive damages violates public policy and is improper even if the parties provided in their arbitration agreement that punitive damages may be awarded. Garrity v. Lyle Stuart, Inc., 40 N.Y.2d 354, 353 N.E.2d 793, 386 N.Y.S.2d 831 (1976).

Having determined that the "interest" was an improper measure of damages and could not be enforced, the District Court should have vacated the award. The District Court had found that the arbitrators had exceeded their authority. Such a finding requires that the award be vacated when a party to the arbitration has properly so moved. Utah Code Annotated 1953, Section 78-31-16.

The District Court could not modify the award pursuant to Utah Code Annotated 1953, Section 78-31-17. The District Court is empowered to modify an award only upon application of a party. No such application had been made. The statute does not grant the District Court authority to modify the award on its own motion. Without arrogating to itself powers which the legislature did not grant, the District Court could not modify the award.

Even if a party had made application for modification or the District Court had authority to modify the award on its own motion, a modification excising the improper damages would not have been appropriate. The statute provides that "the order must modify and correct the award so as to effect the intent thereof." Utah Code Annotated 1953, Section 78-31-17. The District Court had already determined that the intent of the arbitrators in awarding a penalty was improper. It could not make an order giving effect to

that intent. The award could not be modified in accordance with the statute which strictly limits the District Court's authority.

The District Court was required to either confirm or vacate the award. Because it found that the award included an improper measure of damages which the court could not enforce, the arbitration fell within the scope of Utah Code Annotated 1953, Section 78-31-16. The arbitrators had exceeded their authority. The statute required the District Court to vacate the award. Under the statute, the Court had no authority to confirm the balance of the award.

POINT II. The District Court erred in failing to vacate the arbitration award which was not made within the time required and with respect to which the arbitrators improperly reopened the hearing.

The award was made after the time set forth in the letter of the American Arbitration Association for making the award had lapsed. There was no agreement of the parties to extend that time. There was no waiver by Appellants of the requirement that an award be made within the time specified. The arbitrators derive their authority from the parties' agreement and statute and have no power to make an award after the time provided in the agreement or statute for making the award has lapsed. General Metals Corp. v. Precision Lodge 1600, 183 Cal. App.2d 586, 6 Cal. Rtpr. 910 (1960).

Appellee argued below that the time was extended by reopening of the hearings. Appellee asserted that no specific date for making the award was fixed in the Contract and consequently, the

third sentence of Rule 36 of the Construction Industry Arbitration Rules (Record at 81) extends the time for making the award. The language of the third sentence of Rule 36 indicates that it is not intended to apply to agreements to arbitrate future disputes. With few exceptions, no specific date is set forth in any contract relating to the submission to arbitration of potential future disputes. The parties to a contract have no way of knowing when a dispute will arise, when arbitration would be demanded, or how long a proceeding to resolve an unknown dispute could be expected to take. In the absence of such foreknowledge, attempting to fix a specific date by which an award must be made is meaningless. However, the Construction Industry Arbitration Rules are designed to cover agreements to submit existing disputes to arbitration as well as agreements relating to future disputes. The third sentence of Rule 36 is designed to control with respect to agreements to submit existing disputes to arbitration. The parties can, if they choose, agree on a specific date by which the award must be made with respect to a known, existing dispute.

With respect to agreements to submit future disputes, the second sentence of Rule 36 controls. That sentence provides:

> If the reopening of the hearing would prevent the making of the award within the specific time agreed upon by the parties in the contract out of which the controversy has arisen, the matter may not be reopened, unless the parties agree upon the extension of such time limit.

It is clear that either a time for the award was agreed upon by the parties in the contract or they failed to set a time. It is also clear that, there was no agreement to extend the time.

If the parties did agree upon a time, that time was thirty days from the close of the hearings as indicated by Rule 41 of the Construction Industry Arbitration Rules (Record at 82) which the parties agreed would apply (Record at 65-66, paragraph 16.1) and by the letter of the American Arbitration Association which stated that an ward would be due within thirty days of the close of the hearings (Record at 83-84).

No award was made within that time as a result of the reopening the hearing. No extension of the time was agreed upon by the parties. Therefore, reopening the hearings was improper. The time for making an award having lapsed, the arbitrators had no authority to make the award. The District Court should have vacated the award.

If the parties failed in their agreement to set a time within which the award must be made, the Utah Statutes set a time limit. Utah Code Annotated 1953, Section 78-31-8 provides:

> Award-Time for Making.- If the time within which the award shall be made is not fixed in the arbitration agreement, the award must be made within sixty (60) days from the time of the appointment of the arbitrators, and an award made after the lapse of sixty (60) days shall have no legal effect, unless the parties extend the time in which said award may be made, which extension, or any ratification, shall be in writing.

The date of appointment of the arbitrators does not appear in the record but that appointment certainly occurred before the first hearings were held on April 25, 1983, (Record at 44), one hundred ninety-six (196) days before the award was made. More than

sixty (60) days elapsed after the closing of the hearings on September 2, 1983 before the award was made.

If the parties did not set a time limit for making the award, by statute the award, made more than sixty days from appointment of the arbitrators, has no legal effect. It should have been vacated by the District Court.

Whether (1) the parties agreed upon a time for making the award and the rule applied or (2) the statute applied because they had failed to so agree, no award was made within the time required. No extension of time was agreed upon. The arbitrators had no power to make an award after the required time. They exceeded their power in making the award. The award has no legal effect and pursuant to Utah Code Annotated 1953, Section 78-31-16, it must be vacated.

The doctrine of waiver does not justify confirming an untimely award. There is no evidence in the record of any waiver by Appellants of their rights. They did not acquiesce to any proceedings after the time set forth in the letter of the American Arbitration Association for making the award. They objected to reopening the hearings, to submission of additional evidence and argument of new theories for recovery by Appellee, Worthington & Kimball Construction Co., after the taking of evidence had concluded and agreed upon briefs had been submitted, and objected to additional proceedings.

Both the statute regarding time for making the award and the rule regarding reopening of the hearing require an affirmative act by both parties to extend the time. Refusal or failure by

Appellants to make such an affirmative act does not constitute a waiver. Nor does it evidence an intent to waive. Rather, it evidences the unwillingness of Appellants to agree to extend the time.

The Connecticut Supreme Court, interpreting a statute similar to Utah Code Annotated 1953, Section 78-31-8, held that because written agreement is required to extend the time for making the award, waiver is precluded by the statute. Marsala v. Valve Corporation of America, 157 Conn. 362, 254 A.2d 469 (1969). There was in that case no waiver despite participation in and failure to object to proceedings after the time fixed by the statute had lapsed.

While public policy favors resolving disputes by arbitration, the arbitration must conform to the agreement of the parties. Lindon City v. Engineers Construction Co. 636 P.2d 1070 (Utah 1981). The Court cannot ignore the requirement of the statute or of the rule which the parties agreed would control, one of which must apply. Nor should the Court construe the statute or rule to require a party to take some action to avoid waiver of a time limit when both the statute and rule specify that the time limit applies unless there is an express agreement to the contrary.

The finding of a waiver would not do justice to the parties. Appellants were not responsible for the delay in making the award. They argued in their arbitration reply brief that Appellee, Worthington & Kimball Construction Co., had not established a claim against Appellant, C & A Enterprises and C & A

Companies, Inc., another respondent in the arbitration. It was not Appellants burden at any time during the arbitration proceedings to remind Appellee, Worthington & Kimball Construction Co., that it would be necessary to establish a case against each arbitration respondent which it desired to be bound by an award. Appellants did not raise a new issue by arguing the failure to establish a claim. The issue existed from the moment Appellee, Worthington & Kimball Construction Co., named those parties as respondents in the arbitration. Appellee, Worthington & Kimball Construction Co., in its motion to reopen the hearings, argued new theories for recovery and facts not then in evidence. All this occurred after it had concluded its case and stated it had no further witnesses and after the time agreed upon by the parties and directed by the arbitrators for all briefs to be filed had passed. If there was any waiver, Appellee, Worthington & Kimball Construction Co., waived its right to prove a case against Appellant, C & A Enterprises and C & A Companies, Inc. in the arbitration proceeding by waiting until the hearings were to close to prove its claims against such parties.

No award was made within the time established by statute or agreed upon rules, whichever applies. There was no agreement to extend the time for making the award as required under the statute or rules. Rather, Appellants objected to reopening of the hearings, and to additional proceedings which were held. There is no basis for finding that Appellants waived their rights to insist upon an award within the required time. Instead, if there was a waiver, it was Appellee, Worthington & Kimball Construction Co., that waived

its right to prove claims it omitted until after all evidence and briefs had been submitted. Any award made by the arbitrators was made after the time for making the award had passed. The arbitrators had no power after the time had lapsed and thus exceeded their powers. The District Court should have vacated the award.

POINT III. The District Court erred in ruling that the claims of Appellant, C & A Enterprises, against Appellee, Otto Buehner & Company, are barred by collateral estoppel.

This Court has discussed the doctrine of collateral estoppel in International Resources v. Dunfield, 599 P.2d 515 (Utah 1979). In that case, the Court stated that in order for collateral estoppel to apply, there must be (1) a final judgment on the merits and (2) an actual determination of the issues. Neither of the two requirements is met in this case.

The only judgment which existed upon which collateral estoppel could be based was the Order and Judgment which confirmed the arbitration award. However, that judgment issued in this same case was not a final judgment. Under Rule 54(b) of the Utah Rules of Civil Procedure, an order, however denominated, which adjudicates fewer than all the issues or the rights and liabilities if fewer than all the parties is not final unless the court makes a determination that there is no just reason for delay and directs entry of judgment. More than one claim for relief had been presented in this case. Multiple parties were involved. The judgment confirming the arbitration award did not adjudicate all the claims presented nor did it adjudicate the rights and liabilities of all the parties.

The claims remaining to be decided are described in the pretrial order.

While it might have done so under Rule 54(b) of the Utah Rules of Civil Procedure, the District Court did not determine that there was no just reason for delay or direct entry of judgment. As a result, the judgment was "subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties", Utah Rules of Civil Procedure, Rule 54(b). The order was in fact modified by the District Court as it refused to give effect in the Corrected Order, Judgment and Decree of Foreclosure to the fifteen percent (15%) "interest" provided in the arbitration award.

Since there was no final judgment, collateral estoppel could not bar Appellants' claims against Appellee, Otto Buehner & Co.

There was not an actual determination of the issues raised by the cross-claim of C & A Enterprises. The arbitration award is binding only to persons who are parties to the arbitration and only as to subject matter submitted to the arbitrators. Patrick J. Ruane, Inc. v. Parker, 185 Cal.App.2d 488, 8 Cal.Rptr. 379 (1960); Geo. V. Nolte & Co. v. Pieler Construction Co., 337 P.2d 710 (Wash. 1959). Hosek MFG-Overland Foundry Co. v. Teats, 110 P.2d 976 (Colo. 1941).

Appellee, Otto Buehner & Company, was not a party to the arbitration. It was not a party to the contract which was the subject of the arbitration. There was no agreement between

Appellant, C & A Enterprises, and Appellee, Otto Buehner & Co. to arbitrate claims existing between them. While public policy favors arbitration, the Court has recognized that a person cannot be compelled to arbitrate claims which he has not agreed to arbitrate. Utah Code Annotated 1953, Section 78-31-1; Lindon City v. Engineers Construction Co., supra. Similarly, arbitrators cannot make binding decisions regarding matters not submitted to them. Even if the award purported to resolve claims between Appellant, C & A Enterprises, and Appellee, Otto Buehner & Company, it would to that extent be ineffective.

The claims of C & A Enterprises against Otto Buehner & Company were claims based on negligence. The arbitrators only considered the contractual claims of the parties to the Contract. They did not consider common law claims for negligence arising out of the work performed by Appellee, Otto Buehner & Company, or its failure to exercise due care in connection therewith.

There was no final judgment which actually determined the claims of Appellant, C & A Enterprises, against Appellee, Otto Buehner & Company. The doctrine of collateral estoppel does not apply. The District Court erred in refusing to permit C & A Enterprises to prove such claims.

CONCLUSION

The arbitration award should have been vacated. The arbitrators exceeded their powers by including in the award a measure of damages which the District Court held to be improper and

which it refused to enforce. That the "interest" was not compensatory damages was evident from the face of the award and is supported by evidence beyond the award itself which indicates that actual interest was not payable under the contract and the arbitrators intent was to impose a penalty which was not within the parties' agreement and was not within the arbitrators' authority.

The arbitrators further exceed their power by making an award after the time for making an award had lapsed. Whether the time for making an award was set by agreement of the parties or by statute, the award was not timely made. Arbitrators only have power to the extent authority is granted by an agreement of the parties or by statute. After the time for making the award had lapsed, the arbitrators had no further power to make an award.

The District Court should have vacated the award. This court must reverse the judgment confirming the award and remand this case to the District Court with instructions to vacate the arbitration award.

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Collateral estoppel did not apply to the claims of Appellant, C & A Enterprises, against Appellee, Otto Buehner & Company. There was no final judgment which determined the issues with respect to such claims. Appellant, C & A Enterprises, was improperly barred from submitting evidence to prove such claims. The decision of the District Court that collateral estoppel applied must be reversed and the case remanded to permit Appellant, C & A Enterprises, to pursue its claims.

Respectfully submitted this ~~9th~~ 30th day of August, 1985.

Robert F. Bentley

CERTIFICATE OF MAILING

I, ROBERT F. BENTLEY, certify that I caused to be mailed two copies of the foregoing Brief to the following parties, this 30th day of August, 1985, postage prepaid, deposited in the United States Mail:

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[9] On appeal, GMAC asserts that Draper Bank's appeal was in bad faith, and asks for attorney's fees pursuant to U.C.A., 1953, § 78-27-56 (Supp.1983). That section allows a court to award attorney's fees to a "prevailing party" if an action or defense to the action was "without merit and not brought or asserted in good faith." Although Draper Bank's claims of error are without merit, it did not appeal in bad faith. *Cady v. Johnson*, Utah, 671 P.2d 149 (1983).

Affirmed. Costs to GMAC.

HALL, C.J., and OAKS, HOWE and DURHAM, JJ., concur.

Diana BEHRENS, individually and as Guardian ad Litem of Nathan Alan Behrens, Plaintiffs and Appellants,

v.

RALEIGH HILLS HOSPITAL, INC., Defendant and Respondent.

No. 18093.

Supreme Court of Utah.

Dec. 22, 1983.

Plaintiff brought wrongful death action against hospital seeking compensatory damages. After defendant's motion for new trial was granted, plaintiff moved to amend her complaint to include claim for punitive damages. The Third District Court, Salt Lake County, G. Hal Taylor, J., denied motion to amend complaint, and plaintiff appealed. The Supreme Court, Stewart, J., held that: (1) plaintiff's amendment to include punitive damages count was not barred by limitations; (2) plaintiff's motion to amend complaint to add punitive damages count did not refer to new or different acts of misconduct by defendant hospital but, rather, relied upon different legal characterization of the same conduct, and thus, was not outside scope of notice of intent to sue; and (3) wrongful death statute permits recovery of punitive damages in appropriate cases.

Reversed and remanded.

1. Pleading ⇐238(2)

Trial court may deny motion to amend for movant's failure to present written motion and proposed amended complaint. Rules Civ.Proc., Rule 7(b)(1).

2. Death ⇐55

Plaintiff's written motion to amend complaint to add punitive damages count filed prior to trial in wrongful death action, which included specific language to be added to complaint, was improperly denied. U.C.A.1953, 78-11-7.

3. Pleading ⇐250

Plaintiff's renewed motion to amend complaint to add punitive damages count filed after trial court granted defendant's motion for new trial was improperly denied, where plaintiff had previously filed written motion to add punitive damages count before trial which included specific language to be added, and where defendant did not object to plaintiff's failure to file a proposed complaint and in fact, knew precisely what issues were. U.C.A.1953, 78-11-7.

4. Pleading ⇐127

If plaintiff in wrongful death action were able to adduce necessary foundational evidence at trial, she could claim punitive damages without formal amendment to pleadings. Rules Civ.Proc., Rule 54(c)(1); U.C.A.1953, 78-11-7.

5. Limitation of Actions ⇐127(18)

Amendment of claim to include damages does not import into case new and different cause of action; thus, plaintiff's motion to amend complaint to add punitive damages count was not barred by statute of limitations in wrongful death action. U.C.A.1953, 78-11-7.

6. Limitation of Actions ⇐127(5)

Setting forth of an additional ground of negligence as cause of same injury is not new cause of action.

7. Physicians and Surgeons ⇐18.20

Notice of intent to sue is not intended to be equivalent of complaint and need not contain every allegation and claim set forth in complaint. U.C.A.1953, 78–14–8.

8. Physicians and Surgeons ⇐18.20

Purpose of an intent to sue notice is to give parties an opportunity to discuss, and hopefully to resolve, potential claim before they become locked into lawsuit. U.C.A. 1953, 78–14–8.

9. Physicians and Surgeons ⇐18.20

Although notice of intent to sue must include specific allegations of misconduct on part of prospective defendant, that requirement does not need to meet standards required to state claim for relief in complaint; parties need to give only general notice of intent to sue and of injuries then known and not a statement of legal theories. U.C.A.1953, 78–14–8.

10. Physicians and Surgeons ⇐18.20

Plaintiff's motion to amend complaint to add punitive damages count in wrongful death action did not refer to new or different acts of misconduct but, rather, relied upon different legal characterization of same conduct; thus, motion to amend complaint was not outside scope of notice of intent to sue, where notice cited specific allegations of defendant hospital's misconduct, including failing to diagnose decedent's dangerous mental condition and allowing him to possess razor. U.C.A.1953, 78–11–7, 78–14–8.

11. Physicians and Surgeons ⇐18.20

Describing defendant's conduct as negligent conduct in notice of intent to sue did not preclude describing conduct as grossly negligent or reckless elsewhere in wrongful death action. U.C.A.1953, 78–14–8.

12. Physicians and Surgeons ⇐18.20

Law governing notice of intent to sue does not require that claim for punitive damages be expressed in notice of intent, as long as it includes general statement of nature of claim. U.C.A.1953, 78–14–8.

13. Death ⇐9

Wrongful death statute is not required to be strictly construed because it deviates from common law. U.C.A.1953, 68–3–2.

14. Death ⇐93

Consistency with general tort law suggests that wrongful death statute should be construed to permit punitive damages; if the Legislature intended to prohibit award of punitive damages, it could have done so expressly, assuming that such action would be constitutional. Const. Art. 16, § 5; U.C.A.1953, 78–11–7.

15. Death ⇐9

Primary purpose of wrongful death statute is to compensate deceased's heirs. U.C.A.1953, 78–11–7.

16. Death ⇐93

Purpose behind wrongful death statute of compensating deceased's heirs is not inconsistent with general policy of permitting punitive damages to punish a wrongdoer and to deter particularly culpable, dangerous conduct. U.C.A.1953, 78–14–8.

17. Death ⇐93

Wrongful death statute permits recovery of punitive damages in appropriate cases, in view of broad statutory language which permits recovery for nonpecuniary losses, liberal construction that has been placed on that language, and desirability of having rule of law in wrongful death cases consistent with general tort law. U.C.A. 1953, 78–11–7.

18. Damages ⇐87(1)

Although punitive damages may be awarded in an appropriate case, general rule is that only compensatory damages are appropriate and that punitive damages may be awarded only in exceptional cases. U.C.A.1953, 78–11–7.

19. Damages ⇐91(1)

punitive damages should not be awarded to increase sorrow that defendants generally suffer or when an injury has been

inflicted by error or inadvertence, or to give plaintiff an in terrorem weapon in settlement negotiations. U.C.A.1953, 78-11-7.

20. Damages ⇐91(1)

Since punitive damages are not intended as additional compensation to plaintiff, they must, if awarded, serve societal interest of punishing and deterring outrageous and malicious conduct which is not likely to be deterred by other means.

21. Damages ⇐91(3)

Simple negligence will never suffice as basis upon which punitive damages may be awarded; defendant's conduct must be malicious or in reckless disregard for rights of others, although actual intent to cause injury is not necessary.

22. Damages ⇐91(1)

To be liable for punitive damages, defendant must either know or should know that his conduct would, in high degree of probability, result in substantial harm to another, and conduct must be highly unreasonable or an extreme departure from ordinary care, in a situation where high degree of danger is apparent

23. Damages ⇐87(1)

Punitive damages should be awarded only when they will clearly accomplish public objective not accomplished by award of compensatory damages.

24. Damages ⇐87(1)

Punitive damages are not intended to vent vindictiveness or to increase sorrow and suffering that persons guilty of error normally feel as result of the all too human propensity to err, and even to blunder; such damages may, however, be appropriate to take profit out of wrongdoing where compensatory damages are small in relation to financial resources of defendant and can be subsumed as cost of doing business.

25. Damages ⇐87(1)

Intended deterrent effect of awarding punitive damages must be clear and in proportion to nature of wrong and possibility of recurrence.

James E. Hawkes, Bob W. Warnick, Salt Lake City, for plaintiffs and appellant.

Robert F. Orton, Salt Lake City, for defendant and respondent.

STEWART, Justice:

The issue on this appeal is whether punitive damages may be awarded in a wrongful death action. The case is here on an interlocutory appeal from the trial court's refusal to permit the plaintiff to amend its complaint to seek punitive damages.

I. THE FACTS

Plaintiff's decedent, Robert Alan Behrens, was admitted to the defendant Raleigh Hills Hospital to undergo treatment for alcohol abuse. On the third day of his stay, a hospital employee allowed decedent to use a razor to shave. Instead, decedent used the razor to slash his wrists; he died four days later.

Decedent's wife, individually and on behalf of their infant son, filed this action for wrongful death seeking compensatory damages only. The jury trial resulted in a judgment for plaintiff in the amount of $100,000. However, the trial court granted defendant's motion for a new trial because of its failure to give a comparative negligence jury instruction. That ruling is not challenged.

After the motion for a new trial was granted, plaintiff moved to amend her complaint to include a claim for punitive damages. The matter was heard on oral argument, and the motion to amend was denied. Because the precise basis for that denial is not in the record, we examine first the possible procedural grounds offered as a justification for the ruling.

II. PROCEDURAL OBJECTIONS

A. Motion to Amend

[1] Defendant argues that the motion to amend was properly denied for procedural reasons because it was not presented in writing and was not accompanied by the

proposed amended complaint. Although a trial court may deny a motion to amend for a movant's failure to present a written motion and a proposed amended complaint, *see* Utah R.Civ.P. 7(b)(1); 3 J. Moore, *Moore's Federal Practice* ¶ 15.12 (2d ed. 1983), that rule does not govern this case.

[2, 3] Prior to trial, plaintiff filed a written motion to amend the complaint. Plaintiff's motion included the language to be added to the complaint, i.e., "Plaintiff prays for punitive damages in the amount of $50,000." That motion was improperly denied by the trial court. The motion was renewed after the trial court granted a new trial. The defendant did not object to plaintiff's failure at that time to file a proposed complaint. Indeed, the defendant knew precisely what the issues were with respect to the motion to amend and filed a lengthy and well-researched memorandum on the issue of punitive damages. Under the circumstances, plaintiff's first motion to amend was sufficient. It was again error to deny the renewed motion.

Furthermore, this case must be viewed against the backdrop of Utah R.Civ.P. 54(c)(1), which states that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." *See also Pope v. Pope*, Utah, 589 P.2d 752 (1978); *Palombi v. D & C Builders*, 22 Utah 2d 297, 452 P.2d 325 (1969). *Cf. Motivated Management International v. Funcy*, Utah, 604 P.2d 467 (1979). As Professor Moore states:

> Rule 15 provides liberally for amendment of pleadings and supplemental pleadings to the end that litigation may be disposed of on the merits. And Rule 54(c) continues the story by providing that, except as to a judgment by default which shall not be different in kind from or exceed the amount prayed, every other final judgment shall grant the relief to which the party in whose favor it is rendered is entitled.
>
> While under Rule 8(a)(3), *supra*, every pleading setting forth a claim for relief should contain a demand for judgment, this prayer for relief constitutes no part of the pleader's cause of action; a pleading should not be dismissed for legal insufficiency unless it appears to a certainty that the claimant is entitled to no relief, legal, equitable or maritime, under any state of facts which could be proved in support of the claim, irrespective of the prayer for relief; and, *except as to a judgment by default, the prayer does not limit the relief, legal, equitable or maritime, which the court may grant.* [Emphasis added, footnotes omitted.]

6 J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* ¶ 54.60 at 1212–14 (2d ed. 1983).

[4] Thus, if the plaintiff were able to adduce the necessary foundational evidence at trial, she could claim punitive damages under Rule 54(c) without a formal amendment to the pleadings. Case authorities support this proposition. In *Guillen v. Kuykendall*, 470 F.2d 745, 748 (5th Cir. 1972) (per curiam), the court stated:

> It is not necessary to claim exemplary [i.e., punitive] damages by specific denomination if the facts show that the wrong complained of was "inflicted with malice, oppression, or other like circumstances of [aggravation][1]", 22 Am Jur.2d Damages § 293.

Accord Gilbreath v. Phillips Petroleum Co., 526 F.Supp. 657 (W.D.Okl.1980) (interpreting Oklahoma law); *Alexander v. Jones*, 29 F.Supp. 690, 692 (E.D.Okla.1939) (same). *Cf. Nolan v. Foreman*, 665 F.2d 738 (5th Cir.1982).

B. Statute of Limitations

[5, 6] The defendant also asserts that the claim for punitive damages is a new claim for relief that is barred by the statute of limitations. However, an amendment to include damages does not import into a case a new and different cause of action. *Hjorth v. Whittenburg*, 121 Utah 324, 241 P.2d 907 (1952). *See*

1. So in original; see 22 Am.Jur.2d Damages § 293 at 389 (1965).

also Johnson v. Brinkerhoff, 89 Utah 530, 57 P.2d 1132 (1936). Even the setting forth of "an additional ground of negligence as the cause of the same injury" is not a new cause of action. *Peterson v. Union Pacific Railroad Co.*, 79 Utah 213, 221, 8 P.2d 627, 630 (1932).

Other jurisdictions have also allowed a claim for punitive damages to be added on the ground that the claim raised no new legal issues and therefore its addition did not prejudice the other party. *Owen v. Superior Court*, 133 Ariz. 75, 649 P.2d 278 (1982); *Thomas v. Medesco, Inc.*, 67 F.R.D. 129 (E.D.Pa.1974); *Hodnik v. Baltimore & Ohio Railroad*, 54 F.R.D. 184 (W.D.Pa. 1972); *Walker v. Fleming Motor Co. Inc.*, 195 Kan. 328, 404 P.2d 929 (1965). *See also Hernandez v. Brooks*, 95 N.M. 670, 625 P.2d 1187 (App.1980). Accordingly, the statute of limitation is no bar. *See* Rule 15(c); *Peterson v. Union Pacific Railroad Co.*, 79 Utah 213, 8 P.2d 627 (1932); *Thomas v. Medesco, Inc.*, 67 F.R.D. 129 (E.D.Pa. 1974).

[7-9] Defendant also argues that denial of the motion was proper because the proposed amendment set forth additional allegations and claims outside the scope of plaintiff's notice of intent to sue, which had been filed prior to commencement of this action. A notice of intent to sue, as required by U.C.A., 1953, § 78-14-8, is not intended to be the equivalent of a complaint and need not contain every allegation and claim set forth in the complaint. The purpose of an intent to sue notice is to give the parties an opportunity to discuss, and hopefully to resolve, the potential claim before they become locked into a lawsuit. Although the notice must include "specific allegations of misconduct on the part of the prospective defendant," that requirement does not need to meet the standards required to state a claim for relief in a complaint. The parties need to give only general notice of an intent to sue and of the injuries then known and not a statement of legal theories.

[10-12] In the present case, the notice cited specific allegations of the Hospital's misconduct, including failing to diagnose decedent's dangerous mental condition and allowing him to possess a razor. The proposed amendment to the complaint does not refer to new or different acts of misconduct; rather, the amendment relies upon a different legal characterization of the same conduct. Describing the defendant's conduct as negligent conduct in the notice of intent does not preclude describing it as "grossly negligent" or reckless. Nor does § 78-14-8 require that a claim for punitive damages be expressed in the notice of intent, as long as it includes "a general statement of the nature of the claim."

III. PUNITIVE DAMAGES IN WRONGFUL DEATH ACTIONS

The key substantive issue in this case is whether the Utah wrongful death statute allows for recovery of punitive damages or only permits compensatory damages. The relevant portion of U.C.A., 1953, § 78-11-7 states: "In every action under this [section] . such damages may be given as under all the circumstances of the case may be just." Whether this provision allows for recovery of punitive damages in a wrongful death action is a question of first impression in Utah.

The common law recognized no action for the wrongful death of a human being Lord Campbell's Act, which was enacted in England in 1846 to override the common law, created a statutory action for wrongful death. That act provided for the recovery of damages which the jury found resulted from the death. Comment, *A Primer on Damages Under the Utah Wrongful Death and Survival Statutes*, 1974 Utah L.Rev. 519. Although English courts have restricted recovery under that act to pecuniary losses suffered by the survivors, American courts have not ruled consistently one way or the other *Id.*; 1 S Speiser, *Recovery For Wrongful Death* § 3·1 at 103 (2d ed. 1975).

Most wrongful death statutes in the United States, including Utah's, were modeled after Lord Campbell's Act. 1 S. Speis-

er, *supra*, § 1:9 at 29; U.C.A., 1953, § 78–11–7 (Compiler's Notes). Some American jurisdictions adopted, expressly either in their statutes or by judicial construction, the pecuniary damage limitation of the English act. 1 S. Speiser, *supra*, § 3:1 at 106–09; 1974 *Utah L.Rev.*, *supra*, at 520. A majority of American jurisdictions allow recovery of nonpecuniary damages, such as mental anguish or loss of companionship, 1 S. Speiser, *supra*, § 3:1 at 113–15 and § 3:49 at 313–20. However, only some of those jurisdictions limit damages to those which are compensatory, whether pecuniary or nonpecuniary damages or both, while denying noncompensatory damages aimed at punishing the wrongdoer. 1 S. Speiser, *supra*, § 3:4; J. Stein, *Damages and Recovery, Personal Injury and Death Actions* § 183 at 361–64 (1972).

At bottom, the allowance of punitive damages in wrongful death actions is a function of the governing statute construed in light of legislative intent and public policy. J. Stein, *supra*, § 183 at 360; Restatement (Second) of Torts § 925 (1979). In those jurisdictions where punitive damages are not allowed in wrongful death actions, the rationale is generally that the governing statute limits recovery to pecuniary losses. Some states have relied on the canon of statutory construction that a statute in derogation of the common law must be construed narrowly and, on that basis, have refused to allow punitive damages. On the other hand, the statutes in nearly half the American jurisdictions, either expressly or by construction, allow recovery of punitive damages in appropriate wrongful death actions, and this position represents the modern trend.[2]

Defendant contends that the Utah statute, being in derogation of the common law, must be strictly construed and that the claim for punitive damages must consequently be denied because the statute neither expressly nor impliedly allows for such damages.

The Utah wrongful death act was originally passed by the Territorial Legislature in 1874 to remedy the harsh effects of the common law rule which did not recognize wrongful death actions at all. Ch. 11 [1874] Laws of Territory of Utah 9, II Compiled Laws of Utah § 2961 (1888). At statehood, a cause of action for wrongful death was guaranteed by the Constitution which also prohibited any statutory limits on the amount recoverable. Article XVI, § 5 states:

> The right of action to recover damages for injuries resulting in death, shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation ....

[13] The Utah wrongful death statute, implementing the constitutional provision, although in derogation of the common law, traditionally has been liberally construed by the courts. *See Jones v. Carvell*, Utah, 641 P.2d 105 (1982), and cases cited. Indeed, a liberal construction is supported by one of our earliest statutes, U.C.A., 1953, § 68–3–2:

> The rule of the common law that statutes in derogation thereof are to be strictly construed has no application to the statutes of this state. The statutes establish the laws of this state respecting the subjects to which they relate, and their provisions and all proceedings under them *are to be liberally construed* with a view to effect the objects of the statutes and to promote justice. [Emphasis added.]

Thus, unlike those wrongful death statutes which disallow punitive damages because those statutes are construed strictly, the Utah wrongful death statute is not required to be strictly construed because it deviates from the common law.

2. *See generally* 1 S. Speiser, Recovery For Wrongful Death § 3:4 (2d ed. 1975 & 1982 Supp.); J. Stein, Damages and Recovery, Personal Injury and Death Actions § 183 (1972 & 1982 Supp. § 183.6); Annot., Exemplary or Punitive Damages As Recoverable In Action For Death, 94 A.L.R. 384 (1935), Comment, Punitive Damages in Wrongful Death, 20 Clev.St L.Rev 301 (1971).

The traditional, liberal construction of the Utah statute has been applied specifically to the damages clause of the act which provides for "such damages ... as under all the circumstances of the case may be just." U.C.A., 1953 § 78–11–7. This Court, at an early date, construed the statute to allow recovery of damages for both pecuniary and nonpecuniary losses, even though damages for nonpecuniary losses are not expressly authorized by the statute. *E.g., Evans v. Oregon Shortline Railroad Co.*, 37 Utah 431, 439, 108 P. 638, 641 (1910); *Corbett v. Oregon Short Line Railroad Co.*, 25 Utah 449, 71 P. 1065 (1903). In *Jones v. Carvell, supra*, we recently stated: "[T]he statute is broadly phrased, and this Court has construed it accordingly." *Id.* at 110.

Most commentators agree that absent an express prohibition against recovery of punitive damages in wrongful death actions, the position most consistent with fairness and sound public policy is to allow punitive damages where the circumstances warrant. For example, in his comprehensive treatise, Speiser comments:

> Under existing systems, many jurisdictions do not allow recovery of punitive damages in wrongful death actions, unless the statutes are fairly explicit in sanctioning such recovery. This would make sense in states (and there are a few) that do not allow punitive damages at all. But it makes no sense for a state that allows punitive damages for a wilful, wanton, malicious, reckless or grossly negligent tort that results in personal injury, emotional anguish or property damage, to deny such punitive damages where the injury victim happens to die. Death is, after all, the final injury—the ultimate insult. Such a result defies logic and distorts symmetry in the law.

2 S. Speiser, *Recovery for Wrongful Death*, § 15:14 at 487 (2d ed. 1975). Speiser also states:

> The nature and quality of the wrongful act should dictate whether its perpetrator should be compelled to respond in more than compensatory damages—not the fortuitous circumstance whether he happens to injure or to kill his victim.

1 S. Speiser, *supra*, § 3:4 at 135. *See also* K. Redden, *Punitive Damages* § 4.2(A)(3) (1980); Comment, *Constitutional Law—Wrongful Death*, 8 Cumb.L.Rev. 567, 574 (1977); Comment, *Punitive Damages in Wrongful Death*, 20 Clev.St.L.Rev. 301, 304, 314 (1971).

[14] This state has traditionally permitted recovery of punitive damages in personal injury cases, *e.g., Cruz v. Montoya*, Utah, 660 P.2d 723 (1983). Consistency with general tort law suggests that the Utah wrongful death statute should be construed to permit punitive damages. If the Legislature intended to prohibit the award of punitive damages, it could have done so expressly, assuming that such action would be constitutional under Article XVI, § 5.

[15, 16] Defendant relies on language in *Morrison v. Perry*, 104 Utah 151, 168, 140 P.2d 772, 780 (1943), to support its argument against punitive damages. In *Morrison*, the Court stated: "Under our wrongful death statute, [citation omitted], the law does not seek to punish the wrongdoer, but simply to compensate the heirs for the loss sustained." This language, however, was directed to another issue. The issue before the Court was recovery of funeral expenses, not recovery of punitive damages. Certainly the primary purpose of the statute is to compensate the deceased's heirs, but that is not its only purpose. Compensation is not inconsistent with the general policy of permitting punitive damages to punish a wrongdoer and to deter particularly culpable dangerous conduct.

Other jurisdictions with statutory language identical or similar to Utah's have also construed that language to allow punitive damages. In *Gavica v. Hanson*, 101 Idaho 58, 608 P.2d 861 (1980), the Idaho Supreme Court construed an identical wrongful death damage provision to allow punitive damages:

> Thus, while a wrongdoer may be liable for punitive damages if he injures another, it is argued that punitive damages

> should nevertheless be withheld if a wrongdoer so injures another as to cause death. We find no logic in such a conclusion. If wrongful conduct is to be deterred by the award of punitive damages, that policy should not be thwarted because the wrongdoer succeeds in killing his victim.

Id. at 61, 608 P.2d at 864.

The West Virginia wrongful death statute provides that "the jury may award such damages as to it may seem fair and just." W.Va.Code, § 55–7–6 (1981). In *Bond v. City of Huntington*, W.Va., 276 S.E.2d 539 (1981), the court construed that language to permit recovery of punitive damages. The court reasoned that "the deterrence principle of punitive damages is perfectly compatible with a wrongful death claim," and perhaps even more appropriate there than in actions for less severe injuries. "The fact that the wrongful death statute never spelled out particular items of damages has not precluded this Court in the past from concluding that certain elements of damages could be obtained." *Id.* at 545. *See also Perry v. Melton*, W.Va., 299 S.E.2d 8 (1982).

Defendant cites several cases from other jurisdictions that deny punitive damages in wrongful death cases. We acknowledge the division among the authorities on this question; however, for the most part, contrary conclusions can be traced to material differences in either the governing statute or its legislative history.

[17] In sum, because of the broad language of the wrongful death statute which permits recovery for nonpecuniary losses, the liberal construction that has been placed on that language, and the desirability of having the rule of law in wrongful death cases consistent with general tort law, we hold that the wrongful death statute permits the recovery of punitive damages in appropriate cases.

IV. LIMITATIONS ON PUNITIVE DAMAGES

[18–20] Although punitive damages may be awarded in an appropriate case, the general rule is that only compensatory damages are appropriate and that punitive damages may be awarded only in exceptional cases. It is not the point to allow punitive damages to be awarded to increase the sorrow that defendants generally suffer when an injury has been inflicted by error or inadvertance, or to give a plaintiff an *in terrorem* weapon in settlement negotiations. Since punitive damages are not intended as additional compensation to a plaintiff, they must, if awarded, serve a societal interest of punishing and deterring outrageous and malicious conduct which is not likely to be deterred by other means. *See* C. McCormick, *Handbook on the Law of Damages* §§ 77–78 (1935); J. Stein, *Damages and Recovery, Personal Injury and Death Actions* § 183 (1972).

Our cases have generally held that punitive damages may be awarded only on proof of "willful and malicious," conduct, *e.g.*, *Leigh Furniture and Carpet Co. v. Isom*, Utah, 657 P.2d 293, 312 (1982); *First Security Bank of Utah v. J.B.J. Feedyards, Inc.*, Utah, 653 P.2d 591, 598 (1982); *Elkington v. Foust*, Utah, 618 P.2d 37, 41 (1980); *Kesler v. Rogers*, Utah, 542 P.2d 354, 359 (1975), or on proof of conduct which manifests a knowing and reckless indifference toward, and disregard of, the rights of others, *Branch v. Western Petroleum, Inc.*, Utah, 657 P.2d 267, 277–78 (1982); *Terry v. Zions Cooperative Mercantile Institution*, Utah, 605 P.2d 314, 327 (1979), especially where compensatory damages may be simply absorbed as a cost of business. *See also* Restatement (Second) of Torts § 908 (1979).

[21, 22] Punitive damages should be awarded infrequently. Simple negligence will never suffice as a basis upon which such damages may be awarded. "Punitive damages are not awarded for mere inadvertence, mistake, errors of judgment and the like, which constitute ordinary negligence." Restatement (Second) of Torts § 908 comment b at 465 (1979). A defendant's conduct must be malicious or in reckless disregard for the rights of others, al-

though actual intent to cause injury is not necessary. *Branch v. Western Petroleum, Inc., supra.* That is, the defendant must either know or should know "that such conduct would, in a high degree of probability, result in substantial harm to another," *Danculovich v. Brown,* Wyo., 593 P.2d 187, 193 (1979), and the conduct must be "highly unreasonable conduct, or an extreme departure from ordinary care, in a situation where a high degree of danger is apparent." *Id.* at 191. *See also* J. Stein, *supra,* §§ 186–187.

[23–25] Furthermore, punitive damages should be awarded only when they will clearly accomplish a public objective not accomplished by the award of compensatory damages. They are not intended to vent vindictiveness or to increase the sorrow and suffering that persons guilty of an error normally feel as a result of the all too human propensity to err, and even to blunder. Such damages may, however, be appropriate to take the profit out of wrongdoing where compensatory damages are small in relation to the financial resources of a defendant and can be subsumed as a cost of doing business. *See generally Branch v. Western Petroleum, Inc., supra; First Security Bank of Utah v. J.B.J. Feedyards, supra; Terry v. Zions Cooperative Mercantile Institution, supra.* The intended deterrent effect must be clear and in proportion to the nature of the wrong and the possibility of recurrence.

Reversed and remanded. Costs to appellant.

HALL, C.J., and HOWE, OAKS and DURHAM, JJ., concur.

KENNECOTT CORPORATION, KENNECOTT MINERALS COMPANY DIVISION, Plaintiff,

v.

The INDUSTRIAL COMMISSION OF UTAH, and Rose K. Georgas, widow of Alex Demetrios Georgas, Defendants.

No. 19036.

Supreme Court of Utah.

Dec. 28, 1983.

Employee's widow brought workmen's compensation action against employer to recover benefits for death of employee who allegedly fell, because of heart attack, into tank in which he drowned while he was on employer's premises during lunch hour, in allowed place apparently getting fresh air or drink of water. Administrative law judge granted recovery, and Industrial Commission denied review. Employer appealed. The Supreme Court, Stewart, J., held that: (1) personal comfort rule was adopted; (2) personal comfort rule was applicable, and thus employee was in course of his employment at time of fall; and (3) idiopathic fall doctrine applied, and thus employee's widow was eligible for benefits.

Affirmed.

1. Workers' Compensation ⇐615

For purposes of statute providing for workmen's compensation if employee is injured or killed by accident arising out of or in course of his employment, course of employee's employment is not limited simply to those places where employee's work requires his presence. U.C.A.1953, 35–1–45.

2. Workers' Compensation ⇐652

For purposes of workmen's compensation eligibility, employee does not leave course of employment by engaging in acts ministering to his personal comfort, unless extent of departure is so great that intent to abandon job temporarily may be inferred, or unless method chosen is so un-

40 N.Y.2d 354

Jean GARRITY, Respondent,

v.

LYLE STUART, INC., Appellant.

Court of Appeals of New York.

July 6, 1976.

Author brought action to confirm arbitration award granting her compensatory and punitive damages against defendant publishing company. The Supreme Court, New York County, Thomas C. Chimera, J., confirmed award, and publishing company appealed. The Supreme Court, Appellate Division, 48 A.D.2d 814, 370 N.Y.S.2d 6, affirmed and publishing company appealed. The Court of Appeals, Breitel, C. J., held that arbitrator had no power to award punitive damages; that such award was violative of public policy; and that issue of punitive damages was not waived.

Order modified and, as so modified, affirmed.

Gabrielli, J., filed dissenting opinion in which Jones and Wachtler, JJ., concurred.

1. Arbitration ⇐29.6

Arbitrator has no power to award punitive damages, even if agreed upon by parties; punitive damages is a sanction reserved to state, a public policy of such magnitude as to call for judicial intrusion to prevent its contravention; and, since enforcement of award of punitive damages as purely private remedy would violate strong public policy, arbitrator's award which imposes punitive damages should be vacated.

2. Arbitration ⇐29.4, 29.6, 63.1, 63.2

Arbitrators generally are not bound by principles of substantive law or rules of evidence and thus error of law or fact will not justify vacatur of award; furthermore, arbitrators generally are free to fashion remedy appropriate to wrong, if they find one, but authentic remedy is compensatory and measured by harm caused and how it may be corrected; these broad principles are tolerable so long as arbitrators are not thereby empowered to ride roughshod over strong policies in law which control coercive private conduct and confine to state and its courts infliction of punitive sanctions on wrongdoers.

3. Arbitration ⇐56

Court will vacate arbitration award enforcing illegal agreement or one violative of public policy.

4. Damages ⇐89(1)

At law, on civil side, in absence of statute, punitive damages are available only in limited number of instances.

5. Damages ⇐87(1)

Award of punitive damages is social exemplary "remedy" not private compensatory remedy.

6. Arbitration ⇐29.6

Even if so-called "malicious" breach of publishing contract would permit imposition of punitive damages by court or jury, it was not province of arbitrators to award punitive damages to author.

7. Contracts ⇐129(1)

Law does not and should not permit private persons to submit themselves to punitive sanctions of the order reserved to state; freedom of contract does not embrace freedom to punish, even by contract.

8. Contracts ⇐129(1)

Parties to publishing agreement had no power to waive limitations on privately assessed punitive damages and no power to agree to such damages by failing to object to demand for such damages in arbitration award.

9. Arbitration ⇐56

That arbitrator's award of punitive damages, in violation of public policy, was quite modest was immaterial.

Richard Goldsweig, Yonkers, and Jack N. Albert, New York City, for appellant.

Donald S. Engel, New York City, for respondent.

BREITEL, Chief Judge.

Plaintiff author brought this proceeding under CPLR 7510 to confirm an arbitration award granting her $45,000 in compensatory damages and $7,500 in punitive damages against defendant publishing company. Supreme Court confirmed the award. The Appellate Division affirmed, one Justice dissenting, and defendant appeals.

The issue is whether an arbitrator has the power to award punitive damages.

[1] The order of the Appellate Division should be modified to vacate the award of punitive damages and otherwise affirmed. An arbitrator has no power to award punitive damages, even if agreed upon by the parties (*Matter of Publishers' Ass'n of N. Y. City* [*Newspaper Union*], 280 App.Div. 500, 504–506, 114 N.Y.S.2d 401, 404–406). Punitive damages is a sanction reserved to the State, a public policy of such magnitude as to call for judicial intrusion to prevent its contravention. Since enforcement of an award of punitive damages as a purely private remedy would violate strong public policy, an arbitrator's award which imposes punitive damages should be vacated.

Plaintiff is the author of two books published by defendant. While the publishing agreements between the parties contained broad arbitration clauses, neither of the agreements provided for the imposition of punitive damages in the event of breach.

A dispute arose between the parties and in December, 1971 plaintiff author brought an action for damages alleging fraudulent inducement, "gross" underpayment of royalties, and various "malicious" acts designed to harass her. That action is still pending.

In March, 1974, plaintiff brought a new action alleging that defendant had wrongfully withheld an additional $45,000 in royalties. Defendant moved for a stay pending arbitration, which was granted, and plaintiff demanded arbitration. The demand requested the $45,000 withheld royalties and punitive damages for defendant's alleged "malicious" withholding of royalties, which plaintiff contended was done to coerce her into withdrawing the 1971 action.

Defendant appeared at the arbitration hearing and raised objections concerning plaintiff's standing and the conduct of the arbitration hearing. Upon rejection of these objections by the arbitrators, defendant walked out.

After hearing testimony, and considering an "informal memorandum" on punitive damages submitted by plaintiff at their request, the arbitrators awarded plaintiff both compensatory and punitive damages. On plaintiff's motion to confirm the award, defendant objected upon the ground that the award of punitive damages was beyond the scope of the arbitrators' authority.

[2] Arbitrators generally are not bound by principles of substantive law or rules of evidence, and thus error of law or fact will not justify vacatur of an award (see *Matter of Associated Teachers of Huntington v. Board of Educ.*, 33 N.Y.2d 229, 235, 351 N.Y.S.2d 670, 674, 306 N.E.2d 791, 795, and cases cited). It is also true that arbitrators generally are free to fashion the remedy appropriate to the wrong, if they find one, but an authentic remedy is compensatory and measured by the harm caused and how it may be corrected (*Mat-*

ter of Staklinski [*Pyramid Elec. Co.*], 6 N.Y.2d 159, 163, 188 N.Y.S.2d 541, 542, 160 N.E.2d 78, 79; see *Matter of Paver & Wildfoerster* [*Catholic High School Ass'n.*], 38 N.Y.2d 669, 677, 382 N.Y.S.2d 22, 26, 345 N.E.2d 565, 569, and cases cited). These broad principles are tolerable so long as arbitrators are not thereby empowered to ride roughshod over strong policies in the law which control coercive private conduct and confine to the State and its courts the infliction of punitive sanctions on wrongdoers.

[3] The court will vacate an award enforcing an illegal agreement or one violative of public policy (see *Matter of Associated Teachers of Huntington v. Board of Educ.*, 33 N.Y.2d 229, 235–236, 351 N.Y.S. 2d 670, 674–675, 306 N.E.2d 791, 795, *supra*, and cases cited; *Matter of Western Union Tel. Co.* [*Amer. Communications Ass'n*], 299 N.Y. 177, 187, 86 N.E.2d 162, 167; *Matter of East India Trading Co.* [*Halari*], 280 App.Div. 420, 421, 114 N.Y. S.2d 93, 94, affd., 305 N.Y. 866, 114 N.E. 2d 213). Since enforcement of an award of punitive damages as a purely private remedy would violate public policy, an arbitrator's award which imposes punitive damages, even though agreed upon by the parties, should be vacated (*Matter of Publishers' Ass'n of N. Y. City* [*Newspaper Union*], 280 App.Div. 500, 504–506, 114 N. Y.S.2d 401, 404–406, *supra*; Domke, Commercial Arbitration, § 33.03; Fuchsberg, 9 N.Y. Damages Law, § 81, p. 61, n. 9; 14 N.Y.Jur., Damages, § 184, p. 46; cf. *Local 127, United Shoe Workers of Amer. v. Brooks Shoe Mfg. Co.*, 3 Cir., 298 F.2d 277, 278, 284).

Matter of Associated Gen. Contrs., N. Y. State Chapter (Savin Bros.), 36 N.Y.2d 957, 373 N.Y.S.2d 555, 335 N.E.2d 859, is inapposite. That case did not involve an award of punitive damages. Instead, the court permitted enforcement of an arbitration award of treble liquidated damages, amounting to a penalty, assessed however in accordance with the express terms of a trade association membership agreement. The court held that the public policy against permitting the awarding of penalties was not of "such magnitude as to call for judicial intrusion" (p. 959). In the instant case, however, there was no provision in the agreements permitting arbitrators to award liquidated damages or penalties. Indeed, the subject apparently had never ever been considered.

[4, 5] The prohibition against an arbitrator awarding punitive damages is based on strong public policy indeed. At law, on the civil side, in the absence of statute, punitive damages are available only in a limited number of instances (see *Walker v. Sheldon*, 10 N.Y.2d 401, 404, 223 N.Y.S.2d 488, 490, 179 N.E.2d 497, 498). As was stated in *Walker v. Sheldon (supra)*: "[p]unitive or exemplary damages have been allowed in cases where the wrong complained of is morally culpable, or is actuated by evil and reprehensible motives, not only to punish the defendant but to deter him, as well as others who might otherwise be so prompted, from indulging in similar conduct in the future." It is a social exemplary "remedy", not a private compensatory remedy.

It has always been held that punitive damages are not available for mere breach of contract, for in such a case only a private wrong, and not a public right, is involved (see, e. g., *Trans-State Hay & Feed Corp. v. Faberge, Inc.*, 35 N.Y.2d 669, 360 N.Y.S.2d 886, 319 N.E.2d 201, affg. on mem. at App.Div., 42 A.D.2d 535, 344 N.Y. S.2d 730; *Van Valkenburgh, Nooger & Neville v. Hayden Pub. Co.*, 33 A.D.2d 766, 767, 306 N.Y.S.2d 599, 601 [breach of contract by book publisher, which failed deliberately and in breach of good faith to use "best efforts" to promote plaintiff's books; punitive damages denied], affd., 30 N.Y.2d 34, 330 N.Y.S.2d 329, 281 N.E.2d 142 [discussing the facts and particularly the breach of fair dealing in greater detail],

cert. den., 409 U.S. 875, 93 S.Ct. 125, 34 L.Ed.2d 128; Restatement, Contracts, § 342; 14 N.Y.Jur., Damages, § 183, pp. 45–46).

[6] Even if the so-called "malicious" breach here involved would permit of the imposition of punitive damages by a court or jury, it was not the province of arbitrators to do so. Punitive sanctions are reserved to the State, surely a public policy "of such magnitude as to call for judicial intrusion" (*Matter of Associated Gen. Contrs., N. Y. State Chapter [Savin Bros.]*, 36 N.Y.2d 957, 959, 373 N.Y.S.2d 555, 556, 335 N.E.2d 859, 860, *supra*). The evil of permitting an arbitrator whose selection is often restricted or manipulatable by the party in a superior bargaining position, to *award punitive damages is that it displaces* the court and the jury, and therefore the State, as the engine for imposing a social sanction. As was so wisely observed by Judge, then Mr. Justice, Bergan in *Matter of Publishers' Ass'n of N. Y. City (Newspaper Union)*, 280 App.Div. 500, 503, 114 N.Y.S.2d 401, 404, *supra*:

"The trouble with an arbitration admitting a power to grant unlimited damages by way of punishment is that if the court treated such an award in the way arbitration awards are usually treated, and followed the award to the letter, it would amount to an unlimited draft upon judicial power. In the usual case, the court stops only to inquire if the award is authorized by the contract; is complete and final on its face; and if the proceeding was fairly conducted.

"Actual damage is measurable against some objective standard—the number of pounds, or days, or gallons or yards; but punitive damages take their shape from the subjective criteria involved in attitudes toward correction and reform, and courts do not accept readily the delegation of that kind of power. Where punitive damages have been allowed for those torts which are still regarded somewhat as public penal wrongs as well as actionable private wrongs, they have had rather close judicial supervision. If the usual rules were followed there would be no effective judicial supervision over punitive awards in arbitration."

The dissent appears to have recognized the danger in permitting an arbitrator in his discretion to award unlimited punitive damages. Thus, it notes that the award made here was neither "irrational" nor "unjust" (40 N.Y.2d p. 365, 386 N.Y.S. 2d p. 838, 353 N.E.2d p. 800). Standards such as these are subjective and afford no practical guidelines for the arbitrator and little protection against abuse, and would, on the other hand, contrary to the sound development of arbitration law, permit the courts to supervise awards for their justness (cf. *Lentine v. Fundaro*, 29 N.Y.2d 382, 386, 328 N.Y.S.2d 418, 422, 278 N.E.2d 633, 635).

Parties to arbitration agree to the substitution of a private tribunal for purposes of deciding their disputes without the expense, delay and rigidities of traditional courts. If arbitrators were allowed to impose punitive damages, the usefulness of arbitration would be destroyed. It would become a trap for the unwary given the eminently desirable freedom from judicial overview of law and facts. It would mean that the scope of determination by arbitrators, by the license to award punitive damages, would be both unpredictable and uncontrollable. It would lead to a Shylock principle of doing business without a Portia-like escape from the vise of a logic foreign to arbitration law.

In imposing penal sanctions in private arrangements, a tradition of the rule of law in organized society is violated. One purpose of the rule of law is to require that the use of coercion be controlled by the State (Kelsen, General Theory of Law and State, p. 21). In a highly developed commercial and economic society the use of private force is not the danger, but the uncontrolled use of coercive economic sanctions in private arrangements. For

centuries the power to punish has been a monopoly of the State, and not that of any private individual (Kelsen, *loc. cit., supra*). The day is long past since barbaric man achieved redress by private punitive measures.

[7, 8] The parties never agreed or, for that matter, even considered punitive damages as a possible sanction for breach of the agreement (see dissenting opn. below by Mr. Justice Capozzoli, 48 A.D.2d 814, 370 N.Y.S.2d 6). Here there is no pretense of agreement, although plaintiff author argues feebly that the issue of punitive damages was "waived" by failure to object originally to the demands for punitive damages, but only later to the award. The law does not and should not permit private persons to submit themselves to punitive sanctions of the order reserved to the State. The freedom of contract does not embrace the freedom to punish, even by contract. On this view, there was no power to waive the limitations on privately assessed punitive damages and, of course, no power to agree to them by the failure to object to the demand for arbitration (cf. *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 704, 65 S.Ct. 895, 900, 89 L.Ed. 1296, affg., 293 N.Y. 666, 56 N.E.2d 259 ["waiver" of right "charged or colored with the public interest" is ineffective]; see, generally, 6A Corbin, Contracts, § 1515, pp. 728–732 [e. g., "waiver" of defenses to an usurious agreement is ineffective]).

[9] Under common-law principles, there is eventual supervision of jury awards of punitive damages, in the singularly rare cases where it is permitted, by the trial court's power to change awards and by the Appellate Division's power to modify such awards (see *Walker v. Sheldon*, 10 N.Y.2d 401, 405, n. 3, 223 N.Y.S.2d 488, 491, 179 N.E.2d 497, 499, *supra*). That the award of punitive damages in this case was quite modest is immaterial. Such a happenstance is not one on which to base a rule.

Accordingly, the order of the Appellate Division should be modified, without costs, to vacate so much of the award which imposes punitive damages, and otherwise affirmed.

GABRIELLI, Judge (dissenting).

Although espousing a desire to obviate a "trap for the unwary" and a "Shylock principle of doing business without a Portia-like escape" (40 N.Y.2d p. 359, 386 N.Y.S.2d p. 834, 353 N.E.2d p. 796 the majority reaches a result favoring a guileful defendant and voids a just and rational award of punitive damages to a wholly innocent and deserving plaintiff. Stripped to its essence the defendant, by willful and fraudulent guises, refused to pay plaintiff royalties known to be due and owing to her; forced her to commence actions claiming fraudulent acts and to enforce arbitration to redress the wrongs done to her and to collect the sums rightfully due; and, finally, defendant waived any objection to the claim for punitive damages, deliberately refused to participate in the arbitration hearing and abruptly left the hearing without moving against the claim for punitive damages or even so much as offering any countervailing evidence or argument on the merits of plaintiff's claims. I cannot, therefore, join with the majority and conclude, as they now do, that the ultimate limit of the damages awardable to plaintiff is that sum which was unquestionably due and owing to her in any event under the royalty agreement.

The basic issue presented for our determination is whether, in an arbitration proceeding brought pursuant to a contract containing a broad arbitration clause, an award of punitive damages is violative of public policy.

Plaintiff, the author of *The Sensuous Woman* and *The Sensuous Man*, entered into agreements with the defendant to publish the two books. The agreements con-

tained identical, broad arbitration clauses which provide:

"Any controversy or claim arising out of this agreement or the breach or interpretation thereof shall be determined by arbitration in accordance with the rules then obtaining of the American Arbitration Association, and judgment upon the award may be entered in the highest court of the forum, State or Federal, having jurisdiction."

A dispute arose between the parties and in December, 1971 plaintiff commenced an action for damages against defendant alleging that defendant and its principal officer, Lyle Stuart, committed fraud in inducing her to enter into the agreements, substantially underpaid her royalties then due, and engaged in nefarious business activities calculated to harass and annoy her. Defendant moved for a stay of the action pending arbitration. The decision on the motion has been held in abeyance pending trial of the fraudulent inducement issue, which as yet has not been held due to protracted pretrial discovery proceedings.

In March, 1974 plaintiff commenced a new and separate action asserting that defendant had wrongfully withheld an additional $45,000 in royalties during the first half of 1973. Defendant obtained a stay of that action pending arbitration and plaintiff subsequently served a demand for arbitration. The demand restated the claim made in the March, 1974 complaint and also contained an additional claim for punitive damages allegedly resulting from defendant's maliciously withholding royalties due plaintiff who charged that it was done for the unjustifiable and vindictive purpose of coercing plaintiff to withdraw the pending 1971 action.

Defendant participated in the selection of the arbitrators and appeared at the hearing. Represented by counsel and two corporate officers, defendant promptly entered objections concerning the standing of plaintiff to bring the proceeding and certain administrative matters. No objection was addressed to the demand for punitive damages. The objections were overruled, and defendant's representatives walked out of the hearing and refused to participate any further in the arbitration proceeding. None of the objections raised at the hearing have ever been renewed.

Following the departure of defendant's officers and counsel, the arbitrators heard extensive and, of course, unchallenged evidence from plaintiff. As a result, the arbitrators awarded plaintiff $45,000 on her claim for royalties and $7,500 in punitive damages plus interest and fees. When plaintiff moved to confirm the award, defendant objected, for the first time, that an award of punitive damages is violative of public policy and beyond the scope of the authority of the arbitrators. Special Term confirmed the award and the Appellate Division upheld that determination. I would affirm.

In doing so, I would reject the notion that this award of punitive damages is violative of public policy. We have only recently treated with a somewhat similar argument in *Matter of Associated Gen. Contrs., N. Y. State Chapter (Savin Bros.)*, 36 N.Y.2d 957, 373 N.Y.S.2d 555, 335 N.E.2d 859. There we considered the effect of a public policy argument against penalty awards with respect to an arbitration commenced by a national trade association in the construction industry against one of its employer-members pursuant to the provisions of a broad arbitration clause contained in the association agreement. Specifically at issue was whether an arbitration award of treble liquidated damages, assessed in accordance with the express terms of the agreement, was enforceable.*

* The agreement provided that where an arbitrator found that a member had violated the terms of the agreement, damages were to be awarded " 'in an amount no less than three (3) times the daily liquidated damage amount provided for in each * * * heavy and highway construction contract to which the undersigned firm is a party within the geographic area of the applicable labor contract * * * for each * * * day the

We held that since the arbitration was in consequence of a broad arbitration clause and concerned no third-party interests which could be said to transcend the concerns of the parties to the arbitration, there was present (p. 959, 373 N.Y.S.2d p. 556, 335 N.E.2d p. 860) "no question involving public policy of such magnitude as to call for judicial intrusion" (see, also, *Matter of Riccardi [Modern Silver Linen Supply Co.]*, 36 N.Y.2d 945, 373 N.Y.S.2d 551, 335 N.E.2d 856; cf. *Hirsch v. Hirsch*, 37 N.Y.2d 312, 372 N.Y.S.2d 71, 333 N.E. 2d 371). The *Associated Gen. Contrs.* case may be contrasted with *Matter of Aimcee Wholesale Corp. (Tomar Prods.)*, 21 N.Y. 2d 621, 289 N.Y.S.2d 968, 237 N.E.2d 223, where the issue to be arbitrated concerned the enforcement of State antitrust law, a matter which was, as we said in *Aetna Life & Cas. Co. v. Stekardis*, 34 N.Y.2d 182, 186, n., 356 N.Y.S.2d 587, 589, 313 N. E.2d 53, 54, "of overriding public policy significance such as to call for judicial intervention dehors the provisions of CPLR 7503". Other policies, "especially those embodied in statutory form" (*Matter of Aimcee, supra*, 21 N.Y.2d at p. 629, 289 N. Y.S.2d at p. 974, 237 N.E.2d at p. 227), have also been accorded similar significance (see *Matter of Knickerbocker Agency [Holz]*, 4 N.Y.2d 245, 173 N.Y.S.2d 602, 149 N.E.2d 885 [liquidation of defunct insurance companies]; *Durst v. Abrash*, 17 N.Y.2d 445, 266 N.Y.S.2d 806, 213 N.E.2d 887 [usury law]; *Wilko v. Swan*, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168 [Securities Act of 1933 violation]; *American Safety Equip. Corp. v. Maguire Co.*, 2 Cir., 391 F.2d 821 [Federal antitrust law]).

The case at bar falls within the rationale and rule of the *Associated Gen. Contrs.* case. Controlling here, as there, is the fact that the arbitration clause is broad indeed; there are no third-party interests involved; and the public policy against punitive damages is not so commanding that the Legislature has found it necessary to embody that policy into law, especially one that would apply to all cases involving such damages irrespective of the amount sought, the relative size of the award, or the punishable actions of the parties. Or, put another way, the public policy which "favors the peaceful resolutions of disputes through arbitration" (*Associated Gen. Contrs., supra*, at p. 959, 373 N.Y.S.2d at p. 556, 335 N.E.2d at p. 859) outweighs the public policy disfavoring the assessment of punitive damages in this instance, where the unjustifiable conduct complained of is found to be with malice. I would conclude, therefore, that any public policy limiting punitive damage awards does not rise to that level of significance in this case as to require judicial intervention.

The majority would distinguish the *Associated Gen. Contrs.* case *(supra)* upon the thin ground that the enforcement of a treble liquidated damages clause which was applicable to numerous nationwide contracts that conceivably could have amounted to astronomical sums is not the equivalent of the enforcement of an award of penalty damages. However, as Mr. Justice Greenblott specifically stated for the majority below in that case, and in an opinion expressly approved by this court, the amount of damages therein computed in the arbitration bore "*no reasonable relationship to the amount of damages which may be sustained*" (emphasis added; 45 A.D.2d 136, 140, 356 N.Y.S.2d 374, 378); and a contract clause which is grossly disproportionate to the presumable damage or readily ascertainable loss is a penalty clause, irrespective of its label (*Equitable Lbr. Corp. v. IPA Land Development Corp.*, 38 N.Y.2d 516, 521–522, 381 N.Y.S. 2d 459, 462–463, 344 N.E.2d 391, 395–396; *Ward v. Hudson Riv. Bldg. Co.*, 125 N.Y. 230, 235, 26 N.E. 256, 257; see *Wirth &*

firm complained of is found by the arbitrator to have been in violation of its obligations'." (*Matter of Associated Gen. Contrs., supra*, 36 N.Y.2d p. 958, 373 N.Y.S.2d p. 555, 335 N.E.2d p. 859.).

Hamid Fair Booking v. Wirth, 265 N.Y. 214, 192 N.E. 297; Uniform Commercial Code, § 2-718, subd. [1]; Restatement, Contracts, § 339; 3 Williston, Contracts [rev. ed.], § 779). In short, *Associated Gen. Contrs.* is not only apposite but is controlling. Conversely, *Matter of Publishers' Assn. of N. Y. City (Newspaper Union)*, 280 App.Div. 500, 504–506, 114 N.Y.S.2d 401, 404–406, decided in 1951, and a predicate for the majority holding, has been seriously questioned and said to be of "doubtful validity" (8 Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 7510.07) due to the subsequent enactment of CPLR 7501 which intentionally broadened the scope of arbitration and made awards therein enforceable "without regard to the justiciable character of the controversy". Even the court which authored *Publishers' Ass'n* now agrees that the issue there considered was not properly framed (see *Associated Gen. Contrs.*, 45 A.D.2d at p. 142, 356 N.Y.S.2d at p. 380, *supra*).

An affirmance here would do no violence to precedents in this court. In at least two varied circumstances we have held that although public policy would bar a civil suit for relief, that same public policy was not of such overriding import as to preclude confirmation of an arbitration award (*Matter of Staklinski* [*Pyramid Elec. Co.*], 6 N.Y.2d 159, 188 N.Y.S.2d 541, 160 N.E.2d 78; *Matter of Ruppert* [*Egelhofer*], 3 N.Y.2d 576, 170 N.Y.S.2d 785, 148 N.E.2d 129). In *Ruppert* was permitted the enjoining of a work stoppage in a labor dispute by arbitration despite the fact that the issuance of such relief by a court was prohibited by statute (then Civil Practice Act, § 876-a). Similarly, in *Staklinski*, citing *Ruppert*, we upheld an arbitration award of specific performance of an employment contract in the face of the public policy against compelling a corporation to continue the services of an officer whose services were unsatisfactory to the board of directors. The rule to be distilled from these cases, therefore, is that only where the public interest clearly supersedes the concerns of the parties should courts intervene and assert exclusive dominion over disputes in arbitration (see Comment, Judicial Review of Arbitration: Role of Public Policy, 58 Nw.U.L.Rev. 545, 554–555; see, also, McLaughlin, Supplementary Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 7501, Supp., p. 164; Note, 52 Col.L.Rev. 943, 945).

Nor can we hold, as defendant also urges, that the arbitrators exceeded their authority in awarding punitive damages to plaintiff. Arbitrators are entitled to "do justice. It has been said that, short of 'complete irrationality', 'they may fashion the law to fit the facts before them'" (*Lentine v. Fundaro*, 29 N.Y.2d 382, 386, 328 N.Y.S.2d 418, 422, 278 N.E.2d 633, 636, quoting *Matter of National Cash Register Co.* [*Wilson*], 8 N.Y.2d 377, 383, 208 N.Y.S.2d 951, 955, 171 N.E.2d 302, 305, and *Matter of Exercycle Corp.* [*Maratta*], 9 N.Y.2d 329, 336, 214 N.Y.S.2d 353, 357, 174 N.E.2d 463, 466; see, also, *Matter of Spectrum Fabrics Corp.* [*Main St. Fashions*], 309 N.Y. 709, 128 N.E.2d 416, affg., 285 App.Div. 710, 139 N.Y.S.2d 612). The award made here was neither irrational nor unjust. Indeed, defendant has not denied that its actions were designed to harass and intimidate plaintiff, as she claimed and the arbitrators obviously concluded. Hence, the award was within the power vested in the arbitrator.

As we have noted, plaintiff sought punitive damages as listed and set forth in the demand for arbitration, presenting of course a threshold question to which defendant failed to respond and, in fact, summarily refused to address himself. In effect, therefore, defendant's failure to act, respond or contest the claim is tantamount to a waiver of any objection thereto and,

indeed, is equivalent to an agreement to arbitrate the allegation now complained of.

Accordingly, the order of the Appellate Division should be affirmed.

JASEN, FUCHSBERG and COOKE, JJ., concur with BREITEL, C. J.

GABRIELLI, J., dissents and votes to affirm in a separate opinion in which JONES and WACHTLER, JJ., concur.

Order modified, without costs, in accordance with the opinion herein and, as so modified, affirmed.

40 N.Y.2d 366

In the Matter of George RILEY, Respondent,

v.

AIRCRAFT PRODUCTS MANUFACTURING CORPORATION et al., Appellants,

and

Special Fund for Reopened Cases, Respondent,
Workmen's Compensation Board, Respondent.

Court of Appeals of New York.

July 8, 1976.

Employer and its insurer appealed from order of the Supreme Court, Appellate Division, which affirmed decision of Workmen's Compensation Board that award to claimant was not chargeable to the Special Fund, for reopened cases. The Court of Appeals, Breitel, C. J., held that although there is no express requirement that there have been a formal opening of a claim or a prior award before liability can be shifted to the Special Fund, where, although seven years had elapsed between time of claimant's accident and time that he became totally disabled and formally presented a claim, advance payments of compensation had been made by the employer within three years of the presentation of the formal claim, liability could not be shifted to the Special Fund; and that advance payments of compensation made by predecessor corporations were binding on the current corporate employer of the claimant.

Affirmed.

1. Workmen's Compensation ⇐1030.2

There is no express requirement, in order to shift liability for workmen's compensation benefits to the Special Fund for reopened cases, that there be a formal opening of a claim or a prior formal award. Workmen's Compensation Law § 25-a.

2. Workmen's Compensation ⇐1030.2

In the case of "stale" initial claims, i. e., claims arising from old injuries without there ever having been a formal opening or award, it is consistent with objective of statute creating the Special Fund for reopened cases to shift liability to the Special Fund for an old accident and dormant compensation matter. Workmen's Compensation Law § 25-a.

3. Workmen's Compensation ⇐1030.2

Where, although seven years elapsed between time of claimant's accident and time that claimant became totally disabled and filed formal claim for workmen's compensation, employer had made advance payments of compensation within three years prior to presentation of formal claim, liability for the claim could not be shifted to the Special Fund for reopened cases. Workmen's Compensation Law § 25-a.

4. Workmen's Compensation ⇐1030.2

Initial "stale" workmen's compensation claims are to be measured, for purposes of shifting liability to the Special Fund, for reopened cases, from the last payment of

efforts to have the stock delivered were exerted here.

Notwithstanding the caution demanded of a trial court in ruling on a motion for a nonsuit and of an appellate court in reviewing the ruling it is apparent that plaintiff's evidence viewed in the light most favorable to him was insufficient and that the ruling of the trial court was correct.

Order and judgment affirmed.

WOOD, P. J., and FOURT, J., concur.

GENERAL METALS CORPORATION, a corporation, and Adel Precision Products, a Division of General Metals Corporation, Petitioners and Respondents,

v.

PRECISION LODGE 1600 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS, A.F.L.-C.I.O., an unincorporated voluntary association, and Fred J. Goodman, Defendants and Appellants,

and

Daniel F. Fitzpatrick, as a member, Business Representative and on behalf of Precision Lodge No. 1600 of the International Association of Machinists, A.F.L.-C.I.O., Cross-Petitioner and Appellant.

Civ. 24051.

District Court of Appeal, Second District, Division 3, California.

Aug. 5, 1960.

Petition to vacate an award of an arbitrator under a collective bargaining agreement. From an order of the Superior Court of Los Angeles County, Bayard Rhone, J., vacating the award and denying a petition for a confirmation, the union and others appealed. The District Court of Appeal, Shinn, P. J., held that where pursuant to a collective bargaining agreement, grievance of an employee was referred to an impartial arbitrator and agreement required the arbitrator to render his decision in writing not later than 15 days after taking the matter under submission, award was properly vacated where it was not rendered within the 15 days as required by the agreement.

Order affirmed.

1. Arbitration and Award ⇐50

When the time for making an award has been fixed by the agreement of the parties, the arbitrator has no jurisdiction to make an award after the time has expired and it must be vacated upon proper application.

2. Labor Relations ⇐460

Where, pursuant to a collective bargaining agreement, grievance of an employee was referred to an impartial arbitrator and agreement required the arbitrator to render his decision in writing not later than 15 days after taking the matter under submission, award was properly vacated where it was not rendered within the 15 days as required by the agreement. West's Ann. Code Civ.Proc. §§ 1287, 1288.

3. Labor Relations ⇐479

Where an arbitrator under collective bargaining agreement was without jurisdiction to act on date specified for failure to render his decision within 15 days, it was immaterial whether the employer suffered prejudice by reason of the delay and the award was a nullity and it was properly set aside. West's Ann.Code Civ.Proc. §§ 1287, 1288.

Rose, Klein & Marias, by Alfred M. Klein, Los Angeles, for appellants.

Sheppard, Mullin, Richter & Hampton, Los Angeles, for respondents.

SHINN, Presiding Justice.

This is an appeal by Precision Lodge 1600 of the International Association of Machinists, and Fred J. Goodman from an order vacating the award of an arbitrator

and denying a petition for confirmation of the award.

Pursuant to a collective bargaining agreement between the Union and General Metals Corporation, the grievance of an employe named Goodman was referred to an impartial arbitrator selected by the parties. Article VII, section 2 of the agreement provided: "Said arbiter shall render his decision in writing not later than fifteen (15) days after he has taken the matter under submission." The arbitrator took the matter under submission on May 9, 1958 and rendered his decision in favor of Goodman on July 10th. The company petitioned the court to vacate the award and the Union petitioned to confirm it. Code Civ.Proc. §§ 1287, 1288. The court ordered the award annulled upon the ground that it had not been rendered within 15 days, as required by the arbitration agreement.

[1, 2] The decisive question presented on the appeal is whether the court correctly vacated the award because it was not rendered within the 15-day period. The question must be answered in the affirmative. It has been the law of California since 1866 that when the time for making an award has been fixed by agreement of the parties, the arbitrator has no jurisdiction to make an award after the time has expired and the same must be vacated by the court upon proper application. Ryan v. Dougherty, 30 Cal. 218; In re Abrams and Brennan, 2 Cal.App. 237, 84 P. 363; Matter of Silliman, 159 Cal. 155, 113 P. 135; Willis Finance & Construction Co. v. Porter, 88 Cal.App. 523, 263 P. 842. This view is in accord with the weight of authority. See cases collected in 154 A.L.R. 1392. Appellants frankly concede that the provision that the arbiter shall render his decision within 15 days is both mandatory and jurisdictional.

[3] Appellants insist, however, that no harm resulted. Since the arbitrator was without jurisdiction to act on July 10th it is immaterial whether the company suffered prejudice by reason of the delay. The award was a nullity and it was properly set aside.

The order is affirmed.

VALLÉE and FORD, JJ., concur.

Edna M. COLLISON, as Administratrix-With-The-Will-Annexed of the Estate of Masie E. O'Brien, Deceased, Plaintiff,

v.

Louis Franklin THOMAS, Successor Administrator of the Estate of William P. O'Brien, Deceased, Defendant.

Edna M. COLLISON, as Administratrix-With-The-Will-Annexed of the Estate of Masie E. O'Brien, Deceased, Plaintiff, Cross-Defendant and Appellant,

and

Charles T. Rippy, Cross-Defendant and Appellant,

v.

Louis Franklin THOMAS, Successor Administrator of the Estate of William P. O'Brien, Deceased, Defendant, Cross-Complainant and Respondent.

Civ. 24567.

District Court of Appeal, Second District, Division 1, California.

Aug. 8, 1960

Rehearing Denied Aug. 29, 1960.

Hearing Granted Oct. 5, 1960.

Action to quiet title and to reform certain instruments in connection with the acquisition of title and for an accounting and damages. The defendant filed a cross-complaint. The Superior Court of Los Angeles County, Arnold Praeger, J., entered judgment and plaintiff and cross-defendants appealed. The District Court of Appeal, Lillie, J., held that the evidence was sufficient to support implied finding that home-

Wash.2d 32, 308 P.2d 689, where the parties occupied comparable positions, and a judgment for the plaintiff was reversed.

[3] The plaintiffs' argument, in support of the order granting a new trial, seems to be that even if half of the Greenwood car was on the wrong side of the road, the arc of the turn the Bogue car was making was such that the next fraction of a second would have brought it over onto the plaintiffs' side of the road, and a collision would have occurred even had the Greenwood car been entirely on its own side of the road; and it being astraddle of the center line would, therefore, not have been a proximate cause of the collision. That was likewise the contention of the plaintiff in Zahler v. Dittmer, supra.

The answer, given in that case, is likewise applicable here. Whether the Bogue car would have ultimately gone onto the plaintiffs' side of the road is a matter of speculation; and what the consequences and result of an entirely different collision would be, if it had occurred, is likewise speculative. The jury was, as we have indicated, warranted in finding that the negligence of plaintiff Jean Greenwood, in driving on the wrong side of the road, was a proximate cause of the collision which did occur. No cases are cited to support the plaintiffs' theory of liability based on prospective negligence.

We have accepted the invitation to read the record in this case, and have gone into the merits only because there was some feeling that we had not heretofore made it clear that a statement that "the evidence is not sufficient to sustain the verdict," does not comply with the requirement of general rule of the superior court 16, as amended, that an order granting a motion for a new trial give "definite reasons of law and facts for so doing."

The order granting a new trial is vacated; and the trial court directed to reinstate the verdict of the jury, and enter a judgment thereon.

WEAVER, C. J., and MALLERY, FINLEY and FOSTER, JJ., concur.

GEO. V. NOLTE & CO., a corporation, Respondent,

v.

PIELER CONSTRUCTION CO., a corporation, Appellant,

Geo. V. Nolte and Fred M. Harris, doing business as Geo. V. Nolte & Co., Additional Respondents.

No. 34806.

Supreme Court of Washington, Department 1.

April 9, 1959.

Action by subcontractor against construction corporation to recover balance due for construction of sidewalks and curbs. The Superior Court, Skagit County, A. H. Ward, J., entered judgment in favor of the subcontractor, and corporation appealed. The Supreme Court, Ott, J., held that where corporation on September 2, 1954, notified subcontractor that corporation would withhold portion of balance due for the construction work, subcontractor on October 15 filed suit for balance due, corporation on January 4, 1955, filed answer which alleged contract provided for arbitration before maintenance of civil action and filed cross-complaint, subcontractor on February 6, 1955, made written offer to arbitrate, and lapse until subcontractor on March 22, 1956, renewed offer to arbitrate was attributable to filing of cross-complaint, the lapsed time from notification of September 2, 1954, until renewal offer of March 22, 1956, was not unreasonable, and failure of subcontractor to offer to arbitrate prior to bringing action did not bar subcontractor from maintenance thereof.

Affirmed.

1. Contracts ⇐322(1)

When contracting parties have agreed that condition of contract must be performed within reasonable time, party who asserts time of performance to have been unreasonable has burden to prove its unreasonableness.

Contracts ⇐290

Covenant in contract providing for arbitration can be waived.

Contracts ⇐227

Waiver of condition of contract can be accomplished, expressly or impliedly.

Contracts ⇐176(1)

If waiver of condition of contract is accomplished by implication, it is issue to be determined by court, based upon facts and circumstances relied upon.

Contracts ⇐284(3)

Where construction corporation on September 2, 1954, notified subcontractor that the corporation would withhold portion of balance due subcontractor for construction of sidewalks and curbs, subcontractor on October 15 filed suit for balance due, corporation on January 4, 1955, filed answer which alleged subcontract provided for arbitration before maintenance of civil action and filed cross-complaint, subcontractor on February 6, 1955, made written offer to arbitrate, and lapse until subcontractor on March 22, 1956, renewed offer was attributable to filing of the cross-complaint, lapsed time from notification of September 2, 1954, until renewal offer of March 22, 1956, was not unreasonable, and failure of subcontractor to offer to arbitrate prior to bringing action for balance due did not bar subcontractor from maintenance of such action.

6. Arbitration and Award ⇐82(4)

Where subcontractor requested arbitration with prime contractor for subcontractor's claims for construction of streets, curbs, sidewalks, utilities, site improvements, and landscaping, including rehabilitation expense of sidewalks and curbs, which had been constructed by sub-subcontractor, award of arbitrators adjudicated only rights of subcontractor and prime contractor, and did not bar proceeding by sub-subcontractor against subcontractor for balance due under contract between sub-subcontractor and subcontractor.

7. Contracts ⇐322(4)

In action by subcontractor against construction corporation to recover balance due for construction of sidewalks and curbs, evidence supported finding that subcontractor in every respect performed provisions of contract.

Lycette, Diamond & Sylvester, Lyle L. Iversen, Seattle, for appellant.

Sherwood & Forrest, Livesey, Kingsbury & Livesey, Bellingham, for respondent.

OTT, Justice.

Myers, Major & Co., a copartnership (hereinafter referred to as Myers), was the successful bidder for the construction of a Federal housing administration project at the Naval Air Station on Whidbey island. April 24, 1952, Myers, the prime contractor, entered into a subcontract with Pieler Construction Co. (herinafter referred to as Pieler) for the construction of certain streets, curbs, sidewalks, utilities, site improvements, and landscaping on the project, for a total of $246,500.

On or about May 19, 1952, Geo. V. Nolte and Fred M. Harris, doing business as Geo. V. Nolte & Co. (subsequently incorporated and hereinafter referred to as Nolte), entered into a written agreement with Pieler to construct, according to the plans and specifications, the curbing and sidewalks of the Pieler subcontract, for the flat sum of $40,152.25.

The prime contract provided that, if a disagreement should arise between the parties thereto, such dispute must first be submitted for arbitration as "a condition precedent to any right of legal action that either party may have against the other." This provision was carried, by reference, into the other contracts involved.

Nolte constructed the curbs and sidewalks, in full compliance with the plans and specifications, nearly two years before the completion of the prime contract, and was paid $33,547.90 on account. The FHA inspector refused to accept the curbs and sidewalks because, in the interim, the sidewalks had become broken and cracked and the curbs had sunk below the elevation specified. The prime contractor, Myers,

notified the subcontractor, Pieler, of the FHA rejection. Pieler requested Nolte to repair the damages and make the construction acceptable to the FHA inspector, or Pieler would do it and charge Nolte for it. Nolte insisted it had constructed the curbs and sidewalks according to the plans and specifications; that the sidewalks, through no fault of Nolte, had become broken because of the activity of trucks driving over the finished sidewalks without proper protection; and that the curbs had sunk because the engineers' plans had not required adequate ballast before construction. Nolte refused to do the work again unless the additional work and materials would be paid for. Pieler notified Nolte that it had elected to do the rehabilitation work and would recover from the persons responsible for the damage. The cost of the rehabilitation was $7,082.22.

Pieler requested arbitration with Myers for claims aggregating $34,223.60 as its subcontractor, and included its claim for rehabilitation expense of the sidewalks and curbs. At the arbitration hearing, Pieler called Mr. Nolte as its witness, who testified that his company had performed the contract with reference to the construction of the sidewalks and curbs in accordance with the plans and specifications. No evidence was presented refuting the Nolte testimony. The arbitrators denied $5,642.39 of Pieler's claim for these items, for the reasons that there was some evidence of improper impaction along the line of the curbs, and they could not determine from the evidence what portion of the damage to the sidewalks was due to trucks driving over them as distinguished from other causes and what portion of the rehabilitation work was accomplished by Meyers and what portion by Pieler. Pieler permitted the judgment of award to become final.

September 2, 1954, Pieler informed Nolte of the Myers-Pieler arbitrators' award and notified Nolte that it was withholding the amount disallowed from the balance due Nolte. October 15, 1954, Nolte commenced its first action (Island county cause No. 3364) to recover the balance due it from Pieler. Pieler's affirmative answer, filed January 4, 1955, alleged that its contract with Nolte provided for arbitration as a condition precedent to the maintenance of a civil action, and that Nolte had not requested arbitration. Pieler also cross-complained against Nolte for sums due it under the contract. Nolte's written offer to arbitrate during the pendency of this proceeding, dated February 24, 1955, was refused by Pieler March 7, 1955. May 26, 1955, Nolte's reply to Pieler's answer alleged its offer to arbitrate had been refused. December 2, 1955, Pieler moved for summary judgment, alleging that Nolte's failure to arbitrate prior to bringing the action barred it from the maintenance thereof. March 5, 1956, the court filed its memorandum opinion on the motion for summary judgment, in which it held, *inter alia*, that Pieler's cross-complaint did not constitute a waiver of the arbitration covenant because it had been pleaded affirmatively as a bar, and that Nolte's offer to arbitrate was not timely because it did not in fact precede the commencement of the action but was subsequent thereto. March 21, 1956, judgment was entered dismissing both causes of action without prejudice. There was no appeal.

Nolte renewed its written offer to arbitrate on March 22, 1956. It was refused by Pieler March 26, 1956.

June 20, 1956, Nolte commenced the instant action to recover the balance due from Pieler. From a judgment entered in favor of Nolte, Pieler appeals.

Appellant's first contention on appeal is that Nolte's offer to arbitrate was not timely made and constituted a bar to any judgment for Nolte.

Article 40 of the "General Conditions" of the American Institute of Architects provided in part as follows: "* * * the demand for arbitration shall be made within a reasonable time after the dispute has arisen; * * *."

In Vance v. Mutual Gold Corp., 1940, 6 Wash.2d 466, 478, 108 P.2d 799, 805, we

...ved a definition of "reasonable time"

..."Such length of time as may fairly, properly, and reasonably be allowed or required, having regard to the nature of the act or duty, or of the subject matter, and to the attending circumstances.'"

[1] When contracting parties have agreed that a condition of the contract must be performed within a reasonable time, the party who asserts the time of performance to have been unreasonable has the burden to prove its unreasonableness.

[2-4] A covenant in a contract providing for arbitration can be waived. Puget Sound Bridge & Dredging Co. v. Lake Washington Shipyards, 1939, 1 Wash. 2d 401, 410, 96 P.2d 257; 3 Am.Jur. 887, Arbitration and Award, § 56. A waiver of a condition can be accomplished, expressly or impliedly. Puget Sound Bridge & Dredging Co. v. Lake Washington Shipyards, supra. If a waiver is accomplished by implication, it, likewise, is an issue to be determined by the court, based upon the facts and circumstances relied upon.

[5] Of the time that elapsed between September 2, 1954 (the date a dispute arose between Pieler and Nolte), and March 22, 1956 (the date Nolte renewed its offer to arbitrate), all that is reasonably chargeable to Nolte alone is from September 2, 1954, to February 6, 1955 (the date of Nolte's first written offer to arbitrate). The remaining fourteen months' time lapse was attributable solely to Pieler's filing of its cross-complaint, which raised a *bona fide* contention on the part of Nolte that a waiver was thereby implied.

Applying the above rules to these circumstances, Pieler failed to establish the elapsed time to be unreasonable; nor was there any evidence that the elapsed time chargeable to Nolte or to either of the parties caused Pieler any loss. We find no merit in appellant's first assignment of error.

Appellant next contends that the request for arbitration was not timely made for the reason that Art. 40, supra, provided in part: "* * * in no case, however, shall the demand [for arbitration] be made later than the time of final payment, * * *" and that the final payment referred to was the final payment between Myers and Pieler.

The A.I.A. articles were a part of the Myers-Pieler contract; likewise, they were a part of the Pieler-Nolte contract. In interpreting the meaning of the A.I.A. articles as they apply to the Pieler-Nolte contract, the words "final payment" could refer only to the final payment between Pieler and Nolte. We find no merit in this contention.

[6] Appellant next contends that Nolte was a party to the original arbitration proceeding between Myers and Pieler, and that, Nolte having taken no appeal from the judgment of award, its claim was barred by the application of the doctrine of *res judicata*.

With this contention we do not agree. Pieler requested arbitration with Myers. The subject matter for arbitration was the Myers-Pieler contract. The award of the arbitrators adjudicated only the rights of the parties to the Myers-Pieler contract. Nolte was not a party to the Myers-Pieler arbitration. The award of arbitration in the Myers-Pieler contract was not a bar to the instant proceeding because it lacked concurrence of at least two of the required elements. See Symington v. Hudson, 1952, 40 Wash.2d 331, 243 P.2d 484.

[7] Finally, the court found that Nolte in every respect performed the provisions of its contract with Pieler. The findings of the court are supported by the record.

We find no merit in appellant's remaining assignments of error.

The judgment is affirmed.

WEAVER, C. J., and MALLERY, DONWORTH, and HUNTER, JJ., concur.

HIGHLAND CONSTRUCTION COMPANY, a corporation, Plaintiff and Appellant,

v.

UNION PACIFIC RAILROAD COMPANY, a corporation, et al., Defendants and Respondents,

v.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, Third Party Defendant and Appellant.

No. 17900.

Supreme Court of Utah.

Feb. 3, 1984.

Subcontractor who was successful bidder on concrete substructures and piping work to be installed in coal handling facility filed suit against general contractor, and owner of facility alleging breach of contract, breach of fiduciary duty, conspiracy, quantum meruit, tortious interference with contractual rights, business interference and economic duress, as well as punitive damage claims. General contractor counterclaimed for breach of contract and resulting damages for costs which it incurred in substituting work to be performed by subcontractor, and for losses due to winter work and business reputation damages. The Third District Court, Salt Lake County, Christine M. Durham, J., granted a directed verdict in favor of all defendants, and entered judgment on a jury verdict in favor of general contractor on its counterclaim. Subcontractor appealed. The Supreme Court, Howe, J., held that: (1) trial court did not err in refusing to permit subcontractor to prove its damages under total cost, quantum meruit, or "jury verdict" theories; (2) subcontractor was not entitled to punitive damages or business losses; (3) trial court properly presented issues to jury as instructions covered theories of both parties; (4) trial court did not err in excluding testimony of subcontractor's expert witness, since subcontractor offered no data upon which expert could base his opinion; (5) trial court did not abuse its discretion in awarding to general contractor costs of depositions of subcontractor's witnesses; and (6) trial court erred in awarding owner of facility its costs since its memorandum of costs was not timely.

Affirmed as modified.

1. Appeal and Error ⇐927(7)

On review of a directed verdict, Supreme Court will view evidence in light most favorable to party against whom verdict was directed, in order to determine whether it established a prima facie case.

2. Damages ⇐184

Some degree of uncertainty in evidence of damages will not relieve a defendant from recompensing a wronged plaintiff; however, plaintiff must show damages by evidence of facts and not by mere conclusions, and items of damage must be established by substantial evidence and not by conjecture.

3. Damages ⇐15

Whether general or special, damages must be traceable to wrongs complained of.

4. Damages ⇐124(1)

Trial court in action by subcontractor alleging breach of contract did not err in refusing to permit subcontractor to prove its damages under theory of total cost, where nature of alleged losses did not make it impossible or highly impractical to determine them with a reasonable degree of accuracy, subcontractor's bid or estimate was not realistic, and by its own admissions and contradictory statements on direct and cross-examination, subcontractor shouldered major portion of blame for added expenses due to delays, excessive costs and loss of work.

5. Damages ⇐191

Where subcontractor failed to prove causation between its costs and breach of any particular defendant, it was not entitled to present evidence under total cost theory of damages.

6. Contracts ⇐303(1)

Performance under bid is not excused because difficulties are encountered and recovery under such circumstances is restricted to extra work only.

7. Damages ⇐117

Damages are controlled by contractual remedies fashioned by the parties unless it can be shown that work performed was so different from work contemplated by the contract that additional recovery in quantum meruit is warranted.

8. Implied and Constructive Contracts ⇐65

Trial court in breach of contract action brought by subcontractor did not err in refusing to permit subcontractor to prove its damages under quantum meruit theory, where subcontractor's work was anticipated and work was performed in pursuance of the contract; moreover, although subcontractor claimed it had been unjustifiably terminated, it failed to prove in what respects work performed by it differed from work contemplated by the contract.

9. Damages ⇐189

Trial court in breach of contract action brought by subcontractor did not err in refusing to permit subcontractor to prove its damages under "jury verdict" theory of recovery, where subcontractor erected insurmountable barrier to successful proffer of damage evidence by its complete inability to make causal connection between its losses on project and commissions or omissions of defendants or some of them.

10. Damages ⇐89(2)

Punitive damages cannot be awarded for breach of contract unless the breach amounts to an independent tort.

11. Damages ⇐23

Consequential damages will be awarded if losses resulting from a breach were reasonably within contemplation of parties when they entered into contract.

12. Damages ⇐189

Where claim for damages by subcontractor remained unsupported by sufficient documentation to allow jury to reasonably *infer* causality between breaches of defendants and losses by subcontractor, claim of business losses and consequential damages did not rise to level of proof required to permit recovery.

13. Contracts ⇐353(1)

Trial court in breach of contract action properly presented issues to jury, where theories of both parties were covered by its instructions.

14. Contracts ⇐323(1)

Dismissal of individual defendants from breach of contract action was not error, where there was no proffer of evidence of damages attributable to them personally.

15. Evidence ⇐553(2)

Trial court in breach of contract action brought by subcontractor properly excluded testimony of subcontractor's expert witness with respect to hypothetical question that tardy delivery of plans, unavailability of construction sites, incomplete and defective plans and similar negative conditions would have adverse effect upon man and equipment hours, and that it was not practical or possible to quantify and assign a dollar value to each of such conditions, where subcontractor cited no data upon which expert could base his opinion. Rules of Evid., Rule 56(2).

16. Costs ⇐193

Supreme Court will allow deposition costs as necessary and reasonable where development of the case is of such a complex nature that discovery cannot be accomplished through less expensive method of interrogatories, requests for admissions and requests for production of documents; award of such costs should be narrowly made to guard against abuse by those better financially equipped lest costs of seeking justice become prohibitive for the financially ill equipped.

17. Costs ⇐154, 193

Trial court in breach of construction contract action did not abuse its discretion in awarding costs of depositions of subcon-

tractor's witnesses to general contractor, since complexity of case and theories of recovery proposed by subcontractor made it virtually impossible to obtain sufficient information for preparation of case through more conservative methods of discovery; moreover, depositions were used at trial on cross-examination, both to impeach veracity and to refresh memory.

18. Costs ⇐203

Trial court erred in awarding prevailing defendant its costs when memorandum of costs was not timely filed. Rules Civ. Proc., Rule 54(d)(2).

Merlin R. Lybbert and Rex E. Madsen, Salt Lake City, for Highland.

Richard H. Nebeker, Salt Lake City, for third party defendant and appellant.

James P. Cowley, Robert A. Peterson, David A. Greenwood, Salt Lake City, for defendants and respondents.

HOWE, Justice:

Plaintiff, Highland Construction Company, appeals from a directed verdict of no cause of action for failure to introduce any admissible evidence of the quantity of damages it allegedly had sustained under a construction contract. The appeal is taken against Dravo Corporation, Carbon County Coal Company and its general partners, Rocky Mountain Energy Company and Dravo Coal Company, hereinafter collectively referred to as Carbon; Lamb Engineering & Construction Company (Lamb); and Michael R. Lamb and James R. Lamb, as well as Industrial Indemnity Company. None of the other parties is before us on this appeal for reasons not relevant to our review.

Plaintiff was the successful bidder on concrete substructures and piping work to be installed in a coal handling facility under construction near Hanna, Wyoming. On March 26, 1979 Highland entered into a written subcontract with Lamb which was the general contractor for Carbon, owner of the facility. The bid price was $1,097,325. Completion of the work under the subcontract was scheduled for August 15, 1979.

On July 9, 1979 Lamb partially terminated Highland's work for its failure to comply with working schedules on four of the concrete foundations under construction. Highland was allowed to continue the remaining contract work, but was completely terminated on December 27, 1979, after three additional partial terminations by Lamb in August, September and October of that year.

Highland filed suit against Lamb, Carbon and Lamb's surety, Industrial Indemnity Company, Richard R. Lamb and James R. Lamb, alleging breach of contract, breach of fiduciary duty, conspiracy, quantum meruit, tortious interference with contractual rights, business interference and economic duress, as well as punitive damage claims. Lamb counterclaimed for breach of contract and resulting damages for costs which it incurred in substituting work to be performed by Highland, and for losses due to winter work and business reputation damages. The case was tried before a jury. At the end of the liability phase of its case, Highland proffered evidence on a "total cost" theory and the opinion of its expert that Highland's damages approximated its total expenditures on the job (which included a built-in profit), less the amount it had been paid by Lamb. No allocation of damages among the various defendants was made. Defendants objected to that proffer, the objection was sustained, and Highland rested without further proof of damages. Defendants then moved the court for a directed verdict which the court granted. Judgment was entered in favor of all defendants, no cause of action. The trial proceeded on Lamb's counterclaim. The jury returned a verdict on special interrogatories against Highland, awarding damages in the sum of $242,660.25 as a result of Highland's breach of contract.

Highland appeals, citing error by the trial court as follows:

1. Failure to allow Highland to proceed on total costs, quantum meruit, or "jury verdict" theories, and ruling that Highland was not entitled to loss of business or punitive damages.

2. Refusal to accept some of Highland's jury instructions, and the submittal to the jury of a special verdict form favoring Lamb's theories.

3. Ruling that there was no evidence of improper conduct on the part of Michael R. Lamb and James R. Lamb.

4. Exclusion of Highland's expert witness testimony.

5. Award of costs to defendants Lamb and Carbon not contemplated by law.

I.

[1] The record before us is voluminous and covers the entire liability phase of Highland's case against Lamb which it presented at trial stretching over a period of two months. We have diligently reviewed the testimony adduced; however, space will not allow but the briefest reference to some of the crucial points. We will view the evidence in a light most favorable to the party against whom the verdict was directed, in order to determine whether Highland had established a prima facie case. *Cruz v. Montoya*, Utah, 660 P.2d 723 (1983) and cases cited therein; *Lindsay v. Gibbons and Reed*, 27 Utah 2d 419, 497 P.2d 28 (1972).

II.

Highland's first assignment of error is the trial court's refusal to admit evidence of damages based on total costs, quantum meruit, and "jury verdict" theories. After rejecting Highland's proffer, the court made the following finding:

> As to the defendant Lamb Engineering & Construction Company, there is no evidence before the court that its conduct, misconduct, actions, inactions and/or breach of contract caused any damage to any other party or parties to the above-entitled action.

Highland contends that the court should have allowed evidence that Highland's total costs incurred for its partial construction of the concrete structures and piping work were $2,317,172.66, and that after a credit of $413,763.04 paid by Lamb, Highland was entitled to $1,903,409.62. Highland's bid to Lamb was $1,097,325.

[2, 3] It is true that some degree of uncertainty in the evidence of damages will not relieve a defendant from recompensing a wronged plaintiff. *Bastian v. King*, Utah, 661 P.2d 953 (1983) and cases cited therein. However, it is also a general rule of long standing that a plaintiff must show damages by evidence of facts and not by mere conclusions, and that the items of damage must be established by substantial *evidence and not by conjecture. Bunnell v. Bills*, 13 Utah 2d 83, 90, 368 P.2d 597 (1962); *Bingham C. & L. Co. v. Board of Ed.*, 61 Utah 149, 159, 211 P. 981 (1922). And, whether general or special, damages must be traceable to the wrongs complained of. *Ranch Homes, Inc. v. Greater Park City Corp.*, Utah, 592 P.2d 620 (1979).

Highland contends that as a result of the nature of work to be performed it was impossible for it to trace ascertainable and quantifiable damages to the misconduct and/or breach of the various defendants. Therefore, the court below should have let the total costs come in under one of the three theories set out above, and allowed the jury to calculate the amount due as well as allocate percentages among the various defendants.

[4] 1. In support of its total cost theory, Highland refers us to several cases which allowed recovery to the plaintiff under that method. All of them are distinguishable. Two major differences pervade all of them: the contractor was either free from fault (or his fault was insignificant) and suit was brought against a single defendant who was blameworthy in causing the contractor's cost overrun. In *Thorn Const. Co., Inc. v. Utah Dept. of Transp.*, Utah, 598 P.2d 365 (1979), the court found for the contractor because a specific false

representation was made by the defendant's engineer's aide that borrow could be used from a certain pit more than 1.7 miles closer to the construction area than the pit the contractor finally had to use. The court allowed the excess cost for hauling the borrow. This was determined by comparing the cost used by the contractor in his bid estimate with his actual cost. Conversely, here, Highland asks for compensation not just for extra work but for the whole project, including the work done under the bid. It failed to trace its claimed damages to breaches of any defendant.

In *J.D. Hedin Construction Company v. United States*, 347 F.2d 236 (Ct.Cl.1965), the primary cause for delay in construction of a V.A. hospital was the government's faulty piling specifications. This delay forced excavations for the foundation to stand open during a stormy period of weather during which the excavations eroded. The contractor incurred extra costs in remedying the effects of the erosion. Resort was had to the contractor's bid estimate which the court found to be reliable and the contractor was allowed to recover on a "total cost" theory the excess cost actually incurred over his bid estimate. The court expressed its dislike for the total cost method and used it only on that one item of damage because there were proper safeguards: it was clear that the government alone was responsible for the damage and the exact amount of damage was difficult to determine. The court specifically rejected total costs on other items of damage that were "susceptible" to precise computation. In the instant case Highland could not support its claim that damages flowed from acts of or delays caused by Lamb and/or Carbon, rather than from its own fault. It did not try to tie in its claim for damages with its estimate for any particular cost.

In *H. John Homan Co., Inc. v. United States*, 418 F.2d 522, 189 Ct.Cl. 500 (1969), damages were quantified. The contractor had incurred extra costs which were attributable to the government because it had furnished an improper survey and faulty specifications. The contractor was awarded the cost of labor and overhead in excess of those items in its bid estimate. Conversely here, Highland was unable to show what excess cost it had incurred because of any particular act or inaction by any defendant. Moreover, Highland did not attempt to compare its bid estimate for the cost of any item with its actual cost for that item.

The same fatal distinction is noted in *Moorhead Const. Co. Inc. v. City of Grand Forks*, 508 F.2d 1008 (8th Cir.1975). There an inspection of the site would not then have disclosed the difficult site conditions which caused the problems later encountered by the contractor. The trial court ruled that proper soil conditions under Phase I were to be construed as an implied warranty for the contractor to be able to work on Phase II as anticipated. Moreover, the contract provided for an equitable adjustment for latent physical conditions. We note that Highland was required to perform all extra work under written change orders. The record is replete with statements that those portions of the work performed under change orders were compensated and that despite numerous requests by Lamb to submit change orders on other occasions, Highland repeatedly failed to do so. The record does not indicate that Lamb was reluctant to issue such change orders, but reveals that it urged Highland to cooperate as Lamb made two cents profit for every ten cents profit Highland made. All of Moorhead's expenses were found to have been fully documented and reasonably incurred, *Id.* at 1015; none of Highland's were documented, despite repeated requests by the court to do so when it had to reject as inadmissible summaries of costs prepared after the initiation of the lawsuit. The Moorhead court specifically noted that the trial court's method of total costs was not the preferred method for calculating damages, but "that no other method was feasible and the supporting evidence was substantial." *Id.* at 1016. Four factors of proof were advanced in Moorhead under which that method would be acceptable:

(1) [T]he nature of the particular losses make it impossible or highly impractical to determine them with a reasonable degree of accuracy;

(2) the plaintiff's bid or estimate was realistic;

(3) its actual costs were reasonable; and

(4) it was not responsible for the added expenses.

Id. at 1016.

Compared to those guidelines, Highland's fact situation is distinguishable on all but the third point. The record makes it abundantly clear that all extra work performed by Highland was, at the time it was incurred, highly susceptible to precise determination, if change orders had been issued, material invoices segregated, and man-hours separately recorded. Highland's own expert witness, Richard White, dispelled all notions that the bid had been carefully prepared. His testimony confirmed that it was not realistic. Highland did not inspect the site before submitting the bid and the costs of the various components of the job were not separately computed. The bid was more of a haphazard guess than an estimate based on concrete figures. White testified that a realistic bid would have made allowances for remoteness of area, rocky soil conditions, housing and transportation expenses, unfavorable weather conditions at an altitude of 7,000 feet, and sundry other exigencies. None of them was projected by Highland. By its own admissions and contradictory statements on direct and cross-examination, Highland shouldered a major portion of the blame for delays, excessive costs and loss of work.

In rejecting Highland's total cost theory we look for support to similar cases where the plaintiff had failed to quantify damages and was not allowed to ignore the terms of its bid. In *Shocker Const. Co. v. State*, Utah, 619 P.2d 1378 (1980) this Court rejected profits above bid as well as total costs to the extent that the damages were the result of problems plaintiff had with its own internal operations and improper equipment, or were associated with bad weather. *Id.* at 1379. Also *Thorn*, supra, was specifically distinguished in *Shocker* as having been affirmed on the basis of sufficient evidence in contrast to *Shocker*, where plaintiff had failed specifically to associate any portion of its cost with detrimental acts of the defendant. *Id.* at 1380.

In short, Highland failed to prove its increased cost for each alleged problem or breach caused by the defendants, failed to compare its bid estimate with its actual costs for each such problem or breach and failed to prove that defendants were solely responsible for its additional expense. Highland wanted to shorten the process of proof by introducing all of its costs for the entire job. This it may not do.

> [F]ailure to make any satisfactory showing of the amount of damages flowing from such breaches would require the dismissal of such causes ...
>
> Recovery of damages for a breach of contract is not allowed unless acceptable evidence demonstrates that the damages claimed resulted from and were caused by the breach. "The costs must be tied in to fault on defendant's part." [Citations omitted.] *Boyajian v. United States*, 423 F.2d 1231, 1235, 191 Ct.Cl. 233, (1970).

[5, 6] The paucity of evidence on causally connected damages cannot be used by Highland as a sword to ignore its bid and recover its costs plus profit instead. The record is barren of the necessary facts from which the jury might have reasonably found the extent or amount of damages flowing from any misconduct of the multiple defendants. In addition, Highland failed to prove causation between its costs and the breach of any particular defendant. See *Boyajian v. United States*, supra; *Huber, Hunt & Nichols, Inc. v. Moore*, 67 Cal.App.3d 278, 136 Cal.Rptr. 603 (1977). Performance under the bid is not excused simply because difficulties are encountered. Recovery under those circumstances is restricted to extra work only. *L.A. Young Sons Const. Co. v. County of Tooele*, Utah, 575 P.2d 1034 (1978).

2. In the alternative, Highland contends that the trial court should have allowed its total cost under quantum meruit. We disagree.

[7, 8] Under Utah law damages are controlled by the contractual remedies fashioned by the parties unless it can be shown that the work performed was so different from the work contemplated by the contract that additional recovery in quantum meruit is warranted. *Allen-Howe Specialties v. U.S. Const., Inc.*, Utah, 611 P.2d 705 (1980); *Mann v. American Western Life Ins. Co.*, Utah, 586 P.2d 461 (1978). In this case there was a contract clause requiring Highland to submit all proposed extra work in the form of written change orders so that a contractual remedy existed under an express contract. Highland's cases cited in support of an award of quantum meruit damages are all distinguishable. Quantum meruit was the proper recovery where the work was not anticipated under the contract and the contract could for all intents and purposes be considered abandoned. *Lester N. Johnson Co., Inc. v. City of Spokane*, 22 Wash.App. 265, 588 P.2d 1214 (1978); *V.C. Edwards Contracting Co. Inc. v. Port of Tacoma*, 83 Wash.2d 7, 514 P.2d 1381 (1973); *Bignold v. King County*, 65 Wash.2d 817, 399 P.2d 611 (1965); *Wunderlich Contracting Company v. United States*, 240 F.2d 201 (10th Cir.1957), cert. den. 353 U.S. 950, 77 S.Ct. 861, 1 L.Ed.2d 859 (1957). Quantum meruit was also upheld where the subcontractor justifiably ceased work or where the general contractor unjustifiably terminated the subcontractor. *United States v. Algernon Blair, Inc.*, 479 F.2d 638 (4th Cir.1973); *Seaboard Surety Co. v. United States*, 355 F.2d 139 (9th Cir.1966). By contrast, Highland's work was anticipated and the work was performed in pursuance of the contract. Although Highland claimed it had been unjustifiably terminated, it failed to prove in what respects the work performed by it differed from the work contemplated by the contract. Costs incurred in remedying its own faulty work and in repairing its own mistakes were not segregated from those for which Lamb paid and from those for which it did not pay but which actually benefitted some or all of the defendants.

[9] 3. We have carefully analyzed the cases cited by Highland in support of its "jury verdict" theory of recovery. We also recognize that the Lamb-Highland contract contained an equitable adjustment clause to cover changed conditions. We deduce that Highland was to give Lamb written notice of those changed conditions as a prerequisite to such an adjustment, and that written estimates of the labor and material costs, as well as the impact on the completion date were to be submitted in support. We do not read the cases allowing "jury verdict" recovery under similar equitable adjustment clauses to stand for the proposition that the contract may be discarded in its entirety. Instead, the equitable adjustment is the difference between the amount the work would have cost absent unanticipated changes and the amount it did cost as a result of the altered conditions. *Fattore Co., Inc. v. Metropolitan Sewerage Com'n*, 505 F.2d 1 (7th Cir.1974), holding the parties to the equitable adjustment clause invoked by the plaintiff; *Metropolitan Sewerage Com'n v. R.W. Const.*, 72 Wis.2d 365, 241 N.W.2d 371 (1976), rejecting summary of expenses and remanding for an allocation of costs based upon failures of the respective parties; *Dynalectron Corp. (Pacific Div.) v. United States*, 518 F.2d 594, 207 Ct.Cl. 349 (1975) ordering both plaintiff and the government to share costs where both parties shared responsibility for plaintiff's inability to perform Air Force specifications for jamming devices in electronic countermeasure systems.

In distinguishing these cases from Highland's situation, we are not unaware of Highland's proffered admission that approximately $30,000 damages were the result of Highland's underbid on hoppers and another $50,000 of Highland's own labor inefficiencies. However, these conclusory, unilaterally established sums were barren of any supporting evidence and consequently could not constitute the basis for "jury

verdict" damages of costs plus anticipated profits, minus $80,000.

Highland asks us to find the jury verdict approach consistent with this Court's rationale and holding in *Winsness v. M.J. Conoco Distributors*, Utah, 593 P.2d 1303 (1979). That case dealt with the issue of whether money damages could be determined from the lessee's failure to keep a gasoline service station open 24 hours a day. Suffice it to say that the data submitted to the jury in that case were meticulously compiled to serve as a point of departure for the jury's assessment of damages. Antipodal to that fact situation is the one here under review: Highland could express its loss of efficiency in percentage terms only. It offered no breakdown on breaches of contract, and no breakdown of breaches allocated to the several defendants. No evidence was adduced of requests for time extensions apparently allowed under the contract; no evidence was adduced on work beyond the scope of the contract; no evidence was proffered breaking down the cost of Highland's own errors and delays. By Highland's own admission through counsel it was "absolutely unable to come up with something [in the nature of quantifiable elements of damages] that would be more than just a gut reaction." The insurmountable barrier Highland erected to a successful proffer of damage evidence was its complete inability to make the causal connection between its losses on the project and the commissions or omissions of acts of the defendants or some of them. Although we commend counsel for Highland for their valiant effort to harness what evidence they had at their disposal, Highland simply did not keep the proper records necessary to enable a jury to have some methodology as a tool to properly discharge its function.

We therefore hold that the trial court did not err in refusing to permit Highland to prove its damages under any of the three theories addressed above.

[10–12] Highland's related assignment of error, that the trial court improperly ruled that Highland was not entitled to punitive damages and loss of business must also be rejected. It is the general rule in this forum that punitive damages cannot be awarded for a breach of contract unless the breach amounts to an independent tort. *Jorgensen v. John Clay and Co.*, Utah, 660 P.2d 229 (1983), and cases cited therein. There is no evidence to that effect in that portion of the record before us and we affirm the trial court's ruling on punitive damages. Highland's claim for business losses must fail for the same reason that its claim for all other damages fails. Consequential damages will be awarded if the losses resulting from a breach were reasonably within the contemplation of the parties when they entered into the subcontract. *Hadley v. Baxendale*, 156 Eng.Reptr. 145 (Ex.1854). Highland proffered a statement to the effect that it suffered between $785,000 and $1,042,000 in damages. Where the claim for damages remains unsupported by sufficient documentation to allow the jury to reasonably infer a causality between breaches of defendants and losses by Highland, a claim of business losses and consequential damages cannot rise to the level of proof required to permit recovery.

III.

[13] We next consider Highland's contention that the trial court committed error in the giving of a special verdict form and in its failure to submit proposed jury instructions on Highland's theories of defenses to Lamb's counterclaim.

Rule 51 of the Utah Rules of Civil Procedure provides that "[n]o party may assign as error the giving or the failure to give an instruction unless he objects thereto. In objecting to the giving of an instruction, a party must state distinctly the matter to which he objects and the grounds for his objection." See also *Jensen v. Eakins*, Utah, 575 P.2d 179 (1978). We have before us only that portion of the record that deals with Highland's case which was dismissed by a directed verdict prior to the proceeding of the trial on Lamb's counterclaim. There is thus nothing before us

from which we can learn what the nature of the objections was with respect to rejection of some of Highland's proposed instructions. All we have before us are the instructions themselves with notations made by the trial judge. Notwithstanding the cited requirement of Rule 51, that same rule also gives us the discretion, in the interest of justice, to "review the giving or failure to give an instruction." We have reviewed the instructions cited to us by Highland and conclude that the theories of both parties were covered by those instructions submitted to the jury. We have also reviewed the special interrogatories submitted to the jury on damages incurred by Lamb for the completion of work left undone by Highland. In the absence of any record on proper objections to exhibits supporting the cost of completion, we are relegated to assessing the propriety of the instructions from their face. We note that the jury answered all of the special interrogatories, reduced the cost of claimed capital to one-fourth and the fee of administering completion of the work to less than one-fifth of the amounts asked for by Lamb. Answering the special interrogatory on consequential damages, the jury denied in its entirety an amount of nearly $400,000. It would be difficult to suggest that such discriminatory evaluation showed prejudice to Highland. All instructions considered together show that the trial court properly presented the issues to the jury. *Gilhespie v. DeJong*, Utah, 520 P.2d 878 (1974); *Startin v. Madsen*, 120 Utah 631, 237 P.2d 834 (1951). We conclude that Highland's claim of error in instructing the jury is unfounded.

IV.

[14] The trial court's findings and judgment stated that "as to the defendants Michael R. Lamb and James R. Lamb, there is no evidence as to any improper conduct, misconduct or breach of contract, nor is there any other evidence before the court upon which they could be found liable to any other party or parties to the above entitled action." Highland assails this ruling as not being supported by the evidence. We have carefully considered the portions of the record cited to us by Highland and find several inconsistencies. Highland's statement that there was a total termination of Highland's subcontract on July 10, 1979 by these individual defendants is not supported by the record. There was a partial termination only on the fine coal reclaim tunnel, the loadout structure foundation, the transfer tower foundation and the drive building # 1 foundation, on all of which Highland was found to be in default. All other aspects of the work continued under the contract. The only other reference to any misconduct was the taping of a conference between Lamb and Highland without Highland's knowledge. No evidence was adduced that Highland suffered damages at the hands of these individual defendants as a result thereof. There was no proffer of evidence of damages attributable to them personally. We find no error in their dismissal from the action.

V.

[15] Highland's next assignment of error deals with the exclusion of the testimony of Highland's expert witness, Richard White, who was a potential bidder on the coal facility project as a prime contractor. Highland offered Mr. White's testimony as an expert in the construction industry with respect to a hypothetical question that late delivery of plans, unavailability of construction sites, incomplete and defective plans and similar negative conditions would have an adverse effect upon man and equipment hours, and that it was not practical or possible to quantify and assign dollar value to each of those conditions. The court sustained defendants' objections on the ground that it would not be helpful to the jury to ask the witness hypothetically "whether if plans were delivered late it causes problems, and to have him say yes." The court conceded that testimony would be allowed if the witness could base his opinion on the evidence given by other witnesses with respect to plan delays and other problems. The court found that those witnesses up to that point had been "singu-

larly unable" to quantify damages. It suggested that Highland acquaint its expert witness with the record for illustrations of those elements supporting his testimony. Highland declined to analyze the record, stating that the proffer made was sufficient for the purposes intended. It cited no data upon which the expert could base his opinion.

The Utah Rules of Evidence in force at the time of trial of this case [1] permitted testimony by an expert in the form of an opinion if those opinions were "(a) based on facts or data perceived by or personally known *or made known to the witness at the hearing*, and (b) within the scope of the special knowledge, skill, experience or training possessed by the witness." Rule 56(2), Utah Rules of Evidence. [Emphasis added.] "The expertise of the witness, his degree of familiarity with the necessary facts, and the logical nexus between his opinion and the facts adduced must be established." *Edwards v. Didericksen*, Utah, 597 P.2d 1328, 1331 (1979). See also *Day v. Lorenzo Smith & Son, Inc.*, 17 Utah 2d 221, 226, 408 P.2d 186 (1965).

Rule 56(2) and the case law support the trial court's ruling. The testimony was properly excluded so long as the witness was unable to give his opinion based upon data made known to him at trial, as, absent personal knowledge of the facts, this was the only ground on which the evidence could have come in. We therefore affirm the trial court's ruling on this issue.

VI.

Finally, Highland contends that costs were improperly awarded to the defendants. Inasmuch as separate memoranda of costs were filed by Lamb and Carbon, our approach to the issue will be bifurcated.

[16] We first deal with the propriety of the award to Lamb. Lamb's cost memorandum was filed on July 2, 1981, and Highland's motion to have Lamb's bill of costs taxed was filed on July 9, 1981, within the seven-days' period allowed under Rule 54(d)(2) of the Utah Rules of Civil Procedure. The total bill came to $2,526.75, of which $2,280.75 was for depositions of Highland's witnesses. Highland contends the cost of the depositions was not awardable. Although there has been some controversy on this question in our forum, the majority of this Court has consistently held that the costs of depositions are taxable "subject to the limitation that the trial court is persuaded that they were taken in good faith and, in the light of the circumstances, appeared to be essential for the development and presentation of the case." *Frampton v. Wilson*, Utah, 605 P.2d 771, 774 (1980) and cases cited therein; *Thomas v. Children's Aid Society of Ogden*, 12 Utah 2d 235, 239, 364 P.2d 1029 (1961). In *First Security Bank of Utah, N.A. v. Wright*, Utah, 521 P.2d 563, 567 (1974), where we upheld the trial court's denial of deposition costs, we stated that "[t]he burden is upon the claiming party to establish that they are necessary and reasonable, the determination of whether that burden is met is within the sound discretion of the trial court; " For the guidance of both the trial courts and counsel we would allow deposition costs as necessary and reasonable where the development of the case is of such a complex nature that discovery cannot be accomplished through the less expensive method of interrogatories, requests for admissions and requests for the production of documents The award of costs should be narrowly made to guard against abuse by those better financially equipped lest costs of seeking justice become prohibitive for the financially ill equipped.

[17] Even under this restriction, we find no abuse of the discretion of the trial court in awarding the costs of depositions of Highland's witnesses. The complexity of a construction case and the theories of recovery sought to be used here made it

1. The Utah Rules of Evidence were amended effective September 1, 1983, to align them with the Federal Rules of Evidence

virtually impossible to obtain sufficient information for the preparation of the case through more conservative methods of discovery. Moreover, the depositions were used at trial on cross-examination, both to impeach veracity and to refresh memory. We therefore affirm the trial court's award of costs to Lamb in its entirety.

[18] The award of costs to Carbon in the amount of $12,712.46 is another story. The findings and judgment on the directed verdict against Highland were filed on April 27, 1981. Carbon's memorandum of costs was filed May 5, and Highland's motion to strike Carbon's costs, though signed May 11, was not filed until May 15. Both parties were thus outside the limitations permitted by Rule 54(d)(2) of the Utah Rules of Civil Procedure. However, the paramount issue presents itself: Did the trial court err in awarding Carbon its costs when the memorandum of costs was not filed as required by the rules? We hold that it did.

This court has previously held that an unverified memorandum of costs filed within the five-day period did not entitle the plaintiff to an award of costs, and that it was error to permit the filing of a supplemental, verified memorandum thereafter. *Walker Bank & Trust Co. v. New York Terminal W. Co.*, 10 Utah 2d 210, 350 P.2d 626 (1960). The rationale of the Court in that decision that "[c]osts were not recoverable at common law, and the right to recover them is purely statutory" (*Id.* at 216, 350 P.2d 626) is equally applicable where no memorandum at all was filed within the five-day period permitted by the rule. Decisions under similar former statutory law support a strict construction of this rule. *Nelson, et ux. v. Arrowhead Freight Lines, Limited*, 99 Utah 129, 104 P.2d 225 (1940); *Openshaw v. Openshaw*, 80 Utah 9, 12 P.2d 364 (1932). The memorandum of costs should be stricken and Carbon required to bear its own costs with one exception. As the trial progressed through the district court, Carbon ordered and paid for a daily transcript of the testimony. When this appeal was filed by Highland, it certified as part of the record those transcripts and Highland has used them extensively in this appeal. It is therefore equitable that Highland should reimburse Carbon for the transcripts at the rate charged if they had been produced at the conclusion of the trial in the usual manner for appeal purposes and not on the more expensive daily rate basis. We remand to the district court to determine that cost and we award that amount to Carbon as a cost on appeal.

VII.

In sum, we reject Highland's various total cost theories to recover damages, as we have consistently done in similar cases in the past, where the costs were attributable to work covered by the contract, either under the bid, or through change order provisions. Parties to a contract must remain free to enforce the terms of their agreement and the contractor must be held to the terms of his bid, particularly where he is unable to connect additional costs with any particular breach on the part of any particular defendant. The issue of quantifiable damages pervaded all other issues presented by Highland on appeal.

With the exception of the award of costs to Carbon, the judgment, as modified, is affirmed in its entirety. Costs on appeal are awarded to Lamb; no appeal costs are awarded to Carbon except as heretofore noted.

HALL, C.J., and CHRISTOFFERSEN, VeNOY and GOULD, CALVIN, District Judges, concur.

OAKS and DURHAM, JJ., having disqualified themselves, do not participate herein, CHRISTOFFERSEN and GOULD, District Judges, sat.

STEWART, J., does not participate herein.

HOSEK MFG.-OVERLAND FOUNDRY CO. v. TEATS.

No. 14043

Supreme Court of Colorado.

Feb. 3, 1941.

Rehearing Denied Feb. 24, 1941.

1. Arbitration and award ⇐82(4)

In contractor's action against subcontractor for breach of contract to supply cast stone for college building, an arbitration award was properly refused when offered in evidence by subcontractor, where arbitration proceedings were between subcontractor and college and not between subcontractor and contractor, and contractor was only a witness in the proceedings, since that did not constitute him a "party" or subject him to liability under arbitrator's decision.

See Words and Phrases, Permanent Edition, for all other definitions of "Party".

2. Appeal and error ⇐1011(1)

In contractor's action against subcontractor for breach of contract to supply cast stone for college building, it was for the trial court to draw conclusions from conflicting evidence, and those conclusions would not be disturbed by the Supreme Court.

En Banc.

Error to District Court, El Paso County; J. E. Little, Judge.

Action by George O. Teats against the Hosek Manufacturing-Overland Foundry Company, for breach of contract, wherein defendant filed a cross-complaint. To review a judgment for plaintiff, defendant brings error.

Affirmed.

Frank Seydel, of Denver, for plaintiff in error.

Ben S. Wendelken, of Colorado Springs, for defendant in error.

FRANCIS E. BOUCK, Chief Justice.

Reversal is herein sought of a district court judgment for damages based upon a subcontractor's alleged violation of its contract to supply cast stone of given specifications to Teats, the principal contractor, plaintiff below and defendant in error here. Teats sued the subcontractor, the plaintiff in error Hosek Manufacturing-Overland Foundry Company. The latter denied the violation charged against it, affirmatively alleged its full compliance with the specifications, and then charged negligence of Teats himself to be the direct cause of defects or injuries found in the materials supplied. By cross-complaint the company demanded the balance of the purchase price.

The alleged errors assigned by the company are (1) rejection of defendant's exhibit 5, purporting to be an arbitration award, (2) refusal to give the jury each of ten instructions tendered by the defendant, (3) giving the jury an instruction not to consider defendant's defense of arbitration, (4) refusing a new trial.

The subject matter relates to certain repairs and alterations made in a dormitory building of Colorado College at Colorado Springs. An appropriate contract had been entered into by Teats and the college. It called for a cast stone porch and arches. Teats had received and accepted in due course the bid of the defendant company for supplying the materials in question.

[1] The assignments of error all focus upon the single proposition that exhibit 5, the so-called arbitration award, was a final determination of the respective rights and liabilities of Teats and the company.

The specifications underlying the contract between Teats and the college contained the following: "The General Conditions of the contract as prepared by the American Institute of Architects shall become a part of these specifications as fully as if herein written. A copy of these General Conditions may be examined at the office of the Architect." These "general conditions" include provisions for arbitration. The trouble with the alleged arbitration in the case at bar is that the proceedings were between the company and the college, not between the company and Teats. The Court cannot find from the record that Teats was a party to the arbitration proceedings. He was a witness, but that does not constitute him a party or subject him to liability under the decision of the arbitrator. Neither the "general conditions" nor the code chapter on arbitration could accomplish this result. It follows that exhibit 5 was properly refused when offered in evidence by the company.

[2] The arbitration award being properly rejected, there remains nothing but a case of conflicting evidence. It was the province of the trial court to draw conclusions from that evidence, and under a

[illegible] rule we as a reviewing court do not disturb those conclusions.

Judgment affirmed.

PHILLIPS v. PEOPLE.

No. 14804.

Supreme Court of Colorado.

Feb. 10, 1941.

Rehearing Denied March 3, 1941.

1. Criminal law ⇐365(1)

Where immediately after accused shot *prosecuting witnesses, sheriff was notified* and he with two deputies set out to arrest accused who was found near his truck with two guns with him, testimony in prosecution for assault that as accused was reaching for a gun, one of the deputies overpowered him and brought him down and that both of accused's guns were loaded was not inadmissible as being testimony of a separate and independent crime but was admissible as part of the "res gestæ".

See Words and Phrases, Permanent Edition, for all other definitions of "Res Gestæ".

2. Criminal law ⇐478(1)

Where X-ray pictures showing bullet lodged in one of the witnesses were introduced in connection with the testimony of a medical expert in prosecution for assault growing out of shooting of prosecuting witnesses by accused, a ballistics expert thereafter called was competent to testify as to *what would be the condition of bullet ricocheting* off a very hard stone wall and at an angle of some 45 degrees as compared with the bullet shown in the X-ray pictures since qualification as an expert to interpret X-ray pictures was not necessary.

3. Homicide ⇐341

Where accused was charged with "assault to commit murder" and no particular degree of murder was involved and court's instructions covered the crime of murder, refusal to instruct on all degrees of murder if error was not prejudicial since error if any was favorable to the accused.

In Department.

Error to District Court, Jefferson County; Samuel W. Johnson, Judge.

Calvin J. Phillips was convicted of assault, and he brings error.

Affirmed.

Clarence O. Moore, of Denver, for plaintiff in error.

Byron G. Rogers, Atty. Gen., and Gerald E. McAuliffe, Asst. Atty. Gen., for defendant in error.

BAKKE, Justice.

Plaintiff in error, defendant below, was found guilty of assault for shooting a fifteen year old boy and sentenced to six months in jail. Reversal is sought on a writ of error.

Upon our own motion we dismissed the case *for failure to prosecute, but subsequently, on motion of plaintiff in error, it* was reinstated and we now elect to determine the matter as submitted on typewritten briefs, without staying the execution of sentence.

The parties will be designated as in the court below.

The facts briefly stated are: On the afternoon of September 16, 1939, three boys, Parsons, Aday and Schwartz, whose homes are in Golden, went up on Table Mountain near Golden on a hunting trip. Each carried a 22-caliber rifle. As they walked along they shot at various targets—birds, rabbits, etc. They entered upon the land of defendant, who apparently had seen them and was approaching with a gun in the crook of his arm. The boys stopped behind some rocks, but when defendant continued to advance, they ran and tried to hide in a wooden culvert nearby. As usual, there was a dog along and he started whining, *thus revealing their whereabouts to defendant.* Parsons was at the end of the culvert nearest defendant, and behind him was Aday, with Schwartz near the opposite end. Parsons testified to the following conversation with defendant: "So I have got you at last, eh? He said: 'Come on, crawl out of there.' And I went to crawl out. I put my hand behind me to get up and he said, 'So pull a gun on me, will you?' and he fired. Before he fired, I said, 'Don't shoot.'" Schwartz testified that defendant said: "Don't pull a gun on me or I will shoot you right through the heart."

Neil JORGENSEN, Plaintiff and Respondent,

v.

JOHN CLAY AND COMPANY, a corporation, and Aetna Casualty and Surety Company, a corporation, Defendants and Appellants.

No. 17621.

Supreme Court of Utah.

March 3, 1983.

Seller of sheep brought breach of contract action against buyer and its surety. The Sixth District Court, Sanpete County, Don V. Tibbs, J., entered judgment in favor of seller, and appeal was taken. The Supreme Court, Howe, J., held that: (1) buyer was not entitled to have venue changed to Weber County, its principal place of business; (2) award of punitive damages, and attorney fees as an element of them, was error; and (3) seller was entitled to interest on difference between what seller should have received under contract with buyer and what he actually received.

Modified and affirmed.

1. Venue ⇐7.5(2)

Defendant buyer was not entitled to have breach of contract action moved to Weber County, Utah, its principal place of business, where neither face of contract nor implications drawn from it indicated that buyer's obligation was to be performed in a particular county of Utah. U.C.A.1953, 78–13–4.

2. Venue ⇐7.5(7)

Venue in breach of contract action was properly placed in county where plaintiff seller was a resident, where plaintiff seller sued on transitory cause of action and cause of action arose without state. U.C.A.1953, 78–13–6.

3. Damages ⇐89(2)

Generally, punitive damages cannot be awarded for breach of contract.

4. Sales ⇐384(1)

While jury did find malice in buyer's breach of contract for purchase of lambs and returned a verdict of one dollar punitive damages, there was no pleading, argument or evidentiary suggestion that refusal of lambs rose to level of an independent tort, and thus award of punitive damages, and attorney fees as an element of them, was error.

5. Interest ⇐39(2)

Prejudgment interest may be awarded in a case where the loss is fixed as of a particular time and the amount of the loss can be calculated with mathematical accuracy.

6. Interest ⇐56

Seller, the plaintiff in breach of contract action, was entitled to interest on difference between what seller should have received under contract with buyer and what he actually received from another as of date of last delivery.

Richard L. Stine and Richard Campbell, Ogden, Craig S. Cook, Salt Lake City, for defendants and appellants.

Arthur H. Nielsen, Stephen L. Henriod and Clark R. Nielsen, Salt Lake City, for plaintiff and respondent.

HOWE, Justice:

This is a case of breach of contract for the purchase of sheep from Neil Jorgensen (seller). John Clay and Company (buyer) and Aetna Casualty and Surety Company (buyer's surety) seek a reversal of the judgment entered against them and retrial on the basis of improper venue; or, in the alternative, they seek a remittitur in the amounts of $21,400 awarded for attorneys' fees and $14,822.37 awarded for pre-judgment interest.

Seller, who raises sheep for market, is a resident of Mt. Pleasant, Sanpete County, Utah. For many years he had dealt with the buyer who has its principal place of business in Ogden, Weber County, Utah.

Seller entered into a contract with buyer in November of 1978 for the sale of 5,000 lambs at 65 cents per pound with a "weight stop" [1] of 120 pounds. In early December, seller entered into a second contract in which buyer agreed to purchase 10,000 lambs at 70 cents per pound with no weight stop and had the option to take delivery of them between January and March 15, 1979.

At this time most of seller's sheep were pastured in Blythe, California, although some were in Cedar City, Utah and in Mt. Pleasant, Utah. Shipments from Blythe on the first contract began after Christmas and continued into January of 1979. Shipping dates were agreed upon in advance of each shipment so that seller or his representative could be present to supervise the sorting, loading, and inspection of the lambs. Because bad weather conditions developed in Blythe that winter, seller had to move his lambs in order to save them. Buyer, who was already obligated for shipment, agreed to reimburse seller for moving the 10,000 lambs sold under the second contract to a feedlot in Ault, Colorado. The feedlot is located near Monfort Company of Greeley, Colorado, which is a packing house to whom buyer had resold the lambs.

Even though the custom in the industry and the parties' practice had been to notify the owner prior to the shipment of livestock, buyer selected 2,421 of seller's lambs and shipped them to Monfort from the feedlot on February 5, 6, and 7, 1979 without advising seller. When seller protested, buyer assured him that it would not happen again. However, later in February buyer shipped 1,096 more lambs to Monfort without advising seller. Seller was paid for these but received no weight slips and he claimed they were improperly weighed. Consequently, seller advised the feedlot owner not to release any more of his lambs without notifying him.

At the next scheduled shipment, because bad weather prevented him from flying into Ault, Colorado, seller telephoned to authorize the release of his lambs. He was told that since he was not present, another owner's lambs had been substituted and shipped. Later, two days before another shipment was scheduled, he was informed that buyer would not accept any more of his lambs because buyer claimed that seller had interfered with Monfort's slaughtering schedule. In the interim the market had fallen to 60 cents per pound; and, buyer offered to take the lambs at that price with a weight stop of 120 pounds. Seller gave buyer until March 10 to honor the contract but when buyer's only response was to raise its offer to 63 cents per pound, seller resold 6,238 lambs to R.H. Rock Co. at a loss to him of $166,566.40 which was in addition to the unpaid freight charges of $22,000.00 for shipping from Blythe. Further loss was sustained by seller when buyer eventually paid 5 cents per pound less than agreed upon for 274 lambs which seller had delivered in February.

After filing a claim with buyer's surety, seller brought suit in Sanpete County. Buyer moved to change venue to Weber County but the motion was denied, the trial was conducted, and the jury returned its verdict awarding plaintiff $191,463.40 ($166,566.40 damages on the contract, $22,000.00 for freight from Blythe and 5 cents per pound on the 274 lambs shipped in February) and $1.00 punitive damages. To that verdict the trial court added pre-judgment interest of $14,822.37 and attorneys' fees of $21,400.00.

VENUE

Buyer moved to change venue to Weber County, its principal place of business, relying upon the following statutory provisions of U.C.A., 1953:

> 78–13–4. Actions on written contracts.—When the defendant has contracted in writing to perform an obligation in a particular county of the state and resides in another county, an action on such contract obligation may be com-

1. A "weight stop" is a device used in the industry which puts a weight limitation on each lamb so that any excess weight is not paid for by the buyer. It is disapproved by the Packers and Stockyards Administration.

menced and tried in the county where such obligation is to be performed or in which the defendant resides.

78–13–7. All other actions.—In all other cases the action must be tried in the county in which the cause of action arises, or in the county in which any defendant resides at the commencement of the action; provided, that if any such defendant is a corporation, any county in which such corporation has its principal office or place of business shall be deemed the county in which such corporation resides within the meaning of this section....

Since § 78–13–7 applies only where no other provision applies, we need not discuss it here. Buyer cites several cases to support the applicability of § 78–13–4 to this contract. *Simmons v. Hoyt*, 109 Utah 186, 167 P.2d 27 (1946); *Palfreyman v. Trueman*, 105 Utah 463, 142 P.2d 677 (1943); *Floor v. Mitchell*, 86 Utah 203, 41 P.2d 281 (1935); *Atlas Acceptance Corp. v. Pratt*, 85 Utah 352, 39 P.2d 710 (1935); *Buckle v. Ogden Furniture and Carpet Co.*, Utah, 61 Utah 559, 216 P. 684 (1923). In these cases where written contracts to allegedly perform "an obligation in a particular county of this state" had not explicitly or impliedly indicated the place of performance, we resolved the ambiguity in favor of the defendant and held the venue to be at the residence of the defendant, rather than the place of performance. But that principle is not reached here since this case is distinguishable.

[1] Unlike the cases cited in the above paragraph, the contract involved here was not one to perform an obligation in a particular county of this state or necessarily within this state at all. Most of the sheep were pastured in California, had to be moved to Colorado and were resold there. Buyer's agents conducted transactions and communications with seller from Colorado and Arizona. It was Colorado where buyer refused to accept further deliveries which it had agreed to take under the contract. This dimension of contract boundaries beyond the territorial limits of Utah is not present in the cases cited and relied upon by the buyer.

Neither does the face of the contract or implications drawn from it indicate that buyer's obligation was to be performed in a particular county of this state. The omission from the contract of a statement of the place of performance as well as the surrounding factual setting of various out-of-state locations for the parties' transactions are considerations which lead to the conclusion that § 78–13–4 does not obtain in this instance.

Even the fact that the parties contracted in light of the Packers and Stockyards Act is not helpful. The applicable provision[2] suggests that Sanpete County might have been the place of performance only if seller had not been present to receive payment at the time of delivery in California or Colorado. The application of the Packers and Stockyards Act provision to the contract as a fallback provision does not create an ambiguity concerning alternative places of performance as buyer argues, either Its language is quite clear In short, the application of this provision would not qualify this contract under it.

[2] The applicable statute in this instance is the following:

78–13–6. Arising without this state in favor of resident.—All transitory causes of action arising without this state in favor of residents of this state shall, if action is brought thereon in this state, be brought and tried in the county where the plaintiff resides, or in the county where the principal defendant resides, or if the principal defendant is a corpora-

2. 7 U.S.C. § 228b, Reg. of Sec. of Agriculture, Packers and Stockyards Act, 9 C.F.R., Sec 201.43(b)(2)(ii) states:

> No dealer purchasing livestock for slaughter, shall mail a check in payment for the livestock unless (a) the check is made available for actual delivery and the seller or his duly authorized representative is not present to receive payment, at the point of transfer of possession of such livestock, on or before the close of the next business day following purchase of the livestock and transfer of possession thereof

> tion, then in the county where the plaintiff resides or in the county where such corporation has an office or place of business, subject, however, to a change of venue as provided by law.

There is no dispute that plaintiff sued on a transitory cause of action. It is also clear that this cause of action arose "without this state." Colorado was where buyer took possession of some of the lambs without notice to seller and then later refused to accept further deliveries. Buyer provides no persuasive rationale for his argument that while Colorado was the place of injury, it was not the location where the right of a cause of action arose. Because seller had an option under § 78–13–6 to choose where to bring suit, the district court had no prerogative to change venue to the county of buyer's choice. *Walker Bank & Trust Co. v. Walker*, Utah, 631 P.2d 860 (1981). As a result, there was no error on this point.

ATTORNEY'S FEES

There was no provision for payment of attorney's fees in this contract. The trial court awarded them as an element of punitive damages because the jury had found malice.

In tort cases where conduct is willful and malicious, we have allowed the award of punitive damages. *Elkington v. Foust*, Utah, 618 P.2d 37 (1980); *Terry v. Zions Co-op Mercantile Inst.*, Utah, 605 P.2d 314 (1979), *Kesler v. Rogers*, Utah, 542 P.2d 354 (1975); *Holdaway v. Hall*, 29 Utah 2d 77, 505 P.2d 295 (1973); *Powers v. Taylor*, 14 Utah 2d 152, 379 P.2d 380 (1963). In a recent repossession case, *Clayton v Crossroads Equipment Co.*, Utah, 655 P.2d 1125 (1982), we affirmed the award of punitive damages on similar grounds.

Heretofore, we have not approved the award of punitive damages for breach of contract. In *First Security Bank v. Utah Turkey Growers, Inc.*, Utah, 610 P.2d 329 (1980), we held that under the Utah Uniform Commercial Code remedies are applied solely to compensate for actual losses—no punitive awards are permitted. In *Debry & Hilton Travel v. Capitol Intern. Airways*, Utah, 583 P.2d 1181 (1978), we affirmed the denial of attorney's fees in a breach of contract action where punitive damages were also denied. *Palombi v. D & C Builders*, 22 Utah 2d 297, 452 P.2d 325 (1969), involved faulty workmanship in the performance of a contract for the installation of aluminum siding where we held that punitive damages were not justified but awarded attorney's fees on a statutory basis. In *Dahl v. Prince*, 119 Utah 556, 230 P.2d 328 (1951), we held that an award for attorney's fees as damages against an attaching creditor for depriving plaintiff of possession of an automobile was erroneous. See also *Lyman Grazing Assoc. v. Smith*, 24 Utah 2d 443, 473 P.2d 905 (1970), a contract action where malice was not found and attorney's fees were not awarded.

[3] The general rule is that punitive damages cannot be awarded for a breach of contract. *Farris v. U.S. Fidelity and Guaranty Co.*, 284 Or. 453, 587 P.2d 1015 (1978); *Purington v. Sound West*, 173 Mont. 106, 566 P.2d 795 (1977); *Continental Nat. Bank v. Evans*, 107 Ariz. 378, 489 P.2d 15 (1971). See 22 Am.Jur.2d, Damages, § 245 (1965). See also: Restatement of Contracts § 342 (1982); Williston on Contracts § 1340 (Rev. Ed., 1968); Sutherland on Damages, Exemplary Damages, § 391 (4th Ed., 1916).

However, we and other jurisdictions have allowed punitive damages where the breach of contract amounts to an independent tort. *Leigh Furniture and Carpet Co. v. Isom*, Utah, 657 P.2d 293 (1982); *Temmen v. Kent-Brown Chevrolet Co.*, 227 Kan. 45, 605 P.2d 95 (1980); *Jackson v. Glasgow*, Okla. App., 622 P.2d 1088 (1980), *Z.D Howard Co. v. Cartwright*, Okla., 537 P.2d 345 (1975); *Gonzalez v. Allstate Ins. Co.*, 217 Kan. 262, 535 P.2d 919 (1975); *Dold v. Outrigger Hotel*, 54 Hawaii 18, 501 P.2d 368, 58 A.L.R.3d 360 (1972).

We recognize the rule in some jurisdictions which, rather than requiring an independent tort, allows the award of punitive damages if the contract was breached willfully and maliciously. *Yacht Club Sales & Service, Inc. v. First Nat. Bank*, 101 Idaho 852, 623 P.2d 464 (1980); *State Farm Gen-*

eral Ins. Co. v. Clifton, 86 N.M. 757, 527 P.2d 798 (1974); *Boise Dodge Inc. v. Clark*, 92 Idaho 902, 453 P.2d 551 (1966). Despite dicta in some cases, we have not and do not adhere to this rule.

[4] Therefore, while the jury did find malice in the buyer's breach of contract and returned a verdict of $1.00 punitive damages, there was no pleading, argument or evidentiary suggestion that the refusal of the lambs rose to the level of an independent tort. Consequently, the award of punitive damages, and attorney's fees as an element of them, was error in this case; and, attorney's fees were not recoverable on any other ground since there was no contractual or statutory basis for them. *Devore v. Bostrom*, Utah, 632 P.2d 832 (1981); *B & R Supply Co. v. Bringhurst*, 28 Utah 2d 442, 503 P.2d 1216 (1972); *Blake v. Blake*, 17 Utah 2d 369, 412 P.2d 454 (1966).

Accordingly, we order that the award of $1.00 punitive damages and the additional $21,400 attorney's fees awarded as an element of punitive damages be remitted.

INTEREST

[5] Prejudgment interest may be awarded in a case where the loss is fixed as of a particular time and the amount of the loss can be calculated with mathematical accuracy. *Anderson v. State Farm Fire and Casualty Co.*, Utah, 583 P.2d 101 (1978); *Bjork v. April Industries, Inc.*, Utah, 560 P.2d 315 (1977); *Uinta Pipeline Corp. v. White Superior Co.*, Utah, 546 P.2d 885 (1976); *Jack B. Parson Construction Co. v. State*, Utah, 552 P.2d 107 (1976).

[6] Buyer's argument that this is not such a case is unpersuasive. This is not an instance such as a case involving personal injury, false imprisonment, wrongful death, defamation, or the like. Regardless of variability of the weight of the sheep, these damages were mathematically calculated. The jury awarded seller damages based upon the difference between what seller should have received under the contract with buyer and what he actually received from R.H. Rock Company as of the date of last delivery. Seller was entitled to interest on that difference. We find no error on this point.

The judgment below is affirmed except as modified herein. No costs awarded.

HALL, C.J., and STEWART, OAKS and DURHAM, JJ., concur.

Joseph M. KINKELLA, Plaintiff and Appellant,

v.

H.L. (Jim) BAUGH and Dan Baugh, Defendants and Respondents.

No. 17967.

Supreme Court of Utah.

March 7, 1983.

Homeowner brought suit for damages on cost plus 10% contract for remodeling of home. The First District Court, Cache County, VeNoy Christoffersen, J., held for contractors, and homeowner appealed. The Supreme Court, Stewart, J., held that: (1) there was substantial compliance with rule of practice requiring that copies of proposed findings of fact and conclusions of law be served on opposing counsel before being presented to court for signature; (2) evidence adequately supported trial court's finding that evidence tended to support contractors' cost figures; (3) finding on issue of whether defendants were licensed contractors should have been made, but court's failure to do so was not reversible error; and (4) contractors were entitled to contract price for their services.

Affirmed.

void; (6) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (7) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), (3), or (4), not more than three months after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This Rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these Rules or by an independent action.

[1] The sequence of events recited ante would indicate that the proper procedure for setting aside the default in the instant case would be under Rule 60(b)(1)—mistake, inadvertence, surprise, or excusable neglect. This is true particularly in view of the late filing of defendant's motion to dismiss. However, because the time for setting aside a judgment for this reason had expired ("three months after the judgment"), defendant attempts to construe the reason as one falling within Rule 60(b)(7), i. e., that plaintiff is not the real party in interest. A ruling of this kind is typically discretionary with the trial court,[3] its concern being only with why a party failed to answer, not with the merits of any defense he might offer.[4]

[2] The trial court denied defendant's motion on two separate bases: (1) the timeliness of the motion; and (2) the substance of defendant's claim. It would appear that the reason the trial court even considered the substance of the claim was its concern that defendant may have been confused as to the effect of the stipulation for an amended complaint.[5] There is substantial evidence in the record to support the fact that plaintiff was the real party in interest, and that defendant had knowledge thereof.

The trial court's decision is affirmed. Costs to plaintiff.

CROCKETT, C. J., and MAUGHAN, WILKINS and STEWART, JJ., concur.

3. *Mayhew v. Standard Gilsonite Co.*, 14 Utah 2d 52, 376 P.2d 951 (1962); *Ney v. Harrison*, 5 Utah 2d 217, 299 P.2d 1114 (1956).

4. *Board of Education of Granite School District v. Cox*, 14 Utah 2d 385, 384 P.2d 806 (1963) cited with approval in *Airken Intermountain, Inc. v. Parker*, 30 Utah 2d 65, 513 P.2d 429 (1973); See also *Warren v. Dixon Ranch Co.*, 123 Utah 416, 260 P.2d 741 (1953).

5. It is conceivable that defendant expected yet another amended complaint to be filed pursuant to the stipulation.

INTERNATIONAL RESOURCES,
Plaintiff and Appellant,

v.

C. Robert DUNFIELD and Lynn S. Dunfield, Defendants and Respondents.

No. 16127.

Supreme Court of Utah.

Aug. 21, 1979.

In an action upon a contract claim, a motion to dismiss on ground of res judicata or collateral estoppel was granted by the Third District Court, Salt Lake County, David B. Dee, J., and plaintiff appealed The Supreme Court, Crockett, C. J., held that where, in a previous case, court had entered order allowing alleged assignor of plaintiff's claim to be made party but such alleged assignor had never been served nor actually brought into action, and where court had made no findings and thus it was

reasonable to infer that there was no showing as to truthfulness of the allegation of assignment, such alleged assignor was not barred, either by res judicata or collateral estoppel, from bringing the instant action upon such contract claim.

Judgment vacated and case remanded.

1. Judgment ⇐634, 713(2)

Distinction between res judicata and collateral estoppel is that former applies both as to issues which were actually tried and those which could have been tried in prior action, while latter does not apply to issues that could have been tried in prior case but were not.

2. Judgment ⇐707

Where, in first case, court entered order allowing alleged assignor of plaintiff's claim to be made party but such alleged assignor was never served nor actually brought into action, and where court made no findings and thus it was reasonable to infer that there was no showing as to truthfulness of allegation of assignment, such alleged assignor was not barred, either by res judicata or collateral estoppel, from bringing subsequent action upon such contract claim.

Lorin N. Pace, Salt Lake City, for plaintiff and appellant.

Steven C. Vanderlinden, Farmington, for defendants and respondents.

CROCKETT, Chief Justice.

International Resources, a corporation, sued the defendants for breach of a lease agreement and for return of money it had paid in advance thereon. Defendants filed an affidavit which alleged: that one Snellen N. Johnson had sued the defendants in a prior suit on the same claim; that therein the said Johnson had alleged that the plaintiff, International Resources Corporation, had assigned the claim to him; and that that suit had terminated in their favor. On the basis of those averments, which stood undisputed, the defendants moved to dismiss the instant action on the ground of res judicata or collateral estoppel. From the trial court's granting of defendants' motion, plaintiff appeals.

Essential facts appearing from the record pertinent to the issue herein confronted are: that in the prior action, the defendants themselves denied that there had been any assignment by plaintiff of its claim against the defendants to Snellen Johnson. They obtained an order making plaintiff here, International Resources, a party to that suit, but it was never served nor actually brought into that proceeding. It is true that at the conclusion of that trial, the defendants moved to dismiss the complaint on the ground that the plaintiff (Snellen Johnson) had failed to prove the allegations therein; and that the trial court granted that motion and dismissed the complaint with prejudice.

Particularly noteworthy are these facts: that the motion to dismiss that suit, which the court granted, was as against the plaintiff therein, Snellen Johnson; and that the court's order recited that "International Resources had never been formally advised that it had been joined as a party plaintiff in the above entitled action, and no summons nor service of process ever having been served on International Resources, International Resources is dismissed from the case "

The principle which underlies both the doctrine of res judicata and its close relative, collateral estoppel, is that when there has been a proper adjudication upon a controversy, and the judgment has become final, that should settle the matter and there should be no further litigation thereon. Concerning the doctrine of res judicata, it is often said that both the parties and the issues must have been the same; [1] and also that the judgment is conclusive, both as to issues which were actually tried and those which could have been tried in the prior

1. See 28 Am.Jur.2d 700.

action.[2] One of the reasons that it is said that the parties must have been the same in both actions is that before the rights of a party are concluded by a judgment, he is entitled to due process of law and an opportunity to contest the issue if he so desires.

[1] Though the related doctrine of collateral estoppel is based generally upon reasoning similar to that which underlies res judicata, there is an important distinction to be noted. The rationale of collateral estoppel is that, even where the parties may not have been the same, where a party has had an issue adjudicated against him in a prior case, he should be estopped from relitigating that issue in a subsequent case.[3] But it is important to keep in mind this distinction between the rule of res judicata and that of collateral estoppel: while as indicated above, the former applies both as to issues which were actually tried and those which could have been tried in a prior action, the latter does not apply to issues that merely "could have been tried" in the prior case, but operates only to issues which were actually asserted and tried in that case.[4] The primary reason for this is that if the party against whom such a defense is invoked was not a party to the prior action, he would have had no choice as to litigating an issue that merely "could have been tried" in the prior suit; and if the material issue was not actually asserted and determined, there is no basis upon which it could be concluded that he had actually taken any position on the issue and should now be estopped from asserting a different position in the instant suit.

[2] The position essayed by the defendants, in support of the trial court's ruling, is that in the prior suit it was alleged that the plaintiff in this suit (International Resources) had assigned its claim to the plaintiff in the prior suit, Snellen N. Johnson (which allegation, incidentally, the defendants disputed); and that because that suit terminated favorably to them, the plaintiff herein is precluded from maintaining this action on the ground of res judicata or of collateral estoppel.

In applying what has been said above to those contentions, these observations are pertinent: res judicata is not here applicable because, even though the court entered an order allowing plaintiff International Resources to be made a party, it was never served nor actually brought into the action. It is significant that the allegation that International Resources had assigned its claim to the plaintiff in that suit, Snellen Johnson, was the allegation of Snellen Johnson, and not that of International Resources. Moreover, in its ruling in favor of the defendants, dismissing the suit of Snellen Johnson, the court made no findings. In thus rejecting Snellen Johnson's complaint, it is reasonable to infer that Johnson made no showing as to the truthfulness of his allegation that International Resources had assigned its claim to him.

From what has been said above, it will be seen that, whatever view is taken of the two cases, it does not appear that plaintiff International Resources has asserted any different position in the prior case as to its ownership of the claim against the defendants than that which it asserts here. It therefore has not had the "full and fair opportunity" it is entitled to for an adjudication on the question of whether it had made an assignment of its rights to Snellen Johnson, nor as to other issues which may exist relating to the controversy between itself and the defendants. It is therefore necessary that the judgment of dismissal be vacated and the case be remanded for such further proceedings as may seem advised. Costs to plaintiff (appellant).

MAUGHAN, WILKINS, HALL and STEWART, JJ., concur.

2. *Elliston v. Texaco, Inc.*, Utah, 521 P.2d 379.

3. See *Richards v. Hodson*, 26 Utah 2d 113, 485 P.2d 1044; *Allen v. Allen*, Wyo., 489 P.2d 65.

4. We so state in awareness of a concededly overbroad statement in our case of *Tracy Loan and Trust Co. v. Openshaw Inv. Co., et al.*, 102 Utah 509, 132 P 2d 388, to the effect that one would not be "judicially estopped" unless the parties and the issues are the same in the instant and the prior suit. Any misstatement of the rule was corrected and superseded by our decision in *Richards v. Hodson*, supra, note 3.

fense, and any amounts in mitigation must be established by the employer. *Pratt v. Board of Education, supra.* Where no salary agreement has been reached for the damage period, the rate of pay for the previous salary year should be used as the base salary amount. *Brady v. Board of Trustees*, 196 Neb. 226, 242 N.W.2d 616 (1976).

In sum, we hold that, where the College breached its contract with this employee by originally discharging him without observing the formal termination procedures in the College Personnel Manual, (1) even though the College had good cause to dismiss the employee, it was under a contractual obligation to continue to pay his salary until he was properly dismissed; and (2) the College finally performed a proper dismissal by substantially complying with the procedures in its Personnel Manual and therefore is not obliged to reinstate the employee.

The judgment is affirmed. No costs awarded.

HALL, C. J., and STEWART and HOWE, JJ., concur.

MAUGHAN, J., heard the arguments, but died before the opinion was filed.

LINDON CITY, Plaintiff and Appellant,

v.

ENGINEERS CONSTRUCTION CO., a corporation, Defendant and Respondent.

No. 17141.

Supreme Court of Utah.

Sept. 21, 1981.

City brought action against contractor for declaratory judgment as to rights and obligations of litigants. The Fourth District Court, Utah County, George E. Ballif, J., dismissed, and city appealed. The Supreme Court, Hall, C. J., held that: (1) under provisions of contract, city was required to arbitrate prior to litigating disputes; (2) questions as to the interest rate on delinquent payments and whether there had been final payment by check which did not include disputed interest were arbitrable; (3) Arbitration Act did not violate public policy; (4) Act does not deprive the city of due process or its remedy by due course of law; and (5) Act as applied to city was not an unconstitutional delegation of a municipal function to a special commission.

Affirmed.

1. Arbitration ⇐7.5

Question of whether final payment had been made under contract when the amount paid did not include disputed interest and question as to the rate of interest on delinquent contract payments were "disputes" subject to arbitration under provision of contract providing that all claims, disputes and other matters in question arising out of or relating to the contract documents or breach thereof should be arbitrated, except claims which had been waived by the making and acceptance of final payment.

2. Arbitration ⇐9

Under contract calling for arbitration of all disputes, city was required to seek arbitration before bringing suit under the Arbitration Act or the Declaratory Judgment Act. U.C.A.1953, 78–31–1 et seq., 78–33–1 et seq.

3. Arbitration ⇐7.1

Doubts as to whether the content of a contract is arbitrable should be resolved in favor of the parties' freedom to contract.

4. Declaratory Judgment ⇐24

Purpose of the Declaratory Judgment Act is to permit examination of legal documents and statutes to determine questions of construction or validity arising under such instruments. U.C.A.1953, 78–33–1 et seq.

5. Arbitration ⇐6

There is no public policy or other reason to prevent parties from agreeing to arbitration.

6. Estoppel ⇐52.10(4)

Under constitutional guarantee that every person shall have remedy by due course of law for injury to his person or property, party may intentionally and deliberately waive the ordinary and usual remedy to which he is entitled for the redress of a wrong, provided that waiver is expressed in the most unequivocal terms. Const.Art. 1, § 11.

7. Arbitration ⇐8

Arbitration removes a controversy from the area of litigation but it is not an ouster of judicial jurisdiction.

8. Arbitration ⇐2
Constitutional Law ⇐321

Provision of the Arbitration Act permitting valid and enforceable agreements for arbitration of future disputes does not violate the constitutional guarantee of remedy by due course of law for injury to property. U.C.A.1953, 78–31–1 et seq.; Const.Art. 1, § 11.

9. Constitutional Law ⇐251

Due process of law does not necessarily require judicial action; the purposes of the law may be effected by executive or administrative actions and still be valid if they meet the requirements of due process. Const.Art. 1, § 7.

10. Arbitration ⇐2
Constitutional Law ⇐306(3)

Arbitration Act meets due process requirements. Const.Art. 1, § 7; U.C.A.1953, 78–31–1 et seq.

11. Municipal Corporations ⇐62

Arbitration Act, as applied to contract involving municipality, does not unconstitutionally delegate a municipal function to a special commission. Const.Art. 6, § 28; U.C.A.1953, 78–31–1 et seq.

12. Municipal Corporations ⇐1011

Absent statutory prohibition, municipal corporation has the power to submit to arbitration any claim asserted by or against it. U.C.A.1953, 78–31–1 et seq.

Jackson Howard, John R. Merkling, Provo, for plaintiff and appellant.

Robert J. Dahl, Robert F. Babcock, Salt Lake City, for defendant and respondent.

HALL, Chief Justice:

This is an appeal from the dismissal of a complaint seeking a declaratory judgment as to rights and obligations of the litigants under a contract that included provisions calling for arbitration of any disputes that might arise out of the contract. The contract was for construction of a facility for the plaintiff, Lindon City, and resulted after the defendant, Engineers Construction, was the low bidder on an advertised invitation for bids. Both parties agreed to the arbitration by the designated American Arbitration Association. The entire contract was prepared by the City and the arbitration provision was a condition necessary to bind the parties to its terms.

Two disputes did arise: one as to the rate of interest on delinquent contract payments, and the other as to whether there had been a "final payment" by check that did not include the disputed interest.

Engineers claimed that payment had not been made, and requested and gave notice for arbitration according to the contract's terms. Before the date of hearing, the City refused to arbitrate and filed this suit for declaratory judgment.

The contract provisions that are of vital concern in resolving this litigation are reproduced as follows:

> Section 30.1. All claims, disputes and other matters in question arising out of, or relating to, the CONTRACT DOCUMENTS or the breach thereof, except for claims which have been waived by the making and acceptance of final payment as provided by Section 20, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association.

> This agreement to arbitrate shall be specifically enforceable under the prevailing arbitration law. The award rendered by the arbitrators shall be final, and judgment may be entered upon it in any court having jurisdiction thereof.
>
> Section 19.6 If the OWNER fails to make payment 30 days after approval by the ENGINEER, in addition to other remedies available to the CONTRACTOR, there shall be added to each such payment interest at the maximum legal rate commencing on the first day after said payment is due and continuing until the payment is received by the CONTRACTOR.
>
> Section 20.1 The acceptance by the CONTRACTOR of final payment shall be and shall operate as a release to the OWNER of all claims and all liability to the CONTRACTOR ....

[1] It would appear that the "disputes" mentioned above are particularly suited and designed for determination by arbitration by the very provisions insisted upon by the City for inclusion in the very contract it drafted and required as a condition for acceptance of bids. If not so intended to be arbitrable, it is suggested that few, if any, situations or "disputes" would survive for arbitration under such a superficial conclusion. We are of the opinion that a claim, followed by denial of the interest agreed upon and whether final payment under the contract had been made, are "disputes" under the plain, clear wording of the contract provisions set out above, and we so hold.

[2] The only question, therefore, is whether the plaintiff City was premature in filing for declaratory judgment—not whether such a suit is impermissible under any circumstances because of the arbitration agreement. We are convinced that before the plaintiff filed this suit, it was bound by its promise, first, to seek arbitration, then to litigate, if it could under its contract, or under either the Arbitration Act [1] or the Declaratory Judgment Act.[2]

The plaintiff asserts that the trial court held that it had no "standing" in court, while defendant contends the trial court held the suit to be "premature." The statements of the court indicate that it adjudged that the suit was premature. Whatever term is or was used, it connotes the conclusion that in any event the parties covenanted to arbitrate first; otherwise, the provisions therefor would make no sense. There is no question before this Court as to filing suit after arbitration failed, and therefore we need not discuss it except to say that, in fact, the Arbitration Act itself provides for such litigation in U.C.A., 1953, 78–31–13:

> The arbitrators may on their own motion, and shall by request of a party to the arbitration:
>
> (1) At any stage of the proceedings submit any question of law arising in the course of the hearing for the opinion of the court, stating the facts upon which the question arises, and such opinion when given shall bind the arbitrators in the making of their award.
>
> (2) State their final award, in the form of findings of fact, for the opinion of the court on the questions of law arising on the hearing.

The trial court decided the suit was premature, as do we. Resort to the arbitration process has not been had, as agreed, and the arguments as to what the declaratory judgment says or does, are not germane here Neither are those touching the jurisdiction of the arbitrator or issues determinable by the arbitrator in the first instance, such as "future" versus "present" disputes, whether the contract complies with the Arbitration Act, and whether the 1977 amendment to the Act or its predecessor prevailed. The decision of the trial court cannot be interpreted other than to say that none of the above matters can properly be heard by the court prior to arbitration.

[3] As to whether the content of a contract is arbitrable, doubts should be resolved in favor of the parties' freedom to

1. U.C.A., 1953, 78–31–1, *et seq.*

2. U.C.A., 1953, 78–33–1, *et seq*

contract.[3] As was stated in *King County v. Boeing Company*:[4]

> Arbitration is a contractual remedy for the settlement of disputes by extrajudicial means. It is a remedy freely bargained for by the parties, and "provides a means of giving effect to the intention of the parties, easing court congestion, and providing a method more expeditious and less expensive for the resolution of disputes." There is a strong public policy in favor of such a remedy, but it should not be invoked to resolve disputes that the parties have not agreed to arbitrate.
>
> * * * * * *
>
> Arbitration clauses should be liberally interpreted when the issue contested is the scope of the clause. If the scope of an arbitration clause is debatable or reasonably in doubt, the clause should be construed in favor of arbitration unless it can be said that it is not susceptible to an interpretation that covers the asserted dispute.... If an arbitrable issue exists, the parties should not be deprived of the benefits of the agreement for which they bargained. [Citations omitted.][5]

There is nothing in the contract here that is unclear, ambiguous or vague, and even if there were, the parties have agreed to arbitrate such things first. There is nothing in the contract that an average, literate person would not be able to read and interpret such as to demand a judge's decision rather than a competent arbitrator.

[4] The purpose of the Declaratory Judgment Act[6] is to permit examination of legal documents and statutes to determine questions of "construction or validity" arising under such instruments. There is no reason, however, why an arbiter appointed and authorized consensually by the parties cannot examine such instruments for the same reasons, as a condition precedent to a formal lawsuit.[7]

[5] There appears to be no "public policy" or other good reason why persons effectively and by contract, should not be able to agree to an out-of-court settlement. It is accomplished frequently by stipulation, binding concessions, accord and satisfaction, covenant not to sue, by indemnity contract, and by other honorable and legal means.

The trend toward such *inter se* agreements without resort to litigation, reflects a good, practical way to resolve disputes. This very case appears to be a typical example of such attempted avoidance of the cost and protraction this case itself already has engendered. It would appear that in this case the City may have sought lower construction costs and Engineers, a more remunerative margin of profit, by entertaining the arbitration process.

Plaintiff's remaining point on appeal challenges the constitutionality of the Arbitration Act, which permits the parties to "[a]gree to submit to arbitration any controversy which may arise in the future." We note at the outset that 1) plaintiff does not support the point by any substantial meritorious argument, and 2) that many of our sister state courts have held similar acts to be constitutional.

Without satisfactory proof otherwise, constitutionality is generally presumed.[8] In *Branch v. Salt Lake County*,[9] the Court held as follows:

> The first legal principle to be observed is that there is a presumption that a statute is valid and constitutional; and one who questions it has the burden of convincing this court of its unconstitutionality.

3. *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960).

4. 18 Wash.App. 595, 570 P.2d 713 (1977).

5. 570 P.2d at pp. 717–718.

6. *Supra*, note 2.

7. *Gary Excavating v. Town of North Haven*, 164 Conn. 119, 318 A.2d 84 (1972); *Ozdeger v. Altay*, 66 Ill.App.3d 629, 23 Ill.Dec. 446, 384 N.E.2d 82 (1978).

8. *Washington County v. State Tax Commission*, 103 Utah 73, 133 P.2d 564 (1943).

9. 23 Utah 2d 181, 460 P.2d 814 (1969).

Plaintiff contends the amendment violates Article I, Section 11 [10] and Article I, Section 7 [11] of the Constitution of Utah. Plaintiff further argues that the application of the amendment to a party that is a municipal corporation violates Article VI, Section 28 of the Constitution of Utah.[12]

[6, 7] Under Article I, Section 11, a party may intentionally and deliberately waive the ordinary and usual remedy to which a party is entitled for the redress of a wrong, but such waiver should be expressed in the most unequivocal terms.[13] Although *Barnhart v. Civil Service Employees Insurance Company* [14] alludes to this constitutional revision, this Court has consistently ruled that an agreement to arbitrate future disputes was enforceable for reasons of public policy. In *Johnson v. Brinkerhoff*,[15] this Court stated that the Utah statute (R.S. Utah 1933, 104–36–1) did not apply to agreements to arbitrate future disputes, and that such agreements were held to oust the courts of jurisdiction.[16]

[8] In *Latter v. Holsum Bread Co.*,[17] this Court ruled that in the absence of a statute to the contrary, an agreement to arbitrate future disputes was unenforceable on the ground that it denied to the parties judicial remedies and was, therefore, contrary to public policy. In a concurring opinion, Justice Wolfe stated that public policy was what the legislature declared it to be; and although the rule that commercial arbitration contracts were against public policy had long been criticized, it was too firmly imbedded to be overturned without legislation. In the *Barnhart* case,[18] this Court held that inasmuch as the legislature had not amended the arbitration statute, we would adhere to the law as previously established and would decline to enforce an agreement for arbitration of controversies which might arise in the future. In two concurring opinions, Justices Henriod and McDonough expressed the view that there was no reason parties should not be able to enter freely and voluntarily into a binding arbitration agreement, but it was the prerogative of the legislature to amend the statute to so provide. The legislature responded to the clarion opinions expressed by members of this Court and amended the statute to permit valid and enforceable agreements for arbitration of future disputes. This amendment does not violate Article I, Section 11, Constitution of Utah.

[9] Plaintiff contends the amendment violates the due process clause of Article I, Section 7, Constitution of Utah. Such an argument is not persuasive. In *Christiansen v. Harris*,[19] this Court observed that due process of law does not necessarily require judicial action. The purposes of the law, especially as to property, may be effected

10. "All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party."

11. "No person shall be deprived of life, liberty or property, without due process of law."

12. "The Legislature shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property or effects, whether held in trust or otherwise, to levy taxes, . or to perform any municipal functions."

13. *Bracken v. Dahle*, 68 Utah 486, 499, 251 P. 16 (1926).

14. 16 Utah 2d 223, 398 P.2d 873 (1965).

15. 89 Utah 530, 544, 57 P.2d 1132 (1936).

16. Such a phrase and the ensuing rule of law have been subject to some ridicule, 6A Corbin on Contracts, Sec. 1431, p. 381. An agreement to arbitrate future disputes has no effect upon the jurisdiction of the court, although it may affect the court's action. Arbitration removes the controversy from the area of litigation. It is no more an ouster of judicial jurisdiction than a compromise and settlement or a covenant not to sue, each of which disposes of issues without litigation. *Id.*, Sec. 1432, p. 383.

17. 108 Utah 364, 368, 160 P.2d 421 (1945).

18. *Supra*, note 14.

19. 109 Utah 1, 7, 163 P.2d 314 (1945).

by executive or administrative action, and still be valid if they meet the requirements of due process. The requirements are "that no party can be affected by such action, until his legal rights have been the subject of an inquiry by a person or body authorized by law to determine such rights, of which inquiry the party has due notice, and at which he had an opportunity to be heard and to give evidence as to his rights or defenses."

[10] A survey of Chapter 31, Title 78 reveals that the Arbitration Act more than fulfills all these requirements. In addition, there are provisions for action by the courts to affirm, modify, correct or vacate an award.

[11] Finally, plaintiff claims that the 1977 amendment violated the proscription of *Article VI, Section 28* as a delegation to a special commission of a municipal function. Specifically, plaintiff argues that to enforce the binding arbitration clause it included in the contract would be tantamount to subjecting a municipal corporation to the interest of a group antagonistic to the public with no responsibility to the public.

[12] Absent a statutory prohibition, a municipal corporation has the power to submit to arbitration any claim asserted by or against it. This power is based on the right to contract and the right to maintain and defend suits.[20] The arbitration clause in the instant case did not involve a delegation of unlimited discretion to an ad hoc panel of private persons to make basic governmental policy.[21] The contract specified the rights and duties of both parties, and the arbitration clause applied only to disputes about compliance with terms fixed by the contract. Such a clause was not an abdication of the municipality's duties towards new matters which might arise in the future, but only constituted a present agreement that disputes which might arise under the contract would be arbitrated.[22] We therefore conclude and hold that the Arbitration Act is constitutional.[23]

The judgment is affirmed with costs to respondent.

STEWART, HOWE and OAKS, JJ., concur.

MAUGHAN, J., heard the arguments, but died before the opinion was filed.

STATE of Utah in the Interest of: ORGILL, Evan Leonard (04–08–67) Orgill, Bart Wells (01–04–71) Persons under 18 years of age.

Appeal of Joyce THOMASON.

No. 17456.

Supreme Court of Utah.

Sept. 22, 1981.

Mother appealed from order of the Second District Court, Weber County, Calvin Gould, J., which terminated parental rights. The Supreme Court, Howe, J., held that: (1) evidence sustained determination that mother had abandoned children, and (2) evidence sustained determination that mother was unfit by reason of conduct and emotional condition to retain parental rights.

Affirmed.

20. 20 A.L.R.3d 569, Anno.: Power of municipal corporation to submit to arbitration, Sec. 2(a), pp. 572–574; Sec. 4(a), pp. 579–582.

21. Compare *Salt Lake City v. International Association of Firefighters*, Utah, 563 P.2d 786 (1977).

22. *City of Madison v. Frank Lloyd Wright Foundation*, 20 Wis.2d 361, 122 N.W.2d 409, 416–418, 20 A.L.R.3d 545 (1963).

23. See annotation in 55 A.L.R.2d 432 in support of this conclusion. See also, *Berkowitz v. Arbib*, 230 N.Y. 261, 130 N.E. 288 (1921).

157 Conn. 362

Clarence T. MARSALA

v.

VALVE CORPORATION OF AMERICA.

Supreme Court of Connecticut.

Jan. 8, 1969.

Application to vacate arbitration award in favor of employer in dispute as to propriety of employer's discharge of employee. The Superior Court, Fairfield County, Tedesco, J., vacated award and employer appealed. The Supreme Court, King, C. J., held that where parties had not in writing expressly waived requirement that award be made within 60 days after arbitrators were empowered to act, arbitration award which was made more than 60 days after start of arbitration hearing was of no legal effect, though award was made within 60 days after parties' summation briefs for hearing were mailed to arbitrators.

No error.

1. Contracts ⇐284(1)

Arbitration agreements are to be favorably construed.

2. Arbitration and Award ⇐1

Person can be compelled to arbitrate dispute only if, to extent that, and in manner in which, he has agreed to do so.

3. Arbitration and Award ⇐31

Agreement for arbitration of dispute may contain special provisions covering conduct of arbitration proceedings.

4. Arbitration and Award ⇐31

In absence of special provisions governing conduct of arbitration proceedings, proceedings are governed by applicable provisions of general arbitration statutes. C.G.S.A. §§ 52–408 to 52–424.

5. Arbitration and Award ⇐50

Where parties to arbitration proceeding had not in writing expressly waived requirement that award be made within 60 days after arbitrators were empowered to act, arbitration award which was made more than 60 days after start of arbitration hearing was of no legal effect, though award was made within 60 days after parties' summation briefs for hearing were mailed to arbitrators. C.G.S.A. §§ 31–98, 52–408 et seq., 52–413, 52–414, 52–416, 52–418.

6. Arbitration and Award ⇐50

Statutory provision that arbitration award made more than 60 days after arbitrators have been empowered to act shall have no legal effect unless parties expressly extend time in writing is mandatory and not merely directory and it is beyond powers of parties to arbitration proceeding to modify except in manner provided for in statute. C.G.S.A. § 52–416.

Clifford R. Oviatt, Jr., Stamford, with whom, on the brief, was John A. Sabanosh, Bridgeport, for appellant (defendant).

Lawrence J. Merly, Bridgeport, for appellee (plaintiff).

Before KING, C. J., and ALCORN, HOUSE, THIM and RYAN, JJ

KING, Chief Justice.

This was a proceeding brought by the plaintiff, under § 52–418 of the General Statutes, which provides in material part, that the Superior Court "shall make an order vacating * * * [an arbitration] award upon the application of any party to the arbitration: * * * (d) if the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made".

The plaintiff was employed by the defendant as its personnel manager under a

contract dated May 17, 1965, which provided, inter alia, that the contract of employment could not be terminated by either party except for "just cause"; that, if a dispute arose as to what constituted "just cause", it should be determined by a three-member board of arbitration; that one member of such board should be chosen by each party; and that the two thus chosen should themselves choose the third arbitrator.

On December 9, 1966, the plaintiff was discharged on the ground that he had been disloyal. On December 12, he requested arbitration of the dispute as to the propriety of his discharge. The plaintiff chose John V. Turk, Jr., as his arbitrator, the defendant chose Philip H. Smith, an attorney, and the two chose, as the third arbitrator, Peter Seitz. The selection of the three arbitrators was completed on January 30, 1967.

None of the arbitrators was ever sworn, as required by General Statutes § 52–414, although at some point in the proceedings the parties attempted orally to waive that statutory requirement.

On February 22, the arbitrators scheduled the arbitration hearing for May 10. The plaintiff, on February 21, had made application to the Superior Court, apparently pursuant to General Statutes § 52–412, for the taking of a deposition of Philip Sagarin, an officer of the defendant, and on March 20, the plaintiff filed in the Superior Court a notice that Sagarin's deposition would be taken on April 10. On March 22, the defendant asked the plaintiff for alternate dates for the taking of the Sagarin deposition, and it was rescheduled for April 20, at which time it was taken.

The arbitration hearing was held on the scheduled date, May 10, both parties participating and represented by counsel, and the hearing was completed on that day. At the close of the hearing, in response to an inquiry of arbitrator Seitz as to the method of summation, the plaintiff's attorney stated that he would like to have briefs exchanged, and it was agreed that briefs should be exchanged not later than June 13, which was done, and copies were mailed to the arbitrators on that day.

On August 8, the plaintiff's attorney received by mail the award, which consisted of a majority award in favor of the defendant and signed by arbitrators Seitz and Smith and a minority award, in favor of the plaintiff, signed by arbitrator Turk.

On August 29, the plaintiff filed the aforesaid application to vacate the award. The relevant specific grounds were (a) that the award was not rendered within the statutory period of "sixty days from the date on which * * * [the] arbitrators * * * were empowered to act", as required by General Statutes § 52–416, and (b) that the arbitrators, prior to hearing testimony and taking evidence, were not sworn as required by General Statutes, § 52–414 and there was no written waiver of this requirement. The court, after hearing, entered judgment vacating the award on the ground that it had not been rendered within the statutory time limit, and, in effect, it held that the date on which the arbitrators "were empowered to act" within the meaning of § 52–416 was not later than May 10, 1967, which was the date on which the arbitration hearing was held and the evidence concluded. From the judgment vacating the award the defendant appealed.

[1–4] Arbitration agreements are to be favorably construed by the courts. Gaer Bros., Inc. v. Mott, 144 Conn. 303, 307, 130 A.2d 804, 65 A.L.R.2d 749, and cases cited. But a person can be compelled to arbitrate a dispute only if, to the extent that, and in the manner in which, he has agreed so to do. Visselli v. American Fidelity Co., 155 Conn. 622, 624, 237 A.2d 561; Frager v. Pennsylvania General Ins. Co., 155 Conn. 270, 274, 231 A.2d 531, and cases cited. While the agreement for the arbitration of a dispute may contain special provisions governing the conduct of the arbitration proceedings, in the absence of such special

provisions the arbitration proceedings are governed by the applicable provisions of our general arbitration statutes.[1] McCaffrey v. United Aircraft Corporation, 147 Conn. 139, 141, 157 A.2d 920. These statutes consist of §§ 52-408 through 52-424 and are contained in what is now chapter 909 of the General Statutes. Neither party makes any claim that the provisions of chapter 909 are not applicable or that the agreement to arbitrate contained any special provisions relevant or material to the present controversy. Chapter 909 was first enacted as chapter 65 of the Public Acts of 1929 and, with some changes, was taken from the Uniform Arbitration Act first promulgated in 1925. Since that time a new Uniform Arbitration Act has been promulgated, differing considerably from the original act and reflecting changes and improvements suggested by experience in arbitration proceedings under the original Uniform Act. 9 Uniform Laws Annotated (1957) 76.

It is provided in General Statutes § 52-414 that, "[b]efore hearing any testimony or examining other evidence in the cause", the arbitrators "shall be sworn to hear and examine the matter in controversy faithfully and fairly and to make a just award according to the best of their understanding, unless the oath is waived in writing by the parties to the arbitration agreement". Here, the arbitrators were not sworn, and there was an oral, but not a written, waiver of that requirement. The statute expressly requires that the waiver be in writing. Since for the reasons hereinafter pointed out that the court was not in error vacating the award because it had not been rendered within the sixty-day time limit, it is unnecessary to determine the efficacy of the parties' attempted oral waiver of the requirement of the oath.

[5] We turn now to the phrase "empowered to act" since it is clear that the sixty-day period ran from that time, whatever that time was.[2] In the first place, it is important to note that, although what is now General Statutes § 52-416 was taken from § 8 of the original Uniform Arbitration Act, the Uniform Act provided that the sixty-day period should run from the time the arbitrators were appointed, while in the Connecticut statute the phrase "empowered to act" was deliberately substituted. This makes it clear that "empowered to act" does not refer to the time when the arbitrators are appointed as seems to be suggested at one point in the defendant's brief.

Although the arbitrators may, prior to taking the oath, perform some ministerial acts such as assigning a time for a hearing or granting a postponement, under General Statutes § 52-414, as hereinbefore noted, "[b]efore hearing any testimony or examining other evidence in the cause, the arbitrators * * * shall be sworn".

Under the quoted provisions of § 52-414, it is clear that chapter 909, construed as a whole, contemplates that the arbitrators shall not be empowered to take testimony or evidence until they have been sworn or until the oath has been waived in writing. Since the taking of testimony or evidence is indispensable to the performance by the arbitrators of their duties, it is clear that they must be "empowered to act" within the contemplation of the statute not later than the time when the taking of testimony and evidence begins. Here, the hearing

1. In chapter 560 of the General Statutes, which is not applicable to this proceeding, there are certain special statutory provisions regarding the arbitration of labor disputes before the board of mediation and arbitration. See cases such as Danbury Rubber Co. v. Local 402, etc., 145 Conn. 53, 55, 138 A.2d 783; International Brotherhood of Teamsters, etc. v. Shapiro, 138 Conn. 57, 68, 82 A.2d 345.

2. The ambiguity in the phrase "empowered to act", the differing interpretations which have been put upon it, and the need for a clarifying amendment are all pointed out in Siegel, "Time Limits for an Arbitration Award in Connecticut," 30 Conn.B.J. 360.

began, and indeed was completed, on May 10. We conclude that May 10 was the latest date on which it could be said that the arbitrators became "empowered to act" as envisioned in the statute. This, in effect, was what the court held. Of course the parties could not, by their failure to comply with the terms of the statute as to the oath, change the procedure which chapter 909 contemplated would be followed, and it is this contemplated procedure as set forth in the chapter which must be considered in construing the phrase "empowered to act".

The defendant makes the claim that, until arbitrators had heard the testimony and evidence and received the briefs, they were not "empowered to act" since they could not render a valid award at any prior date. We find little merit in this claim. It amounts to one that "empowered to act" means "empowered to decide". Had the General Assembly meant any such thing, it would have used language apt to express such a concept. Indeed, in proceedings under chapter 560 of the General Statutes before the board of meditation and arbitration involving a labor dispute, the General Assembly made clear in the applicable statute that the time in which a decision must be rendered runs from the time "a matter has been fully heard". General Statutes § 31-98; Danbury Rubber Co. v. Local 402, etc., 145 Conn. 53, 58, 138 A.2d 783.

The award was not rendered until August 8, 1967, which was well over sixty days, and, indeed, almost three months, after the latest date on which the arbitrators could have become "empowered to act" under the construction which we have given that phrase. It follows that the award, under the express wording of the statute, had "no legal effect". General Statutes § 52-416.

[6] The defendant claims that in any event the plaintiff's conduct must be held to have constituted a waiver of any delay in the rendition of the award. Section 52-416 expressly provides that "[a]n award made * * * [more than sixty days after the arbitrators have been empowered to act] shall have no legal effect unless the parties expressly extend the time in which such award may be made, which extension or ratification shall be in writing". This clearly makes the provision mandatory and not merely directory and, as such, beyond the powers of the parties to modify except in the manner provided in the statute itself. All this is brought out in International Brotherhood of Teamsters etc. v. Shapiro, 138 Conn. 57, 68, 82 A.2d 345.

The mandatory character of § 52-416 is further reinforced by § 52-413, which, after authorizing the arbitrators to postpone the hearing or to adjourn it from time to time, provides that "no postponement or adjournment shall extend the time as prescribed in section 52-416, or the time, if any, fixed in the arbitration agreement, for rendering the award".

Sections 52-413 and 52-416, taken together, permit the parties to exercise their common-law right to fix, in the agreement for arbitration, the time in which the arbitrators must render their award. Section 52-416 also permits the parties, in writing, to extend the time in which the award may be made or to ratify a late award. Here, however, there was no express extension or ratification in writing. Indeed, there was not even an oral express extension or an oral ratification of the late award. There was, it is true, conduct of both parties which was irreconcilably inconsistent with a compliance with the provisions of the statute as to the time of the rendition of the award. Except for the drastic, mandatory provisions of the applicable statutes, as previously pointed out, it is quite probable that we could, and would, find that each party, by his conduct, had waived the sixty-day time limit. See note, 154 A.L.R. 1392, 1403. Certainly, we find nothing to commend in this plaintiff's conduct in seeking to have the award vacated under § 52-416. But the express provisions of the applicable statutes, and especially the provision in § 52-416 that the

award, under the circumstances of this case, "shall have no legal effect", preclude our finding any waiver or estoppel. The conclusion of the trial court that the award must be vacated was not only not erroneous but was the only conclusion which it could reach under the provisions of our applicable general arbitration statutes.

There is no error.

In this opinion the other judges concurred.

157 Conn. 295

Josephine WILLAMETZ

v.

GUIDA-SEIBERT DAIRY COMPANY et al.

Supreme Court of Connecticut.

Dec. 17, 1968.

Action for property damage and injuries sustained when plaintiff's automobile was struck in rear by defendant's truck allegedly as a result of negligence of defendant's driver-agent. The Superior Court, Hartford County, Pastore, J., rendered judgment pursuant to jury verdict in favor of defendants and plaintiff appealed. The Supreme Court, House, J., held that where, if plaintiff's son and not plaintiff was operator of automobile, there was not only variance in factual aspect of case as pleaded by plaintiff but also complete failure of proof of material allegation to prejudice of defendants giving of supplemental charge that if plaintiff was not operator of automobile or if jury was unable to determine from evidence if she was operator, they should return verdict for defendants was not error.

No error.

1. Trial ⇐296(7)

In automobile accident case wherein plaintiff claimed that she was driving her automobile and defendants claimed that plaintiff's son, whose license had been suspended, was driving, instruction to disregard that portion of charge which related to principle of falsus in uno, falsus in omnibus, and which was withdrawn from jury cured any possible error.

2. Trial ⇐349(2)

Submitting interrogatories to jury for a purpose of ascertaining their decision on contested issue as to identity of operator of plaintiff's automobile after recalling jury to revoke prior instruction and to instruct that if they should find that plaintiff was not driver of automobile or if they were unable to determine whether plaintiff or her son was the driver their verdict should be for defendants was within discretion of court and did not unduly pinpoint the issue.

3. Trial ⇐348

Primary purpose of interrogatory to jury is to elicit determination of material facts and to furnish means of testing correctness of verdict rendered.

4. Judgment ⇐248

Right of plaintiff to recover is limited to allegations of his complaint.

5. Judgment ⇐249

Plaintiff may not allege one cause of action and recover on another.

6. Trial ⇐312(2)

Where, if plaintiff's son and not plaintiff was operator of automobile, there was not only variance in factual aspect of action for injuries sustained when plaintiff's automobile was struck in rear by defendant's truck as pleaded by plaintiff but also complete failure of proof of material allegation to prejudice of defendants, giving of supplemental charge that if plaintiff was not operator of automobile or if jury was unable to determine from evidence if

229, the order denying appellant's motion for new trial herein is affirmed.

KAUFMAN, P. J., and SHOEMAKER, J., concur.

PATRICK J. RUANE, INC., a Corporation, Plaintiff and Respondent,

v.

K. E. PARKER, Defendant and Appellant.

No. 19083.

District Court of Appeal, First District, Division 1, California.

Oct. 20, 1960.

Action for breach of contract was brought by subcontractor against general contractor to recover amount allegedly due subcontractor for performance of the contract. The Superior Court, County of San Francisco, Herman A. van der Zee, J., rendered judgment in favor of the subcontractor, and the general contractor appealed. The District Court of Appeal, Dunnway, J., held that provisions of subcontract that subcontractor agreed to be bound by general conditions of specifications and all conditions of prime contract insofar as they were applicable to subcontractor's work did not obligate subcontractor to repair plaster, which was allegedly defective, at subcontractor's own expense, if damage to plaster was caused either by inadequate plans and specifications, or by general contractor, or by another subcontractor.

Judgment affirmed.

1. Arbitration and Award ⇐86
Contracts ⇐332(1)

In action for breach of contract by subcontractor against general contractor to recover amount allegedly due subcontractor under subcontract, complaint alleging the making of the subcontract and full performance by subcontractor, and answer admitting contract, but denying allegation of performance, and pleading as a separate defense that dispute arose as to whether work had been completed by subcontractor in accordance with plans and specifications and that matter was submitted to arbitration and was decided against subcontractor by arbitrators were, on their face, sufficient pleadings. West's Ann.Code Civ.Proc. § 457.

2. Appeal and Error ⇐654

Where parties referred to a pretrial order at trial, but no pretrial order was included in either transcript, and appellant's contentions on appeal were based in part on claimed insufficiency of complaint in relation to proof, District Court of Appeal on its own motion would order a copy of the pretrial order made a part of the record on appeal. West's Ann.Superior Court Rules, rule 8.4(a).

3. Trial ⇐54(1)

In action for breach of contract by subcontractor against general contractor to recover amount allegedly due subcontractor under subcontract, letters, which had been written by subcontractor to general contractor, and which were offered in evidence by general contractor without limiting the purpose of the offer, were evidence of truth of subcontractor's statements therein that exterior stucco job had been done by subcontractor in accordance with specifications in color and texture as selected by architect and that materials used were those specified with no deviation from specifications, and that stucco was applied under inspection of owner's representative and was inspected and passed, and that job was acceptable to owners and architect on completion.

4. Contracts ⇐322(4)

In action for breach of contract by subcontractor against general contractor to recover amount allegedly due subcontractor under subcontract, evidence was insufficient

to establish that defects in exterior stucco work done by subcontractor were caused by improper scheduling of work by general contractor during improper weather conditions.

5. Appeal and Error ⇐931(1)

On appeal by defendant, District Court of Appeal would accept evidence favorable to plaintiff.

6. Contracts ⇐33

Provisions of subcontract between subcontractor and general contractor that subcontractor agreed to be bound by general conditions of specifications and all conditions of prime contract insofar as they were applicable to work of subcontractor were valid and binding on subcontractor.

7. Contracts ⇐198(2), 199(1)

Provisions of subcontract between general contractor and subcontractor that subcontractor agreed to be bound by general conditions of specifications and all conditions of prime contract insofar as they were applicable to subcontractor's work did not obligate subcontractor to repair plaster, which was allegedly defective, at subcontractor's own expense, if damage to plaster was caused either by inadequate plans and specifications, or by general contractor, or by another subcontractor. West's Ann.Civ. Code, §§ 1643, 1650, 1654, 1655.

8. Arbitration and Award ⇐82(4)

Where issue between subcontractor and general contractor as to alleged defects in plaster work done by subcontractor was not submitted to arbitrators, though subcontractor agreed to submit such issue, and general contractor deliberately withheld that submission, and arbitration was as to the responsibility as between general contractor and county for defects determined by the architect to exist in plaster, award of arbitrators was not binding on subcontractor.

9. Arbitration and Award ⇐82(4, 5)

An arbitration award is not res judicata as to a person who is not a party to the arbitration, or as to subject matter not submitted to the arbitrators.

10. Arbitration and Award ⇐29

An arbitrator has no legal right to decide issues not submitted to him.

11. Contracts ⇐322(3)

In action for breach of contract by subcontractor against general contractor to recover amount allegedly due subcontractor under subcontract, evidence established performance of subcontract by subcontractor.

12. Contracts ⇐287(1), 289

Generally, where construction contract requires that work be done to satisfaction of architect and that satisfaction of architect be evidenced by his certificate to that effect, giving of such a certificate is a condition precedent to right of general contractor to recover from owner, but if architect is satisfied with the work and arbitrarily refuses to issue the certificate, necessity for production of certificate is dispensed with.

13. Contracts ⇐320, 346(2)

Contractor, who pleads performance of contract in action against owner, need prove only substantial performance, and owner is allowed an offset for deficiencies in the work.

14. Contracts ⇐284(2)

Condition of contract that third party, such as an architect, shall take some action is to be construed against party relying on it, and will be held to be a covenant, rather than a condition when terms of contract can be so construed.

15. Contracts ⇐303(4)

If defendant by his own act has prevented performance by plaintiff of condition of contract, defendant may not rely on plaintiff's failure to perform such condition.

16. Contracts ⇐335(2)

In action for breach of contract by subcontractor against general contractor to recover amount allegedly due subcontractor under subcontract, rule that excuse

[illegible] failure of performance of contract must be pleaded did not apply, where subcontractor pleaded performance and proved substantial performance and that defects in subcontractor's work were caused by general contractor.

17. Contracts ⇐289

In action for breach of contract by subcontractor against general contractor to recover amount allegedly due subcontractor under subcontract, evidence that defects appeared in exterior stucco work of subcontractor and that architect rejected the exterior stucco work was evidence of nonperformance on part of subcontractor but was not under the subcontract conclusive as between subcontractor and general contractor.

Johnson & Stanton, Gardiner Johnson, Hiram S. Dillin, San Francisco, for appellant.

Lloyd J. Cosgrove, John G. Evans, San Francisco, for respondent.

DUNIWAY, Justice.

Action for breach of contract. Plaintiff had judgment and defendant appeals. Appellant Parker had the general contract for the construction of the new Hall of Justice and Records Building at Redwood City; respondent ("Ruane") had the subcontract with Parker for the plastering. Although the judgment is for $8,272.01, with interest, no claim of error is made as to $1,204.66 thereof. Error is claimed as to $5,400, representing the cost to Parker of painting exterior stucco, and as to $1,667.35, representing the cost to Parker of patching cracked interior plaster. Parker claims that an arbitration award is determinative in his favor, as to the exterior stucco, and that, as to both items, Ruane pleaded performance, but proved only nonperformance plus an excuse for nonperformance. We have concluded that the judgment must be affirmed.

The Contracts

In his subcontract, Ruane agrees to do "* * * in a workmanlike manner, as required by and in strict accord with said plans and specifications and details illustrative thereof as approved by the Contractor, and to the satisfaction, of the Contractor, all Lathing and Plastering, i. e., all work outlined in Part 1, Sections 16 and 17 of the Specifications." Ruane also agrees "to prosecute [the work] * * * in full accord with the requirements of the general construction as determined by the Contractor * * *" Parker has the right, if Ruane fails to perform, to do the work at Ruane's expense. It is further provided that "The Sub-Contractor acknowledges familiarity with the general conditions of the aforesaid specifications and all conditions of the original contract between the Owner and Contractor and agrees to be bound thereby insofar as they are applicable to this particular work; * * *" The subcontract relieves Parker of liability to Ruane for delay, but not from other liabilities.

The material portions of the general conditions of the prime contract are, as to duties of Parker to the owner, to: determine when and where materials and labor will next be needed (9c), coordinate the various types of work and inform subcontractors (9d), notify subcontractors to furnish and set their work in place (9f), safeguard the work against weather, etc. (9*l*), provide needed heat "as necessary to protect all materials against injury from dampness and cold," and specifically, "[f]rom the beginning of the application of plaster and during the setting and curing period, provide sufficient heat to produce a temperature in the spaces involved not less than 50° Fahrenheit" (9n, 2), furnish, for the architect's approval, samples of materials, including "plaster and lathing materials." Such materials are not to be used without the architect's approval (9r, 2 and special conditions, 13a). Subcontracts are to be approved by the architect (10a). "The Con-

tractor shall bind every Sub-contractor, and every Sub-contractor agrees to be bound by the terms of the Contract Documents to carry out their provisions insofar as applicable to their work" (10c), but there is no contractual relation between the subcontractor and the county (10d). The contractor is required to "[d]o all necessary patching of damaged, cracked or defective plaster, leaving all plaster work in perfect condition." (Specifications, § 17–09.)

As to the architect, the entire work is under his jurisdiction. One of his functions is to "pass upon merits of materials and workmanship." He is "to make written decisions in regard to all claims of the Owner or Contractor and to interpret the Contract Documents on all questions arising in connection with the execution of the work." His decisions or interpretations are subject to arbitration (14, 14b). All material and workmanship are subject to the architect's inspection, and he has "the right to reject defective material and workmanship" or require their correction. Rejected workmanship shall be satisfactorily replaced with proper material without charge (15a). Final payment to the contractor is to be made upon a certification of completion by the architect (17f, g).

The Pleadings

[1] The complaint alleges the making of the contract in general terms only, and full performance on Ruane's part. The answer admits the contract and denies the allegation of performance. It also pleads in substance, as a separate defense that a dispute arose as to whether the work had been completed in accordance with "the plans and specifications" and that this matter was submitted to arbitration and decided against Ruane by the arbitrators. These are, on their face, sufficient pleadings (Code Civ.Proc. § 457). It is also true, however, that they successfully conceal the real issues to be tried.

The Pre-Trial Order

[2] No pre-trial order is included in either transcript, but the parties referred to a pre-trial order at the trial. Because the pre-trial order, "where inconsistent with the pleadings, controls the subsequent course of the case" (Rule 8.8, Rules for the Superior Courts), and because Parker's contentions on appeal are based in part on claimed insufficiency of the complaint in relation to the proof, we have on our own motion ordered a copy of the pre-trial order made a part of the record on appeal. Cf. the remarks of Ashburn, J., as to our status as *parens patriae* in Burnstein v. Zelman, 182 Cal.App.2d —, 5 Cal.Rptr. 829. Unfortunately, the pre-trial order contributes nothing to the clarification of the issues or to the solution of the problem relating to the pleadings presented by appellant Parker. It appears to us to be a totally useless document. Cf. Arch Rib-Summerbell Steel Fabricators v. Lubliner, 183 Cal.App.2d —, 7 Cal. Rptr. 94; Collison v. Thomas, Cal.App., 6 Cal.Rptr. 911. It quotes verbatim the pre-trial statements of the parties, which are no more specific than the pleadings, but does not at any point attempt to state, with any particularity or at all, the actual issues to be tried. Had the pre-trial judge delved into the matter at all, he could have discovered the true nature of the controversy, settled the issues to be tried, required such amendments to the pleadings as might be required (Rule 8.4(a)) and eliminated the contention as to the pleadings now pressed upon us. He did none of these things.

The Real Issues

The issues developed at the trial are these: It is conceded that Ruane did all of the work required by the contract, the controversy being only, in the instance of the exterior plaster, as to (a) whether he was bound to repair the defects that admittedly appeared, regardless of their cause, or (b), if not, whether the defects were the result of defects in his work, or

(c) whether the arbitration award was conclusive against him; and, in the instance of the interior plaster, (a) whether he was bound to repair cracks that admittedly developed, regardlesss of their cause, or (b), if not, whether they were caused by Ruane's faulty workmanship or by Parker's improperly heating the building.

The Findings

The court found that Ruane performed all the conditions stated in his contract, that the arbitration did not decide the question before the court although Parker told Ruane that the arbitrators would decide it, and that the award does not bind or estop Ruane.

The Trial

The conduct of the trial was in many respects as informal as the pre-trial conference must have been. Ruane's case in chief was very brief. Counsel put in evidence his subcontract with Parker and the specifications of the prime contract. He obtained a stipulation that the building had been accepted by the county and notice of completion filed. He proved that the contract price, under the subcontract, except for the amount sued for, had been paid. Mr. Ruane then testified:

"Q. Has all of the work under this subcontract, that is the lathing and plaster work, been performed by your company? A. Yes, sir.

"Q. And the job to your knowledge has been completed? A. Yes, sir.

"Q. And a notice of completion has been filed? A. Yes, sir." On cross-examination, Parker elicited the information that the exterior was repainted before acceptance and that this was not done by Ruane. Counsel then agreed that the arbitration related solely to the exterior plaster, and Ruane rested.

The Facts as to the Exterior Plaster

Counsel for Parker showed that the architect rejected the exterior plaster or stucco "because of stains, leaching and splotches." He showed that, after the arbitration (to be described in more detail hereafter), Ruane refused to remedy the defects.

[3] In showing the negotiations leading up to the arbitration, Parker offered in evidence, without limiting his offer, a letter from Ruane dated December 14, 1955, in which the latter asserted that the exterior job was done "in accordance with specifications in color and texture as selected by the architect. The materials used were those specified with no deviation from the specifications. The stucco was applied under the inspection of the owner's representative and as each area was completed, was inspected and passed before removal of the scaffold." The letter also asserts that the job was "acceptable to the owners and architect upon completion." A like assertion appears in another letter, dated July 19, 1956, similarly offered by Parker. Having been offered by Parker, without any limitation as to the purpose of the offer, these letters are evidence of the truth of Ruane's statements therein, and may be considered in support of the findings of the court. Nelson v. Fernando Nelson & Sons, 5 Cal.2d 511, 518, 55 P.2d 859; Merchant Shippers Ass'n v. Kellogg Express & Draying Co., 28 Cal.2d 594, 170 P.2d 923. To that extent, Parker has supplied what might otherwise be a deficiency in Ruane's proof.

When Parker's counsel finished his proof relating to the exterior stucco, it was agreed that Ruane should proceed in rebuttal on that issue. He offered in evidence another letter, dated April 25, 1956, making a similar but briefer assertion. No objection was made.

[4] Ruane points to a statement in one of the architect's letters, offered by Parker and received without limitation or objection, that "[i]t [the leaching, etc.] is all due probably to application of stucco in improper weather conditions," and to testimony of Parker on cross-examination that Parker scheduled the work that Ruane was to do. Counsel apparently thinks this evi-

dence is a sufficient showing that the defects were caused by improper scheduling by Parker. We disagree. To so hold would stretch the doctrine that a finding must be sustained, if there is any substantial evidence to support it, too far. The evidence as to scheduling is at most equivocal, and in our judgment proves nothing. However, as we shall see, this point is immaterial.

The Arbitration

The arbitration was handled through the American Arbitration Association, no method being prescribed by the contract. Two of its forms of "submission," almost identical in form, were signed. One, signed by Ruane alone, dated May 19, 1956, reads in material part, as follows:

"Michael Goodman, architect for the Hall of Justice and Records Building, Redwood City, California has rejected the exterior stucco because of stains, leeching [sic] and splotches and has demanded that we remedy the features objectionable to him.

"K. E. Parker maintains that the installation of the exterior stucco was performed in accordance with plans and specifications in first class and workmanlike manner and that the leeching [sic] is something beyond his control, and for which he is not responsible.

"Since a difference of opinion exists regarding the responsibility for this alleged condition, the parties hereto wish to submit the matter of responsibility to arbitration."

The other, signed by Parker and the county, but not by Ruane, dated May 22, 1956, is identical except that, in the first paragraph, the words "we remedy" have been rubbed out and the words "K. E. Parker remedy" have been inserted, and in the third paragraph, the word "alleged" does not appear. Parker did not present to the arbitrators the "submission," dated May 19, signed by Ruane, although he told Ruane that he would. The court found that this was done secretly, and in violation of Parker's representations to Ruane. Thus there was submitted to the arbitrators only the question of "responsibility" as between the county and Parker. Their award reads: "The responsibility * * * rests with the contractor, K. E. Parker." Following the award, Parker, claiming that the arbitrators had decided against Ruane, demanded that Ruane remedy the defects. He refused to do so, stating, in a letter to Parker: "* * * nowhere do we find that the responsibility for the deficiency or for remedying the deficiency has been placed specifically against our firm or the work or materials installed by our firm." Parker's position as stated in his testimony is: "No, there was no arbitration with me. I had no arbitration. He had a contract with me to satisfy the architect. There was no arbitration between Mr. Ruane and I."

The Facts as to the Interior Plaster

[5] On this issue, the parties are in agreement that both "normal" and "abnormal" cracking developed. It is also agreed that Ruane did considerable patching of cracks. The evidence as to when the "abnormal" cracking developed, and what caused it, is in sharp conflict. The evidence favorable to Ruane, which we must accept on this appeal, indicates that the lathing and plastering were properly installed, in a good and workmanlike manner, and in accordance with the plans and specifications. It further indicates that the "abnormal" cracking developed over a week-end, when the central heating was first turned on, and during which temperatures inside the building rose to over 80°, and that such improper heating caused the cracks. It further indicates that the heating was done under the direction and control of Parker. These are the cracks that Ruane refused to repair, and that Parker had repaired by another subcontractor. The architect, or his representative, refused to accept the job until the cracks were repaired. Some of the

foregoing evidence came in as part of Parker's case; some came in as rebuttal by Ruane. No objection was made to this procedure except that, in connection with the heating, on cross-examination of Parker, his counsel did object to one question on the ground that the matter was "beyond the issues in this case."

So far as appears from the transcript, counsel for Parker did not, either when Ruane rested or at any time thereafter during the trial, raise the contention on which he now relies, that Ruane pleaded performance but proved nonperformance plus an excuse therefor, and that a judgment supported by such pleading and proof cannot stand. Cf. Wyman v. Hooker, 2 Cal.App. 36, 41, 83 P. 79. He elected to stand upon two propositions: that the architect's demand that the leaching and splotches, and the cracks, be repaired, requires, as between Ruane and Parker, that Ruane do the repairs at his expense, regardless of the cause of the defects, and that the arbitration placed responsibility upon Ruane.

The Contractual Relation of the Parties

[6] The case before us requires a determination of the effect of the language of the subcontract whereby Ruane agrees to be bound by "the general conditions of the aforesaid specifications and all conditions" of the prime contract "insofar as they are applicable to this particular work." Of course these provisions are valid and binding on Ruane. Enochs v Christie, 137 Cal.App.2d Supp. 887, 291 P.2d 200; Gray v. Cotton, 166 Cal. 130, 134 P. 1145; Trottier v. M. H. Golden Construction Co., 105 Cal.App.2d 511, 515–516, 233 P.2d 675. The question is, what are the effects of these provisions?

Essentially, Parker takes the position that they mean that, as to the plastering, Ruane stands in Parker's shoes, for all purposes, vis-a-vis the county. This would mean that Ruane cannot recover if the architect's final certificate is withheld because of objection to the plastering work, regardless of who or what caused the defects therein. It also would mean that Ruane is bound by any arbitration between the county and Parker relating to the plastering even though the question of responsibility, as between Parker and Ruane, was not submitted to the arbitrators. We do not agree. We think that Parker's argument goes too far, and disregards the limiting language in the subcontract, that Ruane is bound by the prime contract "insofar as * * * applicable." Parker's position would put Ruane completely at the mercy of Parker and the county and its architect, any of whom could, under such an interpretation, cause or require him to re-do what is in fact proper work, or pay for the doing of it by Parker, even if Ruane's work, after its proper completion, were to be damaged by Parker or by another of his subcontractors, or by agents of the county, or if the specifications themselves were defective.

[7] Basically, what Ruane undertook to do was the lathing and plastering work called for by the prime contract, in accordance with the plans and specifications, which he did not prepare. In doing the work, he had to install the lathing and plastering in a building which he neither designed nor built; that work was to be done by Parker or by other subcontractors of Parker. Specifically Parker, not Ruane, was to heat the building in such a way as to protect rather than to damage Ruane's plaster. Parker scheduled the work of his subcontractors, including Ruane. Ruane did not warrant the adequacy or sufficiency of the specifications. Even an architect does not do that. Pancoast v. Russell, 148 Cal.App.2d 909, 913, 307 P.2d 719, and see Atowich v. Zimmer, 218 Cal. 763, 25 P.2d 6; Mannix v. Tryon, 152 Cal. 31, 91 P. 983; Wyman v. Hooker, supra, 2 Cal.App. 36, 39, 83 P. 79; Simmons v. Firth, 33 Cal.App. 187, 189–190, 164 P. 807; Roebling Const. Co. v. Doe Estate Co., 33 Cal.App. 397, 408, 165 P. 547. Ruane would have breached his contract if he had concluded that they were inade-

quate and had undertaken, on his own responsibility, to disregard them for that reason. The subcontract provides that Ruane "shall not deviate from the said plans, specifications and details except on written order of the Contractor." It would be unreasonable to construe his obligation, which was also Parker's under the specifications of the prime contract, to repair the plaster, as including an obligation to do that work at his own expense where the damage was caused either by inadequate plans and specifications (Wyman v. Hooker, supra, 2 Cal.App. 36, 39, 83 P. 79) or by Parker or one of his other subcontractors. On that question, the contract documents are silent.

It may be that a party can, by contract, place himself in such a position as Parker asserts, a question that we need not now consider. But we would be reluctant so to hold in any case where the language does not compel such a result. "A contract must receive such an interpretation as will make it * * * reasonable * * *" Civil Code, § 1643. "Particular clauses of a contract are subordinate to its general intent." Civil Code, § 1650. "Stipulations which are necessary to make a contract reasonable * * * are implied * * *." Civil Code § 1655. It is significant, we think, that Ruane relieved Parker from liability to him for delay, but not from any other liability, especially since the subcontract is on Parker's printed form. Cf. Civil Code, § 1654.

The relationship of the architect to the prime contractor is different from his relationship to the subcontractor. As the representative of the owner, his responsibility is to see that the *building* is completed properly, in accordance with his plans and specifications. He can, therefore, reject any part of the work as not in accord therewith, but subject to arbitration. However, it is immaterial to him whether the defect was caused by the prime contractor or one or more subcontractors. He looks solely to the prime contractor for performance, since the contract documents make it clear that there is no contractual relationship between the owner and any subcontractor. It is not surprising, then, that nowhere in the contract documents is he given any authority or responsibility for deciding disputes between a subcontractor and the prime contractor. That is not his function. It follows, we think, that arbitration between the prime contractor and the owner, as to a decision of the architect, does not determine such a question, absent an express agreement that it shall do so. Nothing in the contract documents provides for the arbitration of such a question.

Many cases in this state, none of which has been cited by counsel for either party, recognize that under contracts similar to those before us, a subcontractor can recover from the prime contractor for work properly done by the subcontractor, even though the prime contractor may not be able to recover from the owner because the latter or his architect has rejected the same work. The cases also recognize the differences that we have stated between the relationship of the owner's architect to the prime contractor and his relationship to the subcontractor. Mannix v. Tryon, supra, 152 Cal. 31, 39–41, 91 P. 983 [plastering subcontract, plaster discolored, judgment for subcontractor affirmed]; Lisher v. Fairbanks, 70 Cal.App. 326, 233 P. 74; Frank T. Hickey, Inc. v. Los Angeles Jewish Community Council, 128 Cal.App. 2d 676, 683, 276 P.2d 52; Fielding & Shepley, Inc. v. Dow, 72 Cal.App.2d 18, 20, 163 P.2d 908; C. F. Bolster Company v. J. C. Boespflug, etc., Co., 167 Cal.App.2d 143, 334 P.2d 247.

In the Mannix case, the court said, as to the subcontractor: "He did not agree generally to plaster the dwelling, which would leave to him the selection of the materials and the method of doing the work. His agreement was to do it in a way that the owner and the original contractor had designed, according to the specifications which they had agreed on. He had no discretion in the matter. When

he followed strictly those specifications, used exactly the materials they called for in the composition of the mortar and hard finish, and applied them in a workmanlike manner, he did all his contract called for. He did not contract for results, but only to do the work in a specified way. If the usual result of white walls and ceilings did not follow, he was not responsible for it, unless there was some default on his part in furnishing the materials called for in the specifications or in doing the work with them. The court found, and the evidence fully sustained the finding, that the plaintiff had not been remiss in either particular. Under these circumstances, as he made no express warranty as to results, and plastered and hard finished the rooms with the materials specified in the contract, and did the work skillfully, he did all that he had contracted to do." 152 Cal. at Pages 40–41, 91 P. at page 987.

The Arbitrator's Award Did Not Bind Ruane

[8] The issue between Ruane and Parker was not submitted to the arbitrators although Ruane agreed to submit it. Parker deliberately withheld that submission. The arbitration was as to the responsibility as between Parker and the county for defects determined to exist by the architect. His determination would not fix responsibility as between Ruane and Parker. Certification by a third person, such as the architect, as to performance or nonperformance by a party, as a binding determination, is limited to those matters, which, by the contract, are to be certified to. Brandenstein v. Jackling, 99 Cal.App. 438, 444, 278 P. 880; American-Hawaiian Engineering & Const. Co. v. Butler, 165 Cal. 497, 517–518, 133 P. 280. Such certification is not binding where the contract does not make it so. C. F. Bolster Company v. J. C. Boespflug, etc., Co., supra, 167 Cal.App.2d 143, 153, 334 P.2d 247; Gray v. Cotton, supra, 166 Cal. 130, 135–136, 138, 134 P. 1145; Kinkle v. Fruit Growers Supply Co., 63 Cal.App.2d 102, 108, 146 P.2d 8; Vaughan v. County of Tulare, 56 Cal.App. 261, 266, 205 P. 21.

Referring to an architect's certificate as to certain delinquencies in a contractor's performance, the court said: "But, springing from the nature of such certificates, their power for weal or woe, and the fact that they contemplate forfeitures and the right of rescission, the terms of the certificates themselves are strictly construed." American-Hawaiian Engineering & Const. Co. v. Butler, supra, 165 Cal. 497, 512, 133 P. 280, 286.

[9, 10] The arbitration being as to a decision of the architect, which did not decide the question here involved, it follows that the arbitration decided nothing as between Ruane and Parker. An arbitration award is not res judicata as to a person who is not a party to the arbitration, or as to a subject matter not submitted to the arbitrators. Pancoast v. Russell, supra, 148 Cal.App.2d 909, 914, 307 P.2d 719. An arbitrator "has no legal right to decide issues not submitted to him." Crofoot v. Blair Holdings Corp., 119 Cal.App.2d 156, 184, 260 P.2d 156, 171; and see William B. Logan & Associates v. Monogram Precision Industries, 184 Cal.App.2d —, 7 Cal.Rptr. 212.

Of course, Ruane and Parker could have submitted the question between them to arbitration, and Ruane thought that they did, but Parker saw to it that Ruane's intention so to do was frustrated. Under these circumstances he is in no position to ask us, as he does, to hold that the *award binds Ruane.*

The Rule of Pleading on Which Parker Relies Does Not Apply

[11] Parker asserts that Ruane proved nonperformance, plus an excuse therefor, when he pleaded only performance. He does not claim that performance in accord with the plans and specifications was not shown, and in any event we think that such performance was shown. It seems

that Ruane's statement that "the work * * * [has] been performed" is sufficient to make a prima facie case. Thomas Haverty Co. v. Jones, 185 Cal. 285, 296–297, 197 P. 105, 110. If it was not, further evidence was produced to the same effect, by both parties, without objection as to the order of proof or as to who was doing the proving. What was proved, then, was performance, not nonperformance.

Parker relies on the rule that "a recovery on proof of excuse for nonperformance cannot be had on an allegation of full performance." Kirk v. Culley, 202 Cal. 501, 506, 261 P. 994, 996. The cases in which the rule has been applied do not involve the question here presented, namely, a contention by a subcontractor that he has performed in full compliance with the plans and specifications, and a rejection of his work by the architect for defects that appeared in the subcontractor's work thereafter.[1] Parker asserts that his own satisfaction with Ruane's work, and the architect's approval of it, are conditions precedent to Ruane's right to recover, that Ruane's own proof showed that Parker was not satisfied and that the architect rejected Ruane's work, requiring Parker to repair it before he would accept the job. Actually, it was Parker, not Ruane, who proved some of these facts, but they are not disputed by Ruane. Ruane's position, essentially, is that if he showed that he performed according to the specifications, he has proved his case.

[12] Parker relies on the general rule that, where a contract requires that work be done to the satisfaction of the architect, to be evidenced by his certificate to that effect, the giving of such a certificate is a condition precedent to the contractor's right to recover. Coplew v. Durand, 153 Cal. 278, 279, 95 P. 38, 16 L.R.A.,N.S., 791; Ahlgren v. Walsh, 173 Cal. 27, 31, 158 P. 748; Tally v. Parsons, 131 Cal. 516, 63 P. 833. But even in an action by the prime contractor against the owner, if the architect is satisfied with the work, and arbitrarily refuses to issue the certificates, "the necessity for the production of the certificate is dispensed with." Coplew v. Durand, supra, 153 Cal. 278, 281, 95 P. 38, 39, 16 L.R.A.,N.S., 791; and cf. Philbrook v. Mercantile Trust Co., 84 Cal.App. 187, 197, 257 P. 882; American-Hawaiian Engineering & Const. Co. v. Butler, supra, 165 Cal. 497, 515–516, 133 P. 280; Simmons v. Firth, supra, 33 Cal.App. 187, 164 P. 807.

1. Downs v. Atkinson, 207 Cal. 259, 277 P. 723 (Highway contractor took employee off highway job because state engineer objected to him. Employee was ready to perform at all times. The court did not apply the rule, but sustained recovery by the employee on a complaint alleging performance. Followed in Payne v. Pathe Studios, Inc., 6 Cal.App.2d 136, 141, 44 P.2d 598, and Overton v. Vita-Food Corp., 94 Cal.App.2d 367, 372, 210 P. 2d 757); Kirk v. Culley, 202 Cal. 501, 261 P. 994 (action for attorney's fees); Krotzer v. Clark, 178 Cal. 736, 174 P. 657 (contract to sell real property); Herdal v. Sheehy, 173 Cal. 163, 159 P. 422 (action by prime contractor against the owner); Peek v. Steinberg, 163 Cal. 127, 124 P. 834 (contract for employment); Estate of Warner, 158 Cal. 441, 111 P. 352 (ante-nuptial agreement); Rocke v. Baldwin, 135 Cal. 522, 65 P. 459, 67 P. 903 (attorney's fees); Owen v. Meade, 104 Cal. 179, 37 P. 923 (attorney's fees); Daley v. Russ, 86 Cal. 114, 24 P. 867 (brokerage); Rylee v. De Fini, 134 Cal.App.2d Supp. 877, 285 P.2d 115 (brokerage); Swanson v. Thurber, 132 Cal.App.2d 171, 281 P.2d 642 (brokerage); Martin v. Chernabaeff, 124 Cal.App. 2d 648, 269 P.2d 25 (brokerage); Reininger v. Edlon Mfg. Co., 114 Cal.App.2d 240, 250 P.2d 4 (sale); Ayoob v. Ayoob, 74 Cal.App.2d 236, 237, 168 P.2d 462 (antenuptial agreement); Atkinson v. District Bond Co., 5 Cal.App.2d 738, 43 P. 2d 867 (contract to buy street bonds—dictum); Barnhart v. Blackburn, 137 Cal. App. 240, 30 P.2d 424 (exchange of properties); Stehli Silks Corp. v. Director, 86 Cal.App. 591, 261 P. 313 (sale); McNulty v. New Richmond Land Co., 44 Cal. App. 744, 187 P. 97 (purchase of real property).

We think that the rule invoked does not require a reversal here, for a number of reasons:

First: It has been held that, where a plaintiff fails to plead a condition and the reason for its nonfulfillment, but this defect is supplied by the answer, there was a mere variance, which did not mislead the defendant, so that Code of Civil Procedure, § 469 applies. Antonelle v. Kennedy & Shaw Lumber Co., 140 Cal. 309, 320–321, 73 P. 966, and see the annotations to section 469, in Deering's and West's Annotated Codes. Here, the defect was not supplied by the answer, except as to the arbitration, but it was supplied by the proof, part of which came from Parker himself.

This is an application of the broader rule that when a case is tried on the assumption that a cause of action is stated, that certain issues are raised by the pleadings, that a particular issue is controlling, neither party can change this theory for purposes of review on appeal. Reid v. Overland Machined Products, 183 Cal.App. 2d —, 7 Cal.Rptr. 34, and cases there cited.

Second: It has been held that, where the plaintiff consistently claims that he has performed, and at no time admits nonperformance or claims an excuse therefor, the rule does not apply, even though the defendant attempts to show the latter. Mills v. Geo. A. Moore & Co., 39 Cal.App. 94, 96, 178 P. 304. So, too, error in overruling a demurrer on the ground that the complaint of a contractor did not show either that the required certificate of an engineer was given, or that there was an excuse for its not being given, is not prejudicial when at the trial the facts are shown without objection. Simmons v. Firth, supra, 33 Cal.App. 187, 189, 164 P. 807; Const., Art. VI, § 4½; Code Civ. Proc. § 475.

Third: The rule has not been applied to the satisfaction of the owner or architect in the case of building contracts or subcontracts. There is good reason for this. So far as the satisfaction of Parker is concerned, it has been repeatedly held that performance of a building contract which is satisfactory to a reasonable person is performance of the contract, even if the owner is in fact, not satisfied. Thomas Haverty Co. v. Jones, supra, 185 Cal. 285, 296, 197 P. 105; Scott Co., Inc. v. Rolkin, 133 Cal.App. 209, 23 P.2d 1065; cf. Collins v. Vickter Manor, Inc., 47 Cal.2d 875, 882, 306 P.2d 783; Mattei v. Hopper, 51 Cal.2d 119, 123, 330 P.2d 625; Leboire v. Royce, 53 Cal.2d 659, 672, 2 Cal.Rptr. 745; Tiffany v. Pacific Sewer Pipe Co., 180 Cal. 700, 702–704, 182 P. 428, 6 A.L.R. 1493. Under such circumstances, pleading of performance is sufficient. The subcontractor need not plead that the prime contractor was or was not satisfied. Fielding & Shepley, Inc. v. Dow, supra, 72 Cal.App.2d 18, 21, 163 P.2d 908.

[13] This is in part because of the special nature of building contracts, under which the contractor's work becomes a part of the owner's real property, and is of such a character that it cannot be restored in case the owner rescinds, so that the owner retains the benefit of it. It is long established law in this state that the contractor who pleads performance, need prove only substantial performance, defendant being allowed an offset for deficiencies in the work. Thomas Haverty Co. v. Jones, supra, 185 Cal. 285, 289, 197 P. 105, and cases cited; Atowich v. Zimmer, supra, 218 Cal. 763, 768–769, 25 P.2d 6. As the court said in Joseph Musto Sons-Keenan Co. v. Pacific States Corp., 48 Cal.App. 452, 458, 192 P. 138, 140: "a substantial performance is performance." See Shell v. Schmidt, 164 Cal.App.2d 350, 356, 330 P.2d 817; Shumway v. Woolwine, 84 Cal.App. 220, 223–224, 257 P. 898; Brown v. Aguilar, 202 Cal. 143, 147, 259 P. 735.

[14, 15] It is also the rule that a condition that a third party shall take some action (such as action by the architect here) is to be construed against the party relying

upon it, and will be held to be a covenant, rather than a condition, when the terms of the agreement can be so construed. Antonelle v. Kennedy & Shaw Lumber Co., supra, 140 Cal. 309, 315–316, 318, 73 P. 966. In the case before us, an architect's certificate is not unequivocally made a condition precedent to Ruane's right to recover, nor is it provided, as it often is in building contracts, that the architect's decision is final or conclusive. Moreover, if the defendant, by his own act, has prevented performance of a condition, he may not rely upon it. Ibid, 140 Cal. at page 316, 73 P. at page 968; cf. Lucy v. Davis, 163 Cal. 611, 614–615, 126 P. 490; Victoria S. S. Co. v. Western Assur. Co., 167 Cal. 348, 353, 139 P. 807; San Diego Construction Co. v. Mannix, 175 Cal. 548, 556, 166 P. 325; Alpha Beta Food Markets v. Retail Clerks, 45 Cal.2d 764, 771–772, 291 P.2d 433; Wyman v. Hooker, supra, 2 Cal.App. 36, 40, 83 P. 79; Pacific Allied v. Century Steel Products, Inc., 162 Cal.App.2d 70, 79–80, 327 P.2d 547.

[16] Where the plaintiff pleads performance, and proves substantial performance, including proof that the defects in his work were caused by the defendant, the rule that excuse for failure of performance must be pleaded does not apply. It was directly so held in the case of a plastering contract, in Smith v. Mathews Construction Co., 179 Cal. 797, 800–801, 179 P. 205. See also Conrad v. Foerst, 54 Cal.App. 277, 201 P. 795; Shumway v. Woolwine, supra, 84 Cal.App. 220, 225, 257 P. 898.

It has been held that in the case of a building contract, even the prime contractor may plead performance, although the architect's certificate was withheld, and may prove that the certificate was wrongfully withheld. See Needham v. Sisters of Mercy, 59 Cal.App. 341, 344–345, 210 P. 830, 831, where the court said: "The rule is that an unreasonable, arbitrary or capricious refusal of the architect to give the certificate required by the contract excuses the contractor from producing such a certificate as a condition precedent to the recovery of the payment due, and the allegation of due performance of all conditions on the part of the contractor is a sufficient allegation to put this matter in issue and to permit the contractor to offer evidence showing the reason the certificate had not been produced. The better practice, of course, is to allege the excuse for the failure to present the certificate, as in other cases of nonperformance. But the neglect to do so is not a sufficient ground for reversal when the trial of the issue has been had and a good and sufficient excuse has been proved." In so holding, the court relied upon Antonelle, supra, and upon Wyman v. Hooker, supra, 2 Cal.App. 36, 40, 83 P. 79. Cf. Philbrook v. Mercantile Trust Co., supra, 84 Cal.App. 187, 197, 257 P. 882; Simmons v. Firth, supra, 33 Cal.App. 187, 164 P. 807.

Roebling Const. Co. v. Doe Estate Co., supra, 33 Cal.App. 397, 165 P. 547, was an action by a contractor for the contract price of certain concrete work. The contract required a certificate of acceptance by the architect or a writing by the architect stating a just and true reason for not issuing a certificate, and stating the defects to be remedied. The complaint alleged full performance, and a refusal by the architect to certify. The court found that the contractor had fully performed, according to specifications. It also found that the materials used were inspected and approved by the architect, and that the work was done under his inspection and with his approval. (The letters put in evidence by Parker show the same things here, as to the stucco.) The concrete afterward checked and cracked. The court also found, in substance, that the defects were not the fault of the contractor, but were caused by improper specifications. There was no claim that the architect's certificate was withheld fraudulently, or in bad faith. In affirming a judgment for the contractor, the court said: "It seems to us that, when the plaintiff agreed 'to furnish the necessary labor and materials, includ-

tools, implements and appliances, required, and perform and complete in a workmanlike manner * * * all floors and roof slabs * * * and other works shown and described,' etc., its engagement was to do this, as the contract specifically provides, 'in conformity with the plans, drawings and specifications for the same made by Havens and Toepke, the authorized architects employed by the owner, * * *' and 'under the direction and supervision and subject to the approval of said architects.' This interpretation, we think, is, as the contract provides, 'within a fair and equitable construction of the true intent and meaning of said plans and specifications.' Where, in the erection of a building, the owner agrees to pay a certain sum for doing a certain part of the work and specifically provides the kind of materials to be used and the manner in which they are to be used and stands by and directs and afterward approves the work, the risk of its serving the purpose intended by the owner is clearly upon him." 33 Cal. App. at pages 407–408, 165 P. at page 552. The court further held that, the trial judge having found that the plaintiff performed according to plans and specifications, a further finding as to the cause of the defects that appeared was immaterial and unnecessary: "We cannot see that it was essential to the finding of the court that plaintiff had fully performed its contract, to make a finding as to the improper proportions of sand and cement in the mixture required by the specifications, as the cause of the defects in the floors. If, as we hold, plaintiff contracted only to furnish the materials and do the work in compliance with the plans and specifications and in good and workmanlike manner, the cause of the defects would be immaterial." 33 Cal.App. at page 409, 165 P. at page 551. In reaching its conclusions, the court followed City Street Imp. Co. v. City of Marysville, 155 Cal. 419, 101 P. 308, 23 L.R.A.,N.S., 317, and Coplew v. Durand, supra, 153 Cal. 278, 95 P. 38, 16 L.R.A.,N.S., 791.

The foregoing case, we think, is directly in point, as to the exterior stucco. As to the interior plaster, Ruane proved that he did the work according to the plans and specifications, i. e., that he performed, and that the damage and rejection by the architect were caused by Parker. Thus, again, Ruane proved performance, not nonperformance plus an excuse.

[17] There is no contention that Parker was misled; no claim that he did not have ample opportunity to meet the issues as they actually developed at the trial; no suggestion that he might have been able to produce other evidence if Ruane's pleading had alleged what Parker says it should have. As to the exterior stucco, Parker elected to stand on the arbitration. As to both items he also stood upon the admitted fact that defects did appear after the work was done and upon rejection of the work by the architect. The appearance of the defects and the rejection by the architect were evidence of nonperformance, but were not, under the contract, conclusive as between these parties. For all of these reasons, and under the cited cases, we hold that the pleading and the proof were sufficient.

Affirmed

BRAY, P. J., and TOBRINER, J., concur.

ROBINSON & WELLS, P.C., Plaintiff and Respondent,

v.

Barbara WARREN, Defendant and Appellant.

No. 18413.

Supreme Court of Utah.

July 28, 1983.

Professional legal corporation filed a petition and motion to confirm an arbitrator's award in a controversy with a client over legal fees. The Third District Court, Salt Lake County, James S. Sawaya, J., granted the petition and motion, and denied client's motion to vacate its judgment. Client appealed. The Supreme Court, Oaks, J., held that: (1) client's motion to vacate the arbitrator's award, filed after the award was confirmed, was out of time, and (2) rule governing motions for new trial or amendment of judgment applied where the district court proceeding was only a hearing on a motion to confirm an arbitration award, and thus, by appearing generally in the arbitration proceeding and in the hearing on legal corporation's motion to confirm the award, client submitted to the jurisdiction of the district court and could not contest that jurisdiction as a basis for a new trial.

Affirmed.

1. Arbitration ⇐73.5

Time for appeal of order confirming an arbitrator's award ran from order denying timely motion to alter or amend that judgment under rule governing new trials and amendments of judgment. Rules Civ.Proc., Rules 59, 73(a).

2. Attorney and Client ⇐143

Lawyers are forbidden from entering into fee agreements that are clearly excessive of what is reasonable for the service performed. ABA Code of Jud.Conduct, DR2-106(A, B).

3. Arbitration ⇐73.6

The Supreme Court would ignore all assertions of fact in brief as to what went on in arbitrator's hearing for which there was no reference to the record and no support in the record, and would base its decision solely upon the facts shown in the record.

4. Arbitration ⇐89

The testimony or affidavit of an arbitrator is appropriate evidence to show what matters were or were not presented to and considered in arbitration.

5. Arbitration ⇐1.2

The policy of Utah law favors arbitration as a speedy and inexpensive method of adjudicating disputes.

6. Arbitration ⇐73.7(1)

Judicial review of arbitration awards should not be pervasive in scope or susceptible to repetitive adjudications; it should be strictly limited to the statutory grounds and procedures for review. U.C.A.1953, 78-31-1.

7. Arbitration ⇐77(2)

Provision of Arbitration Act that motions to vacate, modify, or correct shall be served within three months is a statutory maximum, not a guaranteed minimum that permits the filing of such motions after the granting of a motion to confirm. U.C.A. 1953, 78-31-18.

8. Arbitration ⇐77(2)

Motion to vacate arbitrator's award once the court had entered a judgment confirming the award was out of time. Rules Civ.Proc., Rules 59, 73(a); U.C.A.1953, 78-31-15 to 78-31-17, 78-31-19.

9. Arbitration ⇐77(1)

Rule governing motions for new trial or amendment of judgment applied where district court proceeding was only a hearing on a motion to confirm an arbitration award. U.C.A.1953, 78-31-15 to 78-31-17; Rules Civ.Proc., Rules 59, 59(a)(7).

10. Arbitration ⇐72.3

Motion for new trial or to amend judgment could not be used in proceeding

to confirm arbitrator's award to review matters addressed to the hearing before the arbitrator. U.C.A.1953, 78–31–15 to 78–31–17; Rules Civ.Proc., Rule 59.

11. Appearance ⇐19(1)

By appearing generally in an arbitration proceeding and in a hearing on plaintiff's motion to confirm the award, defendant submitted to the jurisdiction of the district court and could not contest that jurisdiction as a basis for a new trial. Rules Civ.Proc., Rules 59, 73(a); U.C.A. 1953, 78–31–15 to 78–31–17, 78–31–19.

Paul H. Proctor, Salt Lake City, for defendant and appellant.

David K. Robinson, Salt Lake City, for plaintiff and respondent.

OAKS, Justice:

The district court confirmed the award of an arbitrator in a controversy between a professional corporation and a client over legal fees. The client's appeal seeks a remand to determine whether the fees met the standard of "reasonableness" specified in the Code of Professional Responsibility, a question not considered by the arbitrator. At issue are the meaning of provisions of the Arbitration Act, U.C.A., 1953, §§ 78–31–1 to –22, and the procedures to be followed in confirming awards under it.

So far as pertinent to this controversy, the written retainer agreement provided that the client would pay specified hourly rates for legal services and that any disputes arising from the relationship would be settled by arbitration pursuant to the *rules of the American Arbitration Association*. When a dispute arose, the plaintiff corporation first filed a civil action against the defendant for $7,145.25 in legal fees, but almost immediately thereafter abandoned the action and referred the matter for arbitration. Both parties were represented by counsel in the arbitration proceeding, which concluded with a $5,306.41 award in favor of the plaintiff, plus a direction that the defendant also reimburse the plaintiff for the $150 administrative fee paid to the American Arbitration Association. The arbitrator, John P. O'Keefe, signed the award on May 21, 1981.

On June 2, 1981, the plaintiff filed in the district court a petition and motion to confirm the award of the arbitrator. The petition and motion was accompanied by a signed and notarized copy of the arbitrator's award and an accompanying affidavit authenticating that document and relating it to plaintiff's controversy with defendant. Defendant's counsel was duly notified. After several continuances, the petition and motion was heard and granted on October 1, 1981. The written order confirming the award and granting judgment against defendant in the amount assigned therein was signed on October 17, 1981.

[1] On October 20, 1981, defendant filed a motion whose meaning and effect provide the principal issue on this appeal. The motion was explicitly "[p]ursuant to Rule 59 . . and . . . Section 78–31–16." In pertinent part, it asked the court to vacate its judgment on two grounds: (1) the arbitrator "improperly refused to hear evidence pertinent and material to the controversy" and (2) the court "is without jurisdiction over the defendant in this action" because the plaintiff "failed to comply with the jurisdictional provisions of [the Arbitration Act]." This motion was heard and denied by a written order dated March 25, 1982, and the defendant took this timely appeal.[1]

[2] 1. *Motion to Vacate.* Defendant's *first argument concerns the relationship between* the fee provisions in the retainer agreement and the Code of Professional Responsibility. Defendant cites ample authority to demonstrate that lawyers' fee agreements are subject to the corrective authority of the court and to the constraints of the Code of Professional Responsibility. *In re Hansen*, Utah, 586 P.2d 413, 416

1. Pursuant to Utah R.Civ.P. 73(a), the time for appeal of the October 17, 1981, order confirming the award of the arbitrator runs from the order denying appellant's timely motion to alter or amend that judgment under Rule 59

(1978); *Herro, McAndrews & Porter v. Gerhardt*, 62 Wis.2d 179, 214 N.W.2d 401 (1974); *Horton v. Butler*, La.Ct.App., 387 So.2d 1315 (1980); *Stanton v. Saks*, S.D., 311 N.W.2d 584 (1981); *Kiser v. Miller*, 364 F.Supp. 1311 (D.D.C.1973), *modified on other grounds*, 517 F.2d 1237 (D.C.Cir.1974). Lawyers are forbidden from entering into fee agreements that are "clearly excessive" of what is "reasonable" for the service performed. Utah Code of Professional Responsibility DR 2-106(A) & (B) (1970).

[3] Plaintiff does not contest these propositions, but maintains that the reasonableness of its fees is not before us on this appeal. In arguing this point, both parties encumber their briefs with assertions of fact about what went on in the hearing before the arbitrator for which there is no reference to the record and no support in the record. We ignore all such matters and base our decision solely upon the facts shown in the record.

[4] The parties waived recording of the arbitration hearing. The only information in the record about that hearing is contained in the arbitrator's affidavit, filed with plaintiff's opposition to the postjudgment motion to vacate. The testimony or affidavit of an arbitrator is appropriate evidence to show what matters were or were not presented to and considered in arbitration. *Giannopulos v. Pappas*, 80 Utah 442, 453-54, 15 P.2d 353, 357 (1932). Here, the affidavit shows that both parties were represented by counsel at the arbitration hearing and that instead of challenging the accuracy of plaintiff's time and cost records, defendant challenged the reasonableness of the total charge on the basis that the representation was not as successful as she had expected.[2] When defendant's counsel "attempted to cite the Utah Bar Association's Code of Professional Responsibility," the arbitrator excluded the provisions of the Code from consideration as "not germane to the dispute." Defendant's counsel took no exception to that ruling. The arbitrator stated that his award was based on the evidence submitted to him on the agreed fees (fixed by the agreement at $50 per hour for office work, $60 per hour for court work, and $20 per hour for paralegals) and the amount of time expended on the representation.

Defendant argues that the arbitrator's award should have been vacated on the statutory ground that the arbitrator was "guilty of misconduct ... in refusing to hear evidence pertinent and material to the controversy." § 78-31-16(3); *Giannopulos v. Pappas*, 80 Utah at 449-50, 15 P.2d at 356. Plaintiff maintains that defendant lost the opportunity to raise this objection in the district court or in this Court because the record shows (as it does) that defendant did not raise this objection until after the court had confirmed and entered judgment on the arbitrator's award. This issue turns on a matter of statutory interpretation of the respective functions of the motion to confirm and the motion to vacate.

[5, 6] The Territory and State of Utah have had statutory provisions for arbitration of disputes since 1884. *Bivans v. Utah Lake Land, Water & Power Co.*, 53 Utah 601, 607, 174 P. 1126, 1128 (1918). The policy of our law favors arbitration as a speedy and inexpensive method of adjudicating disputes. *Giannopulos v. Pappas*, 80 Utah at 449, 15 P.2d at 356. To that end, the Legislature amended the Arbitration Act to permit valid and enforceable agreements for arbitration of future as well as present disputes. § 78-31-1. We held that amendment constitutional in an opinion that reaffirms the strong public policy in favor of arbitration as an approved, practical, and inexpensive means of settling disputes and easing court congestion. *Lindon City v. Engineers Construction Co.*, Utah, 636 P.2d 1070 (1981). To serve that policy and achieve those objectives, judicial review of arbitration awards should not be pervasive in scope or susceptible to repetitive adjudications; it should be strictly limited to the statutory grounds and procedures for review.

2. *See Warren v. Warren*, Utah, 655 P.2d 684 (1982).

This spirit permeates our decisions on judicial review of arbitration awards. Thus, in *Bivans v. Utah Lake Land, Water & Power Co., supra*, we declared that as a general rule "awards will not be disturbed on account of irregularities or informalities, or because the court does not agree with the award, so long as the proceeding has been fair and honest and the substantial rights of the parties have been respected." *Id.* 53 Utah at 612–13, 174 P. at 1130. *Accord, Richards v. Smith*, 33 Utah 8, 14, 91 P. 683, 684 (1907). In the *Bivans* case, we also held that the court should not consider any objection to the appropriateness of evidence offered in the arbitration proceeding where there had been no objection that would allow the alleged defect to be cured in that proceeding. 53 Utah at 614–15, 174 P. at 1131. Similarly, in *Giannopulos v. Pappas*, 80 Utah at 449, 15 P.2d at 356, we declared:

> Ordinarily a court has no authority to review the action of arbitrators to correct errors or to substitute its conclusion for that of the arbitrators acting honestly and within the scope of their authority. The statute has provided a method by which an award thus made may be given legal sanction and reduced to judgment by summary proceedings in the nature of a motion filed in court. The statute also has designated the grounds by which the award may be vacated or set aside, and it is generally held that *no other grounds than those specified can be taken advantage of in such proceeding.* [Citations omitted; emphasis added.]

See Richards v. Smith, 33 Utah at 16, 91 P. at 685. These general principles guide us in interpreting the intent of the various statutory provisions for judicial review.

In successive provisions whose entire text is set out in the footnotes, our Arbitration Act permits a motion to confirm an arbitrator's award within three months [3] and a motion to vacate [4] and a motion to modify or correct [5] within the same period of time. § 78–31–18. The relationship among these remedies when more than one is pursued is crucial in this case, which turns on whether a motion to vacate can be brought forward after the court has already granted a motion to confirm the award. We conclude that it cannot.

Section 15 directs that the court "shall grant" the order confirming the award "unless the award is vacated, modified or cor-

3. [§] 78–31–15. Confirmation or modification by court on motion.—At any time within three months after the award is made, unless the parties shall extend the time in writing, any party to the arbitration may apply to the court for an order confirming the award, and the court shall grant such an order, unless the award is vacated, modified or corrected as provided in the next two succeeding sections [78–31–16, 78–31–17]. Notice in writing of the motion must be served upon the adverse party, or his attorney, five days before the hearing thereof.

4. [§] 78–31–16. Vacating by court—Grounds.—In any of the following cases the court shall, after notice and hearing, make an order vacating the award, upon the application of any party to the arbitration:

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

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

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

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

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

5. [§] 78–31–17 Modification by court—Grounds.—In any of the following cases the court shall, after notice and hearing, make an order modifying or correcting the award upon the application of any party to the arbitration:

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

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

(3) Where the award is imperfect in a matter of form not affecting the merits of the controversy

The order must modify and correct the award so as to effect the intent thereof

rected" as provided in sections 16 and 17. In context, including the specific requirement of written notice to the adverse party, this section apparently contemplates that any motions to vacate, modify, or correct will be before the court when it rules on the motion to confirm. This is the procedure exemplified in the leading case of *Giannopulos v. Pappas, supra*, where the motion to vacate was filed along with a verified answer to the motion to confirm. 80 Utah at 446, 15 P.2d at 354–55. This same procedure was followed under our earlier arbitration statute in *Richards v. Smith*, 33 Utah at 13, 91 P. at 684, and is specified under the provisions of the Uniform Arbitration Act (an improved, modern version of the Act adopted in Utah in 1925). *Audette & Sons, Inc. v. LaRochelle*, Me., 373 A.2d 1226, 1227 (1977).

[7] This construction is further confirmed by the provision directing entry of a conforming judgment or decree upon granting of an order "confirming, modifying, correcting or vacating an award," § 78–31–19, since that direction apparently contemplates that the court would consider such motions together rather than in succession. Otherwise, the procedures, hearings, and action of the court in the motion to confirm could be held for naught and the whole process repeated. We do not readily infer a legislative intent to squander scarce judicial time in this manner. Although there is no express provision to this effect, we hold that the fair intendment of the Arbitration Act bars the filing of motions under sections 16 and 17 once the court has entered a judgment confirming the award under section 15.[6] This construction facilitates the limited scope of review and the considerations of finality sought to be served by our policies on judicial review of arbitration awards.

[8] For the reasons explained above, defendant's motion to vacate the arbitrator's award was out of time. The order denying that motion will be affirmed.

[9] 2. *Motion for New Trial.* Plaintiff contends that the motion for new trial or to amend the judgment under Rule 59 does not apply where the district court proceeding was only a hearing on a motion to confirm an arbitration award. We disagree. As is evident from the content of sections 15 to 17 of the Arbitration Act, §§ 78–31–15 to –17, the proceedings leading to confirming, vacating, or modifying an arbitrator's award can involve evidentiary hearings as well as legal questions. As it relates to the issues of fact and law in the district court proceedings, the content of Rule 59 is fully applicable. This interpretation is confirmed by *Giannopulos v. Pappas, supra*, where the relief given by our decision was to grant a new trial of the district court proceeding to confirm or vacate the arbitrator's award.

[10] At the same time, however, Rule 59 should not be applied to alter the nature of the district court proceeding, which is simply a proceeding to confirm or vacate or modify the arbitrator's award. That is the only "trial" to which the motion for new trial is addressed. It is not addressed to the hearing before the arbitrator. Viewed in that light, some of the grounds for relief under Rule 59 are inapplicable to a district court proceeding to confirm, vacate, or modify an arbitrator's award, but others are fully applicable.

[11] In this case, we find no circumstances in the proceedings of the district court that apply to any of the grounds for new trial under Rule 59. Defendant's claim that the district court was without jurisdiction because plaintiff failed to comply with

6. Section 78–31–18, which provides that motions to vacate, modify, or correct shall be served within three months, is not to the contrary. For the reasons discussed in the text, we interpret that provision as a statutory maximum, not as a guaranteed minimum that permits the filing of such motions after the granting of a motion to confirm.

Section 78–31–18 is inapplicable on the facts of this case in any event, since defendant's motion to vacate was filed more than three months after the arbitration award was filed or delivered. Such a delay has also been held to constitute a waiver of the right to challenge the award under the comparable provision of the Uniform Arbitration Act. *Schroud v. Van C. Argiris & Co.*, 78 Ill.App.3d 1092, 1095, 34 Ill. Dec. 428, 430, 398 N.E.2d 103, 105 (1979).

the jurisdictional provisions of the Arbitration Act would, if correct, constitute an "error in law" under Rule 59(a)(7), but this claim is without merit. By appearing generally in the arbitration proceeding and in the hearing on plaintiff's motion to confirm the award, defendant submitted to the jurisdiction of the district court and cannot contest that jurisdiction as a basis for a new trial. *Barber v. Calder*, Utah, 522 P.2d 700, 702 n. 4 (1974); *Johnson v. Clark*, 131 Mont. 454, 311 P.2d 772 (1957). The application of this general rule on civil actions to a district court proceeding to confirm, vacate, or modify an arbitrator's award is consistent with the general rule that such proceedings are summary proceedings that can be commenced by motion or petition, without service of summons or formal pleadings. *Cutler Associates, Inc. v. Merrill Trust Co.*, Me., 395 A.2d 453, 455 (1978).

The other contentions of the parties are all subsumed in the foregoing rulings.

The judgment confirming the arbitrator's award and the order denying the posttrial motions are affirmed. Costs to respondents.

HALL, C.J., and STEWART, HOWE and DURHAM, JJ., concur.

Richard A. ISAACSON, Plaintiff and Respondent,

v.

Clair DORIUS, Defendant and Appellant.

Lawrence W. LYNN, Plaintiff and Respondent,

v.

Clair DORIUS, Defendant and Appellant.

No. 18166.

Supreme Court of Utah.

Aug. 17, 1983.

Suits were instituted for injuries sustained in an automobile collision. The Sixth District Court, Sanpete County, Don V. Tibbs, J., entered judgment for plaintiffs, and defendant appealed. On motion of plaintiffs to dismiss appeal, the Supreme Court, Hall, C.J., held that although 30–day period for filing a notice of appeal from denial of motion for new trial on November 13, 1981, was extended to December 14, 1981, because December 13, 1981, fell on a Sunday, where notice of appeal was not filed with the clerk of the Supreme Court until December 16, 1981, which was two days beyond the one-month period of limitation for filing, and mailing of a copy of the notice of appeal on December 10, 1981, did not constitute a filing, appeal was untimely and the Supreme Court was thus deprived of its appellate jurisdiction.

Appeal dismissed.

Stewart and Howe, JJ., dissented and filed opinions.

1. Appeal and Error ⇐428(2)

Although 30–day period for filing a notice of appeal from denial of motion for new trial on November 13, 1981, was extended to December 14, 1981, because December 13, 1981, fell on a Sunday, where notice of appeal was not filed with the clerk of the Supreme Court until December 16, 1981, which was two days beyond the one-month period of limitation for filing, and mailing of a copy of the notice of appeal on December 10, 1981, did not constitute a filing, appeal was untimely and the Supreme Court was thus deprived of its appellate jurisdiction. U.C.A.1953, 63–37–1, 78–2–4; Rules Civ.Proc., Rule 73(a).

2. Appeal and Error ⇐428(1)

Statute that any report, claim, tax return, statement or other document or any payment required or authorized to be filed or made to the state of Utah or to any political subdivision thereof which is transmitted through the United States mail shall be deemed filed or made and received by the state or political subdivisions on the

78-31-1. Written agreement for—Enforceable limited right to revoke.—Two or more parties may agree in writing to submit to arbitration, in conformity with the provisions of this chapter, any controversy existing between them at the time of the agreement to submit, or they may agree to submit to arbitration any controversy which may arise in the future. Such an agreement shall be valid and enforceable, and no party shall have the power to revoke the submission without the consent of the other parties to the submission, except upon such grounds as exist at law or in equity for the rescission or revocation of any contract.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-31-1; L. 1977, ch. 142, § 1.

Compiler's Notes.

This section is identical to former section 104-36-1 (Code 1943) which was repealed by Laws 1951, ch. 58, § 3.

The 1977 amendment added "or they may agree to submit to arbitration any controversy which may arise in the future" to the first sentence.

Comparable Provisions.

This chapter is based on the 1925 Uniform Arbitration Act which has been withdrawn by the National Conference of Commissioners on Uniform State Laws as superseded by the 1956 Uniform Arbitration Act.

Cross-References.

Affirmative defense, arbitration and award as, Rules of Civil Procedure, Rule 8(c).

Board of labor, conciliation and arbitration, Const. Art. XVI, § 2.

Fees as full compensation for statutory boards of arbitration, Const. Art. XXI, § 2.

Fire fighters' negotiations, 34-20a-7 to 34-20a-9.

Industrial commission to promote voluntary arbitration of labor disputes, 35-1-16.

Partnership, single partner may not submit to arbitration, 48-1-6.

Policy that work terms and conditions should result from voluntary agreement, 34-20-1.

Public transit district labor disputes, 11-20-32.

Water disputes, informal arbitration by state engineer, 73-2-16.

Future disputes.

An agreement to arbitrate a future dispute is invalid and unenforceable. Shumaker v. Utex Exploration Co., 157 F. Supp. 68.

Provisions of bylaws of corporation for the appraisement of values of capital stock of stockholder desiring to sell or transfer it was not an agreement for the arbitration of future disputes. Shumaker v. Utex Exploration Co., 157 F. Supp. 68.

Whether an agreement is one to arbitrate future disputes should depend upon its prospective operation at time of agreement and not upon whether in light of subsequent developments it later appears of vital import to the parties. Shumaker v. Utex Exploration Co., 157 F. Supp. 68.

This section provides for arbitration of disputes existing at the time the agreement to arbitrate is made which shall be binding on the parties; it does not apply to agreements to arbitrate future disputes; such agreements do not oust the courts of jurisdiction. Johnson v. Brinkerhoff,

Privileged nature of communications made in course of grievance or arbitration procedure provided for by collective bargaining agreement, 60 A. L. R. 3d 885.

State court's power to consolidate arbitration proceedings, 64 A. L. R. 3d 528.

Validity and construction of provision for arbitration of disputes as to alimony or support payments, or child visitation or custody matters, 18 A. L. R. 3d 1264.

Validity and effect, and remedy in respect, of contractual stipulation to submit disputes to arbitration in another jurisdiction, 12 A. L. R. 3d 892.

Validity and enforceability of provision for binding arbitration, and waiver thereof, 24 A. L. R. 3d 1325.

Validity of agreements to arbitrate disputes generally as a condition precedent to the bringing of an action, 26 A. L. R. 1077.

Validity of agreement to submit all future questions to arbitration, 135 A. L. R. 79.

Waiver of arbitration provision in contract, 117 A. L. R. 301, 161 A. L. R. 1426.

DECISIONS UNDER FORMER LAW

Construction.

Submissions to arbitration were to be liberally construed. Richards v. Smith, 33 U. 8, 91 P. 683, applying R. S. 1898, § 3223.

78-31-2. Contents.—The arbitration agreement must state the question or questions in controversy with sufficient definiteness to present one or more issues or questions upon which an award may be based.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-31-2.

Compiler's Notes.

This section is identical to former section 104-36-2 (Code 1943) which was repealed by Laws 1951, ch. 58, § 3.

Collateral References.

Arbitration and Award⇐6.

6 C.J.S. Arbitration § 14 et seq.

5 Am. Jur. 2d 527, Arbitration and Award § 11.

78-31-3. "Court" defined.—The term "court" when used in this chapter means a district court having jurisdiction of the parties and of the subject matter.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-31-3.

Compiler's Notes.

This section is identical to former section 104-36-3 (Code 1943) which was repealed by Laws 1951, ch. 58, § 3.

78-31-4. Arbitrators—Appointment by court on application.—Upon the application in writing of any party to the arbitration agreement, and upon notice to the other parties thereto, the court shall appoint an arbitrator or arbitrators in any of the following cases:

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

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

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

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

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-31-4.

Compiler's Notes.

This section is identical to former section 104-36-4 (Code 1943) which was repealed by Laws 1951, ch. 58, § 3.

Collateral References.

Arbitration and Award⇐26.

6 C.J.S. Arbitration § 60.

5 Am. Jur. 584, Arbitration and Award § 86.

Validity and effect of arbitration agreement provision that, upon one party's failure to appoint arbitrator, controversy may be determined by arbitrator appointed by other party, 47 A. L. R. 2d 1346.

78-31-5. Application to be in writing.—Any application made under authority of this chapter shall be made in writing and heard in a summary way in the manner and upon the notice provided by law or rules of court for the making and hearing of motions, except as otherwise herein expressly provided.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-31-5.

Compiler's Notes.

This section is identical to former section 104-36-5 (Code 1943) which was repealed by Laws 1951, ch. 58, § 3.

Cross-Reference.

Motions and orders generally, Rules of Civil Procedure, Rules 6(b), (d), (e), 7(b), 43(e).

Collateral References.

Arbitration and Award⇐26.

6 C.J.S. Arbitration § 60.

5 Am. Jur. 2d 584, Arbitration and Award § 86.

78-31-6. Hearings — Time — Notice — Postponement. — The arbitrators shall appoint a time and place for the hearing and notify the parties thereof, and may adjourn the hearing from time to time if necessary, and, on application of either party and for good cause, may postpone the hearing to a time not extending beyond the date fixed for making the award.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-31-6.

Compiler's Notes.

This section is identical to former section 104-36 6 (Code 1943) which was repealed by Laws 1951, ch. 58, § 3.

Admission of notice.

It is sufficient if parties admit in their pleadings notice of meeting of board of arbitrators. *Giannopulos v. Pappas*, 80 U. 442, 15 P. 2d 353, applying Laws 1927, ch. 62.

Right to produce evidence and be heard.

The parties have a right to be heard on their proofs, and it is the duty of arbitrators to hear all the evidence material to the matter in controversy. Giannopulos v. Pappas, 80 U. 442, 15 P. 2d 353, applying Laws 1927, ch. 62.

Collateral References.

Arbitration and Award⇐31, 32.

6 C.J.S. Arbitration § 79 et seq.

5 Am. Jur. 2d 604, Arbitration and Award §§ 114-116.

Insurance: necessity and sufficiency of notice of and hearing in proceedings before appraisers and arbitrators appointed to determine amount of loss, 25 A. L. R. 3d 680.

DECISIONS UNDER FORMER LAW

Failure to file submission before hearing.

Under R. S. 1898, § 3223, the effect of failure to file submission in court before hearing was only to permit parties to revoke submission and prevent court from acquiring jurisdiction until filed, and did not affect right of arbitrators to proceed to hearing. Richards v. Smith, 33 U. 8, 91 P. 683.

78-31-7. Failure of party to appear.—If any party neglects to appear before the arbitrators after reasonable notice, the arbitrators may nevertheless proceed to hear and determine the controversy upon the evidence which is produced before them.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-31-7.

Compiler's Notes.

This section is identical to former section 104-36-7 (Code 1943) which was repealed by Laws 1951, ch. 58, § 3.

Collateral References.

Arbitration and Award⇨31.
6 C.J.S. Arbitration § 84.
5 Am. Jur. 2d 607, Arbitration and Award § 118.

78-31-8. Award—Time for making.—If the time within which the award shall be made is not fixed in the arbitration agreement, the award must be made within sixty days from the time of the appointment of the arbitrators, and an award made after the lapse of sixty days shall have no legal effect, unless the parties extend the time in which said award may be made, which extension, or any ratification, shall be in writing.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-31-8.

Compiler's Notes.

This section is identical to former section 104-36-8 (Code 1943) which was repealed by Laws 1951, ch. 58, § 3.

Collateral References.

Arbitration and Award⇨50.
6 C.J.S. Arbitration § 97.
5 Am. Jur. 2d 615, Arbitration and Award § 128.

Construction and effect of contractual or statutory provisions fixing time within which arbitration award must be made, 56 A. L. R. 3d 815.

78-31-9. Representation of parties—By attorney.—No one other than a party to the arbitration, or a person regularly employed by such party for other purposes, or a practicing attorney at law, shall be permitted by the arbitrator or arbitrators to represent before him or them any party to the arbitration.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-31-9.

Compiler's Notes.

This section is identical to former section 104-36-9 (Code 1943) which was repealed by Laws 1951, ch. 58, § 3.

Collateral References.

Arbitration and Award⇨31.
6 C.J.S. Arbitration § 84.
5 Am. Jur. 2d 604, Arbitration and Award § 113.

78-31-10. Witnesses—Subpoena—Fees—Contempt.—The arbitrator or arbitrators, or a majority of them, may require any person to attend before him or them as a witness, and to bring with him any book or writing or other evidence. The fees for such attendance shall be the same as the fees of witnesses in courts of general jurisdiction. A subpoena shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrator or arbitrators, or a majority of them, shall be directed to the person and shall be served in the same manner as a subpoena to testify before a district court. If any person so summoned to testify shall refuse or neglect to obey such subpoena, the court may, upon petition, compel the attendance of such person before the arbitrator or arbitrators, or punish said person for contempt in the same

manner as is provided for the attendance of witnesses or the punishment for their failure to attend district courts.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-31-10.

Compiler's Notes.

This section is identical to former section 104-36-10 (Code 1943) which was repealed by Laws 1951, ch. 58, § 3.

Cross-References.

Contempt generally, 78-32-1 et seq.
Contempt of process of nonjudicial officer, 78-32-15.
Subpoenas, Rules of Civil Procedure, Rule 45.
Witnesses' fees, 21-5-4.

Collateral References.

Arbitration and Award⇐29, 31.
6 C.J.S. Arbitration § 87.
5 Am. Jur. 2d 609, Arbitration and Award § 121.

Liability of parties to arbitration for costs, fees, and expenses, 57 A. L. R. 3d 633.

78-31-11. Depositions.—Depositions may be taken with or without a commission in the same manner and for the same reasons as provided by law for the taking of depositions.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-31-11.

Compiler's Notes.

Except for the deletion of "in actions pending in the district courts" from the end, this section is identical to former section 104-36-11 (Code 1943) which was repealed by Laws 1951, ch. 58, § 3.

Cross-Reference.

Depositions and discovery generally, Rules of Civil Procedure, Rules 26 to 37.

Collateral References.

Arbitration and Award⇐31.
6 C.J.S. Arbitration § 87.
5 Am. Jur. 2d 602, Arbitration and Award § 110.

Discovery in aid of arbitration proceedings, 98 A. L. R. 2d 1247.

78-31-12. Conservation of property pendente lite.—At any time before final determination of the arbitration the court may, upon application of a party to the submission, make such order or decree or take such proceedings as it may deem necessary for the preservation of the property or for securing satisfaction of the award.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-31-12.

Compiler's Notes.

This section is identical to former section 104-36-12 (Code 1943) which was repealed by Laws 1951, ch. 58, § 3.

Collateral References.

Arbitration and Award⇐31.
6 C.J.S. Arbitration § 69.
5 Am. Jur. 2d 587, Arbitration and Award § 90.

78-31-13. Submitting law questions to court.—The arbitrators may on their own motion, and shall by request of a party to the arbitration:

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

(2) State their final award, in the form of findings of fact, for the opinion of the court on the questions of law arising on the hearing.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-31-13.

Compiler's Notes.

This section is identical to former sec-

tion 104-36-13 (Code 1943) which was repealed by Laws 1951, ch. 58, § 3.

Collateral References.

Arbitration and Award⇐31.

6 C.J.S. Arbitration and Award §§ 55, 120.

5 Am. Jur. 2d 621, Arbitration and Award § 140.

Necessity that arbitrators, in making awards, make specific or detailed findings of fact or conclusions of law, 82 A. L. R. 2d 969.

Waiver, or estoppel to assert, substantive right or right to arbitrate as question for court or arbitrator, 26 A. L. R. 3d 604.

78-31-14. Award—Form.—The award of the arbitrators, or of a majority of them, shall be drawn up in writing and signed by the arbitrators, or a majority of them. The award shall definitely deal with all matters of difference in the submission requiring settlement, but the arbitrators may, in their discretion, first make a partial award, which shall be enforceable in the same manner as the final award. Upon the making of an award the arbitrators shall deliver a true copy thereof to each of the parties thereto, or their attorneys, without delay.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-31-14.

Compiler's Notes.

This section is identical to former section 104-36-14 (Code 1943) which was repealed by Laws 1951, ch. 58, § 3.

Effect and conclusiveness of award.

The award of arbitrators, acting within the scope of their authority, determines the rights of the parties to it as efficiently as a judgment secured by legal procedure, and is binding on the parties until set aside or its validity is questioned in some proper manner. Giannopulos v. Pappas, 80 U. 442, 15 P. 2d 353, applying Laws 1927, ch. 62.

Partial award.

This section makes provision for a partial award, which shall have the same effect as a final award, and judgment may be entered for that part thereof which is final. Giannopulos v. Pappas, 80 U. 442, 454, 15 P. 2d 353, applying Laws 1927, ch. 62.

Where arbitrators find that a certain sum of money is due, such finding or award is an indication of a full and complete execution of the submission. Giannopulos v. Pappas, 80 U. 442, 15 P. 2d 353, applying Laws 1927, ch. 62.

Collateral References.

Arbitration and Award⇐51.

6 C.J.S. Arbitration § 95 et seq.

5 Am. Jur. 2d 613, Arbitration and Award § 125.

Comment note: determination of validity of arbitration award under requirement that arbitrators shall pass on all matters submitted, 36 A. L. R. 3d 649.

Concurrence of all arbitrators as condition of binding award, 77 A. L. R. 838.

Power of arbitrators to award injunction, 70 A. L. R. 2d 1055.

Quotient arbitration award or appraisal, 20 A. L. R. 2d 958.

Right of arbitrators to act on their own knowledge of facts, or factors relevant to questions submitted to them, in absence of evidence in that regard, 154 A. L. R. 1210.

78-31-15. Confirmation or modification by court on motion.—At any time within three months after the award is made, unless the parties shall extend the time in writing, any party to the arbitration may apply to the court for an order confirming the award, and the court shall grant such an order, unless the award is vacated, modified or corrected as provided in the next two succeeding sections [78-31-16, 78-31-17]. Notice in writing of the motion must be served upon the adverse party, or his attorney, five days before the hearing thereof.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-31-15.

Compiler's Notes.

This section is identical to former section 104-36-15 (Code 1943) which was repealed by Laws 1951, ch. 58, § 3.

Collateral References.

Arbitration and Award⇐72.

6 C.J.S. Arbitration § 120 et seq.

5 Am. Jur. 2d 626, Arbitration and Award § 145.

Appealability of judgment confirming or setting aside arbitration award, 7 A. L. R. 3d 608.

Time for impeaching arbitration award, 85 A. L. R. 2d 779.

78-31-16. Vacating by court—Grounds.—In any of the following cases the court shall, after notice and hearing, make an order vacating the award, upon the application of any party to the arbitration:

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

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

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

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

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

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-31-16.

Compiler's Notes.

This section is identical to former section 104-36-16 (Code 1943) which was repealed by Laws 1951, ch. 58, § 3.

Admissibility of affidavit or testimony of arbitrator.

While an arbitrator may not by affidavit or testimony impeach his own award or show fraud or misconduct on the part of the arbitrators or any of them, testimony or affidavit of an arbitrator is admissible to establish what matters were presented to and considered by the arbitrators, and any arbitrator is a competent witness to establish such facts. Giannopulos v. Pappas, 80 U. 442, 15 P. 2d 353, applying Laws 1927, ch. 62.

Disregard of evidence.

Refusal to review material testimony is such misconduct as affords sufficient ground for setting aside the award. For example, substantial prejudice may be suffered by one of the parties by the failure or refusal of arbitrators to consider items of expense properly admissible in evidence, or to consider a partnership agreement between the parties, or to consider a lease. Giannopulos v. Pappas, 80 U. 442, 15 P. 2d 353, applying Laws 1927, ch. 62.

Fraud, bad faith or misconduct.

Fraud, bad faith, and prejudicial imposition will vitiate award, even though contract of submission provides that such award shall be absolute and conclusive and without appeal. Bivans v. Utah Lake Land, Water & Power Co., 53 U. 601, 174 P. 1126, applying C. L. 1907, § 3228.

If one party to arbitration agreement requests one of three arbitrators for further time to present certain testimony, and is assured by arbitrator that he would be given an opportunity before the award was made to present such further evidence, which promise the arbitrator did not keep, and did not even convey request to other arbitrators, such misbehavior comes within subd. (3). Giannopulos v. Pappas, 80 U. 442, 15 P. 2d 353, applying Laws 1927, ch. 62.

Before misconduct of arbitrators under subd. (3) will afford ground for vacating award, it must appear that "the rights of any party have been prejudiced." Giannopulos v. Papas, 80 U. 442, 15 P. 2d 353, applying Laws 1927, ch. 62.

Motion to vacate.

Material and competent statement of facts contained in motion to vacate, and in the supporting affidavits, if not denied, must be taken as true. Giannopulos v. Pappas, 80 U. 442, 15 P. 2d 353, applying Laws 1927, ch. 62.

A pleading denominated an answer may, in legal effect, be regarded as a motion to vacate the award where it affirmatively sets out reasons why such should be done, and prays that the award be vacated and that plaintiff take nothing. In other words, the court may look at substance rather than the form of the document. Giannopulos v. Pappas, 80 U. 442, 15 P. 2d 353, applying Laws 1927, ch. 62.

Statutory grounds as exclusive.

No other grounds for vacating or setting aside an award than those specified in this section can be taken advantage of. Giannopulos v. Pappas, 80 U. 442, 15 P. 2d 353, applying Laws 1927, ch. 62.

Vacation of awards in general.

Awards will not be disturbed on account of irregularities or informalities, or because court does not agree with award, so long as proceeding has been fair and honest, and substantial rights of parties have been respected. Bivans v. Utah Lake Land, Water & Power Co., 53 U. 601, 174 P. 1126, applying C. L. 1907, § 3228.

Ordinarily a court has no authority to review the action of arbitrators to correct errors or to substitute its conclusion for that of the arbitrators acting honestly and within the scope of their authority. Giannopulos v. Pappas, 80 U. 442, 15 P. 2d 353, applying Laws 1927, ch. 62.

Collateral References.

Arbitration and Award⇐75-82.
6 C.J.S. Arbitration § 149 et seq.
5 Am. Jur. 2d 643 et seq., Arbitration and Award § 167 et seq.

Arbitrator's consultation with outsider or outsiders as misconduct justifying vacation of award, 47 A. L. R. 2d 1362.

Arbitrator's viewing or visiting premises or property alone as misconduct justifying vacation of award, 27 A. L. R. 2d 1160.

Improper attempt by influencing or by attempting to influence decision as ground for revocation of arbitration, or for avoidance of award thereunder, 8 A. L. R. 1082.

Setting aside arbitration award on ground of interest or bias of arbitrators, 56 A. L. R. 3d 697.

78-31-17. Modification by court—Grounds.—In any of the following cases the court shall, after notice and hearing, make an order modifying or correcting the award upon the application of any party to the arbitration:

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

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

(3) Where the award is imperfect in a matter of form not affecting the merits of the controversy.

The order must modify and correct the award so as to effect the intent thereof.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-31-17.

Compiler's Notes.

This section is identical to former section 104-36-17 (Code 1943) which was repealed by Laws 1951, ch. 58, § 3.

Collateral References.

Arbitration and Award⇐72.
6 C.J.S. Arbitration §§ 154-156, 168.
5 Am. Jur. 2d 626, Arbitration and Award § 145.

Comment note: power of court to resubmit matter to arbitrators for correction or clarification, because of ambiguity or error in, or omission from, arbitration award, 37 A. L. R. 3d 200.

Disqualification of arbitrator by court or stay of arbitration proceedings prior to award on ground of interest, bias, prejudice, collusion or fraud of arbitrators, 65 A. L. R. 2d 755.

Power of arbitrator to correct, or power of court to correct or resubmit, nonlabor award because of incompleteness or failure to pass on all matters submitted, 36 A. L. R. 3d 939.

Quotient arbitration award or appraisal, 20 A. L. R. 2d 958.

78-31-18. Notice of motion—Stay.—Notice of a motion to vacate, modify or correct an award shall be served upon the adverse party or his attorney, within three months after an award is filed or delivered, as prescribed by law for service of notice of a motion in a civil action. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-31-18.

Compiler's Notes.

This section is identical to former section 104-36-18 (Code 1943) which was repealed by Laws 1951, ch. 58, § 3.

Cross-Reference.

Service of notices, Rules of Civil Procedure, Rule 6(d), (e).

Collateral References.

Arbitration and Award ⇐77.
6 C.J.S. Arbitration §§ 147, 165.
5 Am. Jur. 2d 656, Arbitration and Award § 185.

78-31-19. Decree of court.—Upon the granting of an order confirming, modifying, correcting or vacating an award, judgment or decree shall be entered in conformity therewith.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-31-19.

Compiler's Notes.

This section is identical to former section 104-36-19 (Code 1943) which was repealed by Laws 1951, ch. 58, § 3.

Collateral References.

Arbitration and Award⇐75-84.
6 C.J.S. Arbitration §§ 129, 145 et seq.
5 Am. Jur. 2d 642, Arbitration and Award § 166.

78-31-20. Record to be filed with clerk of court—Entry of judgment.—The party moving for an order confirming, modifying, correcting or vacating an award shall, at the time such motion is filed with the clerk, file, unless the same have theretofore been filed, the following papers with the clerk:

(1) The written contract, or a verified copy thereof, containing the agreement for the submission, the selection or appointment of the arbitrator or arbitrators, and each written extension of the time, if any, within which to make the award.

(2) The award.

(3) Every notice, affidavit and other paper used upon an application to confirm, modify, correct or vacate the award, and each order made upon such application. The judgment or decree shall be entered and docketed as if it were rendered in a civil action.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-31-20.

Compiler's Notes.

This section is identical to former section 104-36-20 (Code 1943) which was repealed by Laws 1951, ch. 58, § 3 except that in the former statute the last sentence appeared as a separate paragraph rather than as part of subd. (3).

Purpose of section.

This section provides a method by which an award, made as provided by this chapter, may be given legal sanction and reduced to judgment by summary proceedings in the nature of a motion filed in court. Giannopulos v. Pappas, 80 U. 442, 15 P. 2d 353, applying Laws 1927, ch. 62.

Collateral References.

Arbitration and Award⇐73.
6 C.J.S. Arbitration § 146.

DECISIONS UNDER FORMER LAW

Filing of award.

Under R.S. 1898, §§ 3223 and 3227, it was not duty of arbitrators to file their award with clerk; parties could, if they wished award to have force and effect of judgment, file award with clerk. Richards v. Smith, 33 U. 8, 91 P. 683.

78-31-21. Judgment—Force and effect.—The judgment or decree so entered and docketed shall have the same force and effect in all respects as, and shall be subject to all the provisions of law relating to, a judgment or decree; and it may be enforced as if it had been rendered in the court in which it is entered.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-31-21.

Compiler's Notes.

This section is identical to former section 104-36-21 (Code 1943) which was repealed by Laws 1951, ch. 58, § 3.

Collateral References.

Arbitration and Award⇐82.
6 C.J.S. Arbitration §§ 97, 148.
5 Am. Jur. 2d 642, Arbitration and Award § 166.

Award or decision by arbitrators as precluding return of case to or its reconsideration by them, 104 A. L. R. 710.

78-31-22. Appeals.—An appeal may be taken from the final judgment or decree entered by the court.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-31-22.

Compiler's Notes.

This section is identical to former section 104-36-22 (Code 1943) which was repealed by Laws 1951, ch. 58, § 3.

Order as appealable.

Order of court in arbitration case, setting aside award and ordering new hearing without order for resubmission but also affirmatively ordering plaintiffs and interveners to present their claims for damages to receiver of defendant corporation, held final and appealable order within C.L. 1907, §§ 3230 and 3300. Bivans v. Utah Lake Land, Water & Power Co., 53 U. 601, 174 P. 1126.

Collateral References.

Arbitration and Award⇐73.
6 C.J.S. Arbitration § 161 et seq.
5 Am. Jur. 2d 626, Arbitration and Award § 145.

Appealability of judgment confirming or setting aside arbitration award, 7 A. L. R. 3d 608.

CHAPTER 32

CONTEMPT

CHAPTER 31

ARBITRATION

78-31-1. Written agreement for, etc.

Constitutionality.

The amendment of this section to permit valid and enforceable agreements for arbitration of future disputes does not violate Art. I, § 11, Art. I, § 7, nor Art. VI, § 28 of the state Constitution. Lindon City v. Engineers Constr. Co. (1981) 636 P 2d 1070.

Municipal corporations.

Absent a statutory prohibition, a municipal corporation has the power to submit to arbitration any claim asserted by or against it; the application of this section to permit valid and enforceable agreements for future disputes where one party was a municipal corporation did not violate Art. VI, § 28 of the state Constitution. Lindon City v. Engineers Constr. Co. (1981) 636 P 2d 1070.

Law Reviews.

Alternatives to the Tort System for the Nonmedical Professions: Can They Do the Job?, 1981 B.Y.U. L. Rev. 57.

CHAPTER 32

CONTEMPT

78-32-1. Acts and omissions constituting contempt.

Cross-References.

Defense costs in criminal actions, contempt based on failure of convicted defendant to pay, 77-32a-7 to 77-32a-12.

Disobedience of district court order by city court.

City court judge was not in contempt for failing to comply with a judgment of the district court where that order was not served upon him by writ, but was returned to the city court together with other papers in the file on order of remand. State v. Giles (1978) 576 P 2d 876.

Findings of fact required.

To justify a finding of contempt and the imposition of a jail sentence, there must be made written findings of fact and judgment supported by clear and convincing proof that the party knew what was required of him, and having the ability to comply, willfully and knowingly failed and refused to do so. Thomas v. Thomas (1977) 569 P 2d 1119.

78-32-2. Re-entry after eviction from real property.

Separate mortgages foreclosed in single action.

Where two parcels of realty, subject to separate mortgages executed by the same mortgagor to the same mortgagee, were foreclosed in the same action with judgment being awarded for a combined amount, and the evidence established that one of the parcels was offered and sold separately at the foreclosure *sale and that the other parcel remained* unsold, it was error for trial court to apply the sale price against the combined amount awarded in the foreclosure judgment and award a deficiency judgment for the remaining balance; if the sale price was less than the portion of the foreclosure judgment, plus costs, secured by the sold parcel, a deficiency judgment could have been awarded for such difference; however, before deficiency judgment could be entered with respect to the unsold parcel, such parcel would have to be sold and the proceeds applied against the *indebtedness and costs secured thereby.* Bawden & Associates v Smith (1982) 646 P 2d 711.

78-32-9. Hearing.

Rights of one charged with contempt.

In a prosecution for contempt, not committed in the presence of the court, due process of law requires that the person charged be advised of the nature of the action against him, have assistance of counsel, if requested,

Lien of attorney and discharge thereof.

Where attorney's fee has been allowed by court in foreclosure suit, and amount of fee has been adjudicated and made part of judgment, attorney has interest in judgment and lien thereon to extent of amount allowed, and lien cannot be discharged by payment to anyone except attorney who, to amount of lien, is deemed equitable assignee of judgment. Gray v. Denhalter, 17 U. 312, 53 P. 976, applying Laws 1894, ch. 29, p. 25.

Necessity that court determine and fix fee.

Under this section it is error for the court to fix a 10% attorney's fee without determining whether it is a reasonable one. Jensen v. Lichtenstein, 45 U. 320, 145 P. 1036, applying C. L. 1907, §§ 3504, 3505.

Under this section, the trial court cannot escape the responsibility of determining and declaring what amount shall be allowed as an attorney's fee despite any stipulation of the parties upon that subject contained in either note or mortgage. Jensen v. Lichtenstein, 45 U. 320, 145 P. 1036, applying C. L. 1907, §§ 3504, 3505.

Purpose.

Statute was enacted to prevent division of fees provided for in mortgage between attorney and mortgagee and to allow only such reasonable attorney's fees to be taxed against defendant as were actually agreed to be paid, or were paid, for attorney's services. McClure v. Little, 15 U. 379, 49 P. 298, 62 Am. St. Rep. 938, construing Laws 1894, ch. 39, p. 25.

This section was adopted to protect debtors against being required to pay excessive attorney's fees in foreclosure suits. It was not, however, intended that personal actions upon notes should be affected. Jensen v. Lichtenstein, 45 U. 320, 145 P. 1036, construing C. L. 1907, §§ 3504, 3505.

"Reasonable" fee.

This section contemplates a reasonable sum as an attorney's fee, independently of provisions of note or mortgage. By a "reasonable fee," is meant one which is reasonable under the facts and circumstances of each case, which must depend upon the amount in controversy, the labor and the responsibility imposed upon the attorney in obtaining judgment. A smaller fee would be more reasonable in a default case than in a contested one. Jensen v. Lichtenstein, 45 U. 320, 145 P. 1036, construing C. L. 1907, §§ 3504, 3505.

Collateral References.

Mortgages⇐581(5).

59 C.J.S. Mortgages § 812.

55 Am. Jur. 2d 590 et seq., Mortgages § 625 et seq.

Attorney's compensation in absence of contract or statute fixing amount, 57 A. L. R. 3d 475.

Attorney's fees in matters involving real property mortgages and deeds of trust, 58 A. L. R. 3d 215.

CHAPTER 38

NUISANCE, WASTE, AND OTHER DAMAGE

78-38-1. "Nuisance" defined—Right of action for—Judgment.—Anything which is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance and the subject of an action. Such action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by nuisance; and by the judgment the nuisance may be enjoined or abated, and damages may also be recovered.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-38-1.

Compiler's Notes.

This section is identical to former section 104-56-1 (Code 1943) which was repealed by Laws 1951, ch. 58, § 3.

Form and certainty.

A judgment or decree was to be in plain and intelligible language; the property which was the subject of judgment was to be described with sufficient certainty to leave its identity free from doubt. Smith v. Phillips, 6 U. 376, 23 P. 932; City of Springville v. Holley, 6 U. 378, 23 P. 933.

Where statute did not require judgment to be in any particular form, ordinarily judgment was sufficient if by use of proper language it was stated what prevailing party was to receive and what losing party was required to do, pay, or discharge. Robinson v. Salt Lake City, 37 U. 520, 109 P 817.

Judgment for "the sum of 242.98" was sufficiently certain. Snow v. West, 37 U. 528, 110 P. 52.

Fact that judgment read "defendant," instead of "defendants," was not fatal, since such irregularity was not matter of jurisdiction so as to make judgment void. Higgs v. Burton, 58 U. 99, 197 P. 728.

No particular form or words was essential to constitute a judgment, provided they were such as to indicate with reasonable certainty a final determination of the rights of the parties and the relief granted or denied. But in order that the document be a judgment it had to be sufficiently definite and certain as to be susceptible of enforcement; it had to specify the relief granted or denied; it had to determine the rights of the parties, and describe the parties for or against whom it was rendered. If it did not order, adjudge, or decree anything, it had not even the first essential requisite of a judgment. Ellinwood v. Bennion, 73 U. 563, 276 P. 159.

Judgment in favor of one not a party.

In the absence of a court order substituting the person in whose favor judgment was finally rendered for the original party, judgment would be reversed, because there was, in effect, no judgment in the case. Lowell v. Parkinson, 4 U. 64, 6 P. 58, applying Civil Practice Act of 1870.

Orders distinguished.

Order was decision of a motion, while judgment was decision of trial. Cox v. Dixie Power Co., 81 U. 94, 16 P. 2d 916.

Order granting restitution of moneys collected on execution after motion for new trial was granted, made without notice or hearing, did not have effect of binding judgment. Cox v. Dixie Power Co., 81 U. 94, 16 P. 2d 916.

Validation of invalid judgment by statute.

Legislature could not validate void judgments but where court had jurisdiction of subject matter of suit and of person of defendant, legislature could validate judgment which was defective for omission of some essential step which legislature had right to dispense with. In re Christiensen's Estate, 17 U. 412, 53 P. 1003, 41 L. R. A. 504, 70 Am. St. Rep. 794.

What are "judgments."

An order of a district court, on appeal from probate court, refusing to confirm sale of decedent's real estate, was not a "judgment." In re Estate of Gibbs, 4 U. 97, 6 P. 525.

A verdict could not be regarded as a judgment. Ellinwood v. Bennion, 73 U. 563, 276 P. 159.

A document denominated "Judgment on Verdict," which had not even the first essential requisite of a judgment, was not appealable. Such a document, when filed in the clerk's office, was no more than an order for a judgment, or an order directing the clerk to enter and docket a judgment nunc pro tunc. Ellinwood v. Bennion, 73 U. 563, 276 P. 159.

(b) **Judgment Upon Multiple Claims And/Or Involving Multiple Parties.** When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, and/or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry

of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Compiler's Notes.

Rule 54(b) was amended by the Supreme Court effective May 21, 1976. The amendment inserted references to multiple parties and to adjudication of rights and liabilities of all the parties; and made minor changes in phraseology.

This Rule is similar to Fed. Rule 54(b), except for its substitution of "and/or" for "or" after "third-party claim," and its insertion of "by the court" after "express determination," both in the first sentence.

Cross-Reference.

Stay of judgment upon multiple claims, Rules of Civil Procedure, Rule 62(h).

Absence of express determination.

In action based on alleged breach of loan agreement, where trial court improperly dismissed plaintiff-corporation's complaint with prejudice and granted defendant-bank judgment on its counterclaim and cross-claim, judgment on cross-claim and counterclaim would be subject, on remand, to revision since all claims presented had not been adjudicated and since trial court made no express determination as required by this section. M. & S. Constr. & Engineering Co. v. Clearfield State Bank, 24 U. (2d) 139, 467 P. 2d 410.

Collateral References.

Judgment in favor of less than all parties to contract as bar to action against other parties, 3 A. L. R. 124.

Operation and effect of Rule 54(b) governing entry of judgment on multiple claims, 38 A. L. R. 2d 377.

Right to judgment, levy or lien against individual in action under statute permitting persons associated in business under a common name to be sued in that name, 100 A. L. R. 997.

DECISIONS UNDER FORMER LAW

Affirmance of joint judgment as to one party, reversal as to another.

Supreme Court could affirm a joint judgment as to one appellant and reverse it as to another unless in doing so injustice resulted to party against whom judgment was affirmed. Sweatman v. Linton, 66 U. 208, 241 P. 309, distinguished in 86 U. 506, 44 P. 2d 1090, 86 U. 522, 46 P. 2d 672.

Joint obligations.

In suit on joint contract, recovery could be had against one or the other, or both, of the defendants. Ruffati v. Societe Anonyme Des Mines De Lexington, 10 U. 386, 37 P. 591.

(c) **Demand for Judgment.**

(1) Generally. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. It may be given for or against one or more of several claimants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between or among themselves.

(2) Judgment by Default. A judgment by default shall not be different in kind from, or exceed in amount, that specifically prayed for in the demand for judgment.

Compiler's Notes.

This Rule is similar in substance to Fed. Rule 54(c), but differs from it in text.

Application.

One cannot recover on an implied contract where he pleads and attempts to prove an express contract, seeking no amendment of his pleading, demanding no relief under and urging no claim under a quantum meruit or other theory, since a defendant must be extended every reasonable opportunity to meet an adversary's claim. Taylor v. E. M. Royle Corp., 1 U. (2d) 175, 264 P. 2d 279.

A party must not be prejudiced in any way by the introduction of new issues, but where a partnership issue was raised at the trial, was not objected to by defendant, and both sides went into facts of the

(b) **Amendment.**

Abandonment of motion.

Party must be deemed to have abandoned its motion to amend a particular finding, when it permitted trial court to enter a final order denying its written motion to amend without securing a ruling on its claimed pending motion to amend the particular finding. Zions First Nat. Bank v. C'est Bon Venture (1980) 613 P 2d 515.

RULE 53
MASTERS

(e) **Report.**

(2) In Nonjury Actions.

Failure to object.

One who made no objection to master's report as required by this subdivision could not question the report for the first time on appeal from district court order adopting the master's findings. Score v. Wilson (1980) 611 P 2d 367.

PART VII
Judgment

RULE 54
JUDGMENT; COSTS

(b) **Judgment Upon Multiple Claims, etc.**

Denial of motion to dismiss.

This rule does not necessarily mean there is a final judgment merely because the court's order so recites; there was in fact no final judgment where the trial court denied defendant's motion to dismiss, thus leaving the parties in court, then entered an order that such denial was a final judgment. Little v. Mitchell (1979) 604 P 2d 918.

(c) **Demand for Judgment.**

(2) Judgment by Default.

Attorney fees and costs.

District court's award of attorney fees in excess of the fees demanded in the complaint and of costs where no costs were demanded was proper where the proof at trial showed the party entitled to such relief. Pope v. Pope (1978) 589 P 2d 752.

Nature of relief sought.

Complaint for foreclosure of a lien was defective because of the nature of relief sought even though it did not demand judgment for personal liability on contract and judgment was granted for such personal liability, since this rule provides that a judgment shall grant the relief to which a party is entitled even though it is not demanded. Motivated Management International v. Finney (1979) 604 P 2d 467.

(d) **Costs.**

Depositions.

Defendant was not entitled to the cost of taking depositions where the depositions were not used at trial and there was no evidence presented that they were necessarily incurred for the preparation of defendant's case. Nelson v. Newman (1978) 583 P 2d 601.

Memorandum of costs filed before judgment.

Where memorandum of costs if filed before judgment, and costs in specific amounts are awarded in that judgment, then a party may move to alter or amend the costs in the judgment under Rule 59 and the time limits contained therein, and is not limited to challenging the costs under the procedure of this rule. Nelson v. Newman (1978) 583 P 2d 601.

Objection to costs claimed.

Defendant waived any error as to the costs allowed the plaintiff where defendant waited 23 days after filing of cost bill filing any objection. Suniland Corp. v. Radcliffe (1978) 576 P 2d 847.

Statutory limits.

Award of costs in excess of those expressly allowed by statute for service of subpoena, witness fees and preparation of model, photographs and certified copies of documents was improper even though the costs represented

Construction Industry Arbitration Rules

AMERICAN CONSULTING ENGINEERS COUNCIL

AMERICAN INSTITUTE OF ARCHITECTS

AMERICAN SOCIETY OF CIVIL ENGINEERS

AMERICAN SOCIETY OF LANDSCAPE ARCHITECTS

AMERICAN SUBCONTRACTORS ASSOCIATION

ASSOCIATED GENERAL CONTRACTORS

ASSOCIATED SPECIALTY CONTRACTORS, INC.

CONSTRUCTION SPECIFICATIONS INSTITUTE

NATIONAL ASSOCIATION OF HOME BUILDERS

NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS

NATIONAL UTILITY CONTRACTORS ASSOCIATION, INC.

American Arbitration Association

Effective April 1, 1982

For the Submission of existing disputes:-

We, the undersigned parties, hereby agree to submit to arbitration under the Construction Industry Arbitration Rules of the American Arbitration Association the following controversy: (cite briefly). We further agree that the above controversy be submitted to (one) (three) Arbitrator(s) selected from the panels of Arbitrators of the American Arbitration Association. We further agree that we will faithfully observe this agreement and the Rules and that we will abide by and perform any award rendered by the Arbitrator(s) and that a judgment of the Court having jurisdiction may be entered upon the award.

Standard Arbitration Clause

Parties may refer to these Rules in their contracts. For this purpose, the following clause may be used:

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the Arbitrator(s) may be entered in any Court having jurisdiction thereof.

American Arbitration Association

Arbitration is the voluntary submission of a dispute to a disinterested person or persons for final determination. And to achieve orderly, economical and expeditious arbitration, in accordance with federal and state laws, the American Arbitration Association is available to administer arbitration cases under various specialized rules.

The American Arbitration Association maintains throughout the United States a National Panel of Arbitrators consisting of experts in all trades and professions. By arranging for arbitration under the Construction Industry Arbitration Rules, parties may obtain the services of arbitrators who are familiar with the construction industry.

The American Arbitration Association shall establish and maintain as members of its National Panel of Arbitrators individuals competent to hear and determine disputes administered under the Construction Industry Arbitration Rules. The Association shall consider for appointment to the Construction Industry Panel persons recommended by the National Construction Industry Arbitration Committee as qualified to serve by virtue of their experience in the construction field.

The Association does not act as arbitrator. Its function is to administer arbitrations in accordance with the agreement of the parties and to maintain Panels from which arbitrators may be chosen by parties. Once designated, the arbitrator decides the issues and an award is final and binding.

When an agreement to arbitrate is written into a construction contract, it may expedite peaceful settlement without the necessity of going to arbitration at all. Thus, the arbitration clause is a form of insurance against loss of good will.

TABLE OF CONTENTS

Construction Industry Arbitration Rules

1. Agreement of Parties

The parties shall be deemed to have made these Rules a part of their arbitration agreement whenever they have provided for arbitration under the Construction Industry Arbitration Rules. These Rules and any amendment thereof shall apply in the form obtaining at the time the arbitration is initiated.

2. Name of Tribunal

Any Tribunal constituted by the parties for the settlement of their dispute under these Rules shall be called the Construction Industry Arbitration Tribunal, hereinafter called the Tribunal.

3. Administrator

When parties agree to arbitrate under these Rules, or when they provide for arbitration by the American Arbitration Association, hereinafter called AAA, and an arbitration is initiated hereunder, they thereby constitute AAA the administrator of the arbitration. The authority and duties of the administrator are prescribed in the agreement of the parties and in these Rules.

4. Delegation of Duties

The duties of the AAA under these Rules may be carried out through Tribunal Administrators, or such other officers or committees as the AAA may direct.

5. National Panel of Arbitrators

In cooperation with the National Construction Industry Arbitration Committee, the AAA shall establish and maintain a National Panel of Construction Arbitrators, hereinafter called the Panel, and shall appoint an arbitrator or arbitrators therefrom as hereinafter provided. A neutral arbitrator selected by mutual choice of both parties or their appointees, or appointed by the AAA, is herein-

after called the arbitrator, whereas an arbitrator selected unilaterally by one party is hereinafter called the party-appointed arbitrator. The term arbitrator may hereinafter be used to refer to one arbitrator or to a Tribunal of multiple arbitrators.

6. Office of Tribunal

The general office of a Tribunal is the headquarters of the AAA, which may, however, assign the administration of an arbitration to any of its Regional Offices.

7. Initiation under an Arbitration Provision in a Contract

Arbitration under an arbitration provision in a contract shall be initiated in the following manner:

The initiating party shall, within the time specified by the contract, if any, file with the other party a notice of an intention to arbitrate (Demand), which notice shall contain a statement setting forth the *nature of the dispute, the amount involved, and* the remedy sought; and shall file three copies of said notice with any Regional Office of the AAA, together with three copies of the arbitration provisions of the contract and the appropriate filing fee as provided in Section 48 hereunder.

The AAA shall give notice of such filing to the other party. A party upon whom the demand for arbitration is made may file an answering statement in duplicate with the AAA within seven days after notice from the AAA, simultaneously sending a copy to the other party. If a monetary claim is made in the answer the appropriate administrative fee provided in the Fee Schedule shall be forwarded to the AAA with the answer. If no answer is filed within the stated time, it will be treated as a denial of the claim. Failure to file an answer shall not operate to delay the arbitration.

8. Change of Claim or Counterclaim

After filing of the claim or counterclaim, if either party desires to make any new or different claim or counterclaim, same shall be made in writing and filed with the AAA, and a copy thereof shall be mailed to the other party who shall have a period of seven days from the date of such mailing within which to file an answer with the AAA. However,

after the arbitrator is appointed no new or different claim or counterclaim may be submitted without the arbitrator's consent.

9. Initiation under a Submission

Parties to any existing dispute may commence an arbitration under these Rules by filing at any Regional Office two copies of a written agreement to arbitrate under these Rules (Submission), signed by the parties. It shall contain a statement of the matter in dispute, the amount of money involved, and the remedy sought, together with the appropriate filing fee as provided in the Fee Schedule.

10. Pre-Hearing Conference

At the request of the parties or at the discretion of the AAA a pre-hearing conference with the administrator and the parties or their counsel will be scheduled in appropriate cases to arrange for an exchange of information and the stipulation of uncontested facts so as to expedite the arbitration proceedings.

11. Fixing of Locale

The parties may mutually agree on the locale where the arbitration is to be held. If any party requests that the hearing be held in a specific locale and the other party files no objection thereto within seven days after notice of the request is mailed to such party, the locale shall be the one requested. If a party objects to the locale requested by the other party, the AAA shall have power to determine the locale and its decision shall be final and binding.

12. Qualifications of Arbitrator

Any arbitrator appointed pursuant to Section 13 or Section 15 shall be neutral, subject to disqualification for the reasons specified in Section 19. If the agreement of the parties names an arbitrator or specifies any other method of appointing an arbitrator, or if the parties specifically agree in writing, such arbitrator shall not be subject to disqualification for said reasons.

13. Appointment from Panel

If the parties have not appointed an arbitrator and have not provided any other method of appointment, the arbitrator shall be appointed in the following manner: Immediately after the filing of the

Demand or Submission, the AAA shall submit simultaneously to each party to the dispute an identical list of names of persons chosen from the Panel. Each party to the dispute shall have seven days from the mailing date in which to cross off any names to which it objects, number the remaining names to indicate the order of preference, and return the list to the AAA. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an arbitrator to serve. If the parties fail to agree upon any of the persons named, or if acceptable arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the AAA shall have the power to make the appointment from other members of the Panel without the submission of any additional lists.

14. Direct Appointment by Parties

If the agreement of the parties names an arbitrator or specifies a method of appointing an arbitrator, that designation or method shall be followed. The notice of appointment, with name and address of such arbitrator, shall be filed with the AAA by the appointing party. Upon the request of any such appointing party, the AAA shall submit a list of members of the Panel from which the party may make the appointment.

If the agreement specifies a period of time within which an arbitrator shall be appointed, and any party fails to make such appointment within that period, the AAA shall make the appointment.

If no period of time is specified in the agreement, the AAA shall notify the parties to make the appointment, and if within seven days after mailing of such notice such arbitrator has not been so appointed, the AAA shall make the appointment.

15. Appointment of Arbitrator by Party-Appointed Arbitrators

If the parties have appointed their party-appointed arbitrators or if either or both of them have been appointed as provided in Section 14, and have authorized such arbitrator to appoint an arbitrator within a specified time and no appointment is made within such time or any agreed extension thereof, the AAA shall appoint an arbitrator who shall act as Chairperson.

If no period of time is specified for appointment of the third arbitrator and the party-appointed arbitrators do not make the appointment within seven days from the date of the appointment of the last party-appointed arbitrator, the AAA shall appoint the arbitrator who shall act as Chairperson.

If the parties have agreed that their party-appointed arbitrators shall appoint the arbitrator from the Panel, the AAA shall furnish to the party-appointed arbitrators, in the manner prescribed in Section 13, a list selected from the Panel, and the appointment of the arbitrator shall be made as prescribed in such Section.

16. Nationality of Arbitrator in International Arbitration

If one of the parties is a national or resident of a country other than the United States, the arbitrator shall, upon the request of either party, be appointed from among the nationals of a country other than that of any of the parties.

17. Number of Arbitrators

If the arbitration agreement does not specify the number of arbitrators, the dispute shall be heard and determined by one arbitrator, unless the AAA, in its discretion, directs that a greater number of arbitrators be appointed.

18. Notice to Arbitrator of Appointment

Notice of the appointment of the arbitrator, whether mutually appointed by the parties or appointed by the AAA, shall be mailed to the arbitrator by the AAA, together with a copy of these Rules, and the signed acceptance of the arbitrator shall be filed prior to the opening of the first hearing.

19. Disclosure and Challenge Procedure

A person appointed as neutral arbitrator shall disclose to the AAA any circumstances likely to affect his or her impartiality, including any bias or any financial or personal interest in the result of

the arbitration or any past or present relationship with the parties or their counsel. Upon receipt of such information from such arbitrator or other source, the AAA shall communicate such information to the parties and, if it deems it appropriate to do so, to the arbitrator and others. Thereafter, the AAA shall determine whether the arbitrator should be disqualified and shall inform the parties of its decision, which shall be conclusive.

20. Vacancies

If any arbitrator should resign, die, withdraw, refuse, be disqualified or be unable to perform the duties of office, the AAA shall, on proof satisfactory to it, declare the office vacant. Vacancies shall be filled in accordance with the applicable provision of these Rules. In the event of a vacancy in a panel of neutral arbitrators, the remaining arbitrator or arbitrators may continue with the hearing and determination of the controversy, unless the parties agree otherwise.

21. Time and Place

The arbitrator shall fix the time and place for each hearing. The AAA shall mail to each party notice thereof at least five days in advance, unless the parties by mutual agreement waive such notice or modify the terms thereof.

22. Representation by Counsel

Any party may be represented by counsel. A party intending to be so represented shall notify the other party and the AAA of the name and address of counsel at least three days prior to the date set for the hearing at which counsel is first to appear. When an arbitration is initiated by counsel, or where an attorney replies for the other party, such notice is deemed to have been given.

23. Stenographic Record

The AAA shall make the necessary arrangements for the taking of a stenographic record whenever such record is requested by a party. The requesting party or parties shall pay the cost of such record as provided in Section 50.

24. Interpreter

The AAA shall make the necessary arrangements for the services of an interpreter upon the request

of one or both parties, who shall assume the cost of such services.

25. Attendance at Hearings

Persons having a direct interest in the arbitration are entitled to attend hearings. The arbitrator shall otherwise have the power to require the retirement of any witness or witnesses during the testimony of other witnesses. It shall be discretionary with the arbitrator to determine the propriety of the attendance of any other persons.

26. Adjournments

The arbitrator may adjourn the hearing, and must take such adjournment when all of the parties agree thereto.

27. Oaths

Before proceeding with the first hearing or with the examination of the file, each arbitrator may take an oath of office, and if required by law, shall do so. The arbitrator may require witnesses to testify under oath administered by any duly qualified person or, if required by law or demanded by either party, shall do so.

28. Majority Decision

Whenever there is more than one arbitrator, all decisions of the arbitrators must be by at least a majority. The award must also be made by at least a majority unless the concurrence of all is expressly required by the arbitration agreement or by law.

29. Order of Proceedings

A hearing shall be opened by the filing of the oath of the arbitrator, where required, and by the recording of the place, time, and date of the hearing, the presence of the arbitrator and parties, and counsel, if any, and by the receipt by the arbitrator of the statement of the claim and answer, if any.

The arbitrator may, at the beginning of the hearing, ask for statements clarifying the issues involved.

The complaining party shall then present its claims, proofs and witnesses, who shall submit to questions or other examination. The defending party shall then present its defenses, proofs and witnesses, who

shall submit to questions or other examination. The arbitrator may vary this procedure but shall afford full and equal opportunity to the parties for the presentation of any material or relevant proofs.

Exhibits, when offered by either party, may be received in evidence by the arbitrator.

The names and addresses of all witnesses and exhibits in order received shall be made a party of the record.

30. Arbitration in the Absence of a Party

Unless the law provides to the contrary, the arbitration may proceed in the absence of any party, who, after due notice, fails to be present or fails to obtain an adjournment. An award shall not be made solely on the default of a party. The arbitrator shall require the party who is present to submit such evidence as deemed necessary for the making of an award.

31. Evidence

The parties may offer such evidence as they desire and shall produce such additional evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. An arbitrator authorized by law to subpoena witnesses or documents may do so upon the request of any party, or independently. The arbitator shall be the judge of the admissibility of the evidence offered and conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where any of the parties is absent in default or has waived his or her right to be present.

32. Evidence by Affidavit and Filing of Documents

The arbitrator may receive and consider the evidence of witnesses by affidavit, giving it such weight as seems appropriate after consideration of any objections made to its admission.

All documents not filed with the arbitrator at the hearing, but arranged for at the hearing or subsequently by agreement of the parties, shall be filed with the AAA for transmission to the arbitrator. All parties shall be afforded opportunity to examine such documents.

33. Inspection or Investigation

An arbitrator finding it necessary to make an inspection or investigation in connection with the arbitration shall direct the AAA to so advise the parties. The arbitrator shall set the time and the AAA shall notify the parties thereof. Any party who so desires may be present at such inspection or investigation. In the event that one or both parties are not present at the inspection or investigation, the arbitrator shall make a verbal or written report to the parties and afford them an opportunity to comment.

34. Conservation of Property

The arbitrator may issue such orders as may be deemed necessary to safeguard the property which is the subject matter of the arbitration without prejudice to the rights of the parties or to the final determination of the dispute.

35. Closing of Hearings

The arbitrator shall specifically inquire of the parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies, the arbitrator shall declare the hearings closed and a minute thereof shall be recorded. If briefs are to be filed, the hearings shall be declared closed as of the final date set by the arbitrator for the receipt of briefs. If documents are to be filed as provided for in Section 32 and the date set for their receipt is later than that set for the receipt of briefs, the later date shall be the date of closing the hearing. The time limit within which the arbitrator is required to make an award shall commence to run, in the absence of other agreements by the parties, upon the closing of the hearings.

36. Reopening of Hearings

The hearings may be reopened by the arbitrator at will, or upon application of a party at any time before the award is made. If the reopening of the hearing would prevent the making of the award within the specific time agreed upon by the parties in the contract out of which the controversy has arisen, the matter may not be reopened, unless the parties agree upon the extension of such time limit. When no specific date is fixed in the contract, the arbitrator may reopen the hearings, and the arbitrator shall have thirty days from the closing of the reopened hearings within which to make an award.

37. Waiver of Oral Hearings
The parties may provide, by written agreement, for the waiver of oral hearings. If the parties are unable to agree as to the procedure, the AAA shall specify a fair and equitable procedure.

38. Waiver of Rules
Any party who proceeds with the arbitration after knowledge that any provision or requirement of these Rules has not been complied with and who fails to state an objection thereto in writing, shall be deemed to have waived the right to object.

39. Extensions of Time
The parties may modify any period of time by mutual agreement. The AAA for good cause may extend any period of time established by these Rules, except the time for making the award. The AAA shall notify the parties of any such extension of time and its reason therefor.

40. Communication with Arbitrator and Serving of Notices
There shall be no communication between the parties and an arbitrator other than at oral hearings. Any other oral or written communications from the parties to the arbitrator shall be directed to the AAA for transmittal to the arbitrator.

Each party to an agreement which provides for arbitration under these Rules shall be deemed to have consented that any papers, notices or process necessary or proper for the initiation or continuation of an arbitration under these Rules and for any court action in connection therewith or for the entry of judgment on any award made thereunder may be served upon such party by mail addressed to such party or its attorney at the last known address or by personal service, within or without the state wherein the arbitration is to be held (whether such party be within or without the United States of America), provided that reasonable opportunity to be heard with regard thereto has been granted such party.

41. Time of Award
The award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties, or specified by law, not later than thirty days from the date of closing the hearings, or if oral hearings have been waived, from the date of transmitting the final statements and proofs to the arbitrator.

42. Form of Award
The award shall be in writing and shall be signed either by the sole arbitrator or by at least a majority if there be more than one. It shall be executed in the manner required by law.

43. Scope of Award
The arbitrator may grant any remedy or relief which is just and equitable and within the terms of the agreement of the parties. The arbitrator, in the award, shall assess arbitration fees and expenses as provided in Sections 48 and 50 equally or in favor of any party and, in the event any administrative fees or expenses are due the AAA, in favor of the AAA.

44. Award upon Settlement
If the parties settle their dispute during the course of the arbitration, the arbitrator, upon their request, may set forth the terms of the agreed settlement in an award.

45. Delivery of Award to Parties
Parties shall accept as legal delivery of the award the placing of the award or a true copy thereof in the mail by the AAA, addressed to such party at its last known address or to its attorney, or personal service of the award, or the filing of the award in any manner which may be prescribed by law.

46. Release of Documents for Judicial Proceedings
The AAA shall, upon the written request of a party furnish to such party, at its expense, certified facsimiles of any papers in the AAA's possession that may be required in judicial proceedings relating to the arbitration.

47. Applications to Court
No judicial proceedings by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.

The AAA is not a necessary party in judicial proceedings relating to the arbitration.

Parties to these Rules shall be deemed to have consented that judgment upon the award rendered by the arbitrator(s) may be entered in any Federal or State Court having jurisdiction thereof.

48. Administrative Fees

As a not-for-profit organization, the AAA shall prescribe an administrative fee schedule and a refund schedule to compensate it for the cost of providing administrative services. The schedule in effect at the time of filing or the time of refund shall be applicable.

The administrative fees shall be advanced by the initiating party or parties in accordance with the administrative fee schedule, subject to final apportionment by the arbitrator in the award.

When a matter is withdrawn or settled, the refund shall be made in accordance with the refund schedule.

The AAA, in the event of extreme hardship on the part of any party, may defer or reduce the administrative fee.

49. Fee when Oral Hearings are Waived

Where all oral hearings are waived under Section 37 the Administrative Fee Schedule shall apply.

50. Expenses

The expenses of witnesses for either side shall be paid by the party producing such witnesses.

The cost of the stenographic record, if any is made, and all transcripts thereof, shall be prorated equally between the parties ordering copies, unless they shall otherwise agree, and shall be paid for by the responsible parties directly to the reporting agency.

All other expenses of the arbitration, including required traveling and other expenses of the arbitrator and of AAA representatives, and the expenses of any witness or the cost of any proofs produced at the direct request of the arbitrator, shall be borne equally by the parties, unless they agree

otherwise, or unless the arbitrator in the award assesses such expenses or any part thereof against any specified party or parties.

51. Arbitrator's Fee

Unless the parties agree to terms of compensation, members of the National Panel of Construction Arbitrators will serve without compensation for the first two days of service.

Thereafter, compensation shall be based upon the amount of service involved and the number of hearings. An appropriate daily rate and other arrangements will be discussed by the administrator with the parties and the arbitrator(s). If the parties fail to agree to the terms of compensation, an appropriate rate shall be established by the AAA, and communicated in writing to the parties.

Any arrangement for the compensation of an arbitrator shall be made through the AAA and not directly by the arbitrator with the parties. The terms of compensation of neutral arbitrators on a Tribunal shall be identical.

52. Deposits

The AAA may require the parties to deposit in advance such sums of money as it deems necessary to defray the expense of the arbitration, including the arbitrator's fee if any, and shall render an accounting to the parties and return any unexpended balance.

53. Interpretation and Application of Rules

The arbitrator shall interpret and apply these Rules insofar as they relate to the arbitrator's powers and duties. When there is more than one arbitrator and a difference arises among them concerning the meaning or application of any such Rules, it shall be decided by a majority vote. If that is unobtainable, either an arbitrator or a party may refer the question to the AAA for final decision. All other Rules shall be interpreted and applied by the AAA.

ADMINISTRATIVE FEE SCHEDULE

A filing fee of $200 will be paid at the time the case is initiated.

The balance of the administrative fee of the AAA is based upon the amount of each claim and counterclaim as disclosed when the claim and counterclaim are filed, and is due and payable prior to the notice of appointment of the neutral arbitrator.

In those claims and counterclaims which are not for a monetary amount, an appropriate administrative fee will be determined by the AAA, payable prior to such notice of appointment.

Amount of Claim or Counterclaim	**Fee for Claim or Counterclaim**
$1 to $20,000	3% (minimum $200)
$20,000 to $40,000	$ 600, plus 2% of excess over $20,000
$40,000 to $80,000	$1,000, plus 1% of excess over $40,000
$80,000 to 160,000	$1,400, plus ½% of excess over $80,000
$160,000 to $5,000,000	$1,800, plus ¼% of excess over $160,000

Where the claim or counterclaim exceeds $5 million, an appropriate fee will be determined by the AAA. If there are more than two parties represented in the arbitration, an additional 10% of the administrative fee will be due for each additional represented party.

When no amount can be stated at the time of filing, the administrative fee is $500, subject to adjustment in accordance with the schedule as soon as an amount can be disclosed.

OTHER SERVICE CHARGES

$50 payable by a party causing an adjournment of any scheduled hearing;

$100 payable by a party causing a second or additional adjournment of any scheduled hearing;

$50 payable by each party for each second and subsequent hearing which is either clerked by the AAA or held in a hearing room provided by the AAA.

REFUND SCHEDULE

If the AAA is notified that a case has been settled or withdrawn before it mails a notice of appointment of a neutral arbitrator, all of the fee in excess of $200 will be refunded.

If the AAA is notified that a case is settled or withdrawn thereafter but at least 48 hours before the date and time set for the first hearing, one-third of the fee in excess of $200 will be refunded.

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