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A

TREATISE

ON THE

LAW

OF

AWARDS.

THE SECOND EDITION,

REVISED AND CORRECTED;

With very conſiderable Additions from Printed and Manuſcript Caſes:

AND

AN APPENDIX,

Containing a Variety of uſeful Precedents.

BY

STEWART KYD, ESQ.

BARRISTER AT LAW,

OF THE MIDDLE TEMPLE.

Fronte exile negotium.—Aggreſſis labor arduus.———TERENCE.

Multum magnorum virorum judicio credo; aliquod et meo vindico.

SENEC.

London:

PRINTED FOR J. JOHNSON, G. G. & J. ROBINSON, & J. BUTTERWORTH;

AND E. C. COLLINS, SALISBURY.

1799.

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K9824a
1799

TO

JOHN JOSEPH POWELL, ESQ.

Barriſter at Law,

OF THE MIDDLE TEMPLE,

THIS ESSAY

IS MOST RESPECTFULLY INSCRIBED,

As a Teſtimony of

THE

HIGH SENSE THE AUTHOR ENTERTAINS

OF

THE HONOR

OF

His Friendſhip and good Opinion,

AND OF THE

JUST ESTIMATION IN WHICH HE HOLDS HIS CHARACTER

AS

A LAWYER AND A WRITER.

670795

ADVERTISEMENT.

THE preſent Edition of the *Treatiſe on the Law of Awards* contains a conſiderable Number of Caſes which have been determined ſince the Publication of the firſt; and of theſe ſeveral are no where elſe in Print; in ſome Parts the Arrangement is ſomewhat altered; and ſome Subjects are diſcuſſed, which in the firſt Edition were left untouched.—The APPENDIX of PRECEDENTS is entirely new.

No. 3, ELM-COURT, TEMPLE,
Auguſt 12, 1799.

ADDENDUM.

NOTA BENE.

IN page 139 it is ſtated that the Court of King's Bench had lately decided that an award under ſeal muſt be on a deed ſtamp, the ſealing conſtituting it a deed. This caſe was cited before Buller J. at the ſittings in laſt Trinity Term in the Common Pleas, at Weſtminſter, and ſomething ſaid about the *delivery* of an award *under ſeal* conſtituting it a deed.—That Judge ſaid he ſhould pay no attention to that deciſion in the place where he then ſat, and that by the delivery muſt be underſtood that the arbitrator delivered the inſtrument as his *award*, not as his *deed*.

I have ſince been favoured with the following Note by Mr. Serjeant Bailey:—

" WILSON *v.* SMEE.

" IN Hilary Term 1798 I moved for an attachment " for non-performance of an award; Onſlow ſhewed " for cauſe that the award was under ſeal, that the " atteſtation purported that it had been ſealed and " delivered, and that it ought to have had a deed " ſtamp: The caſe ſtood over for the conſideration of

" the court till Eaſter Term; and then I produced an " affidavit that the arbitrators, at the time they exe- " cuted their award, uſed the words 'that they pub- " 'liſhed it as their award,' and that they did not " deliver it as their act and deed; and on this affidavit " the court thought the ſtamp proper, and made the " rule abſolute."

In Styles 459, Dod *v.* Herbert, Glyn J. C. ſays, " an arbitrament under ſeal is no DEED, and the arbi- " trament may be made without a deed, and therefore " it is not neceſſary to be produced in court, for it is " but a WRITING under hand and ſeal;" and in Perry *v.* Nicholſon, 1 Bur. 278. Deniſon J. page 281, ſays, " It has been ſettled that in actions upon AWARDS " (which are no *ſpecialties*) there is no occaſion to ſet " forth the *whole* award," &c.

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A

TREATISE

ON

THE LAW OF AWARDS.

Introduction.

IN the progreſs of ſociety, a conſiderable time elapſes, after the ideas of property, and of the excluſive rights of the individual, have ariſen in the minds of men, before a compulſory ſyſtem of diſtributive juſtice can be completely eſtabliſhed. During that unſettled period, every diſpute, for the deciſion of which the paſſions of the diſputants do not prompt them to appeal to the chance of arms, is terminated either by a mutual agreement, the conditions of which are ſettled by themſelves, or by the intervention of their friends; or by a reference to ſome indifferent perſon, of whoſe ſuperior wiſdom and equity they have formed a favourable opinion. In the firſt mode of ſettlement, the ſecurity which each party has for performance by the other, ariſes partly from the nature of the agreement, which conſiſts perhaps of mutual conceſſions to be made at the ſame time, partly from the fear of mutual

violence in the caſe of refuſal, and partly from that ſenſe of honour and reſpect for the opinion of others, which in every period of ſociety has a conſiderable influence over the mind. In the other mode, by reference, beſide theſe principles, which are equally applicable to this as to the firſt caſe, there is an additional ſecurity, ariſing from the opinion which the contending parties entertain of the juſtice of the arbitrator. It muſt ſoon have been found, however, that ſomething more than all theſe was wanting to procure a ready and uniform obedience to the judge; and it became neceſſary to arm him with the collective power of the ſociety, to enable him to enforce the execution of his decrees.—Yet after the multiplied concerns, and the complicated rights of men, had rendered the ſcience of law a diſtinct profeſſion, and courts with a regular courſe of proceeding were eſtabliſhed, many reaſons concurred, in many caſes, to induce contending parties ſtill to have recourſe to the original mode of reference, to a domeſtic judge choſen by their mutual conſent.

Under whatever ſyſtem of law regular courts for the diſtribution of juſtice are erected, it is found neceſſary, in order to give certainty to their deciſions, to adapt peculiar forms of action, and modes of pleading, to the particular nature of the caſe, and to eſtabliſh certain formalities in the manner of bringing the parties before the court. The conſideration of expence, that muſt neceſſarily be incurred before a hearing can be obtained, and a fear that a technical miſtake in ſome part of the proceedings may endanger the parties ſucceſs, often prevail with him, though ſatisfied of the juſtice of his cauſe, to refer it to the deciſion of an indifferent perſon, before whom we may explain every

circumſtance, without the apprehenſion of failing from ignorance of form. An action, too, can ſeldom decide more than a ſingle queſtion; but the variety of tranſactions, which, from the nature of improved ſociety, muſt frequently have place between contending parties, requires a tribunal which can completely inveſtigate the whole, ſet one claim or one injury againſt another, and pronounce ſuch a ſentence as will put an end at once to all their diſputes. All courts have found it neceſſary to eſtabliſh particular modes of proof, and certain rules of evidence; and one, amongſt the latter, which is founded in the firſt principles of juſtice and public policy, "that no man ſhall be permitted to give evidence in his own cauſe." But this rule, like many others founded on general principles, and eſtabliſhed for general convenience, is ſometimes productive of particular hardſhip. From the nature of the tranſaction itſelf, perhaps; from the length of time that may have elapſed ſince it took place; from the want of precaution in the parties to have their agreement witneſſed, or reduced into writing at the time; and from many other circumſtances, it may frequently happen, that either there is no other evidence than the teſtimony of the parties themſelves, or what there is without theſe may be very inſufficient to enable a public tribunal to draw a poſitive and certain concluſion. In ſuch a caſe, a judge, who can examine the parties to the tranſanction, who can obſerve their looks and demeanour, and who, without being confined to the ſtrict rules of evidence, is at liberty to decide from circumſtances of probability, has manifeſtly a ſingular advantage. A conviction of the good policy of encouraging theſe domeſtic tribunals, has induced thoſe who have pre-

ſided over the formation of the civil code, to lend them their aſſiſtance to enforce obedience to their decrees: that aſſiſtance, however, is not given indiſcriminately in all caſes, without examining into the propriety and juſtice of the award; it has been thought proper to eſtabliſh rules of interpretation, derived from the nature of the authority conferred upon the arbitrators, and the implied engagement under which the contending parties bind themſelves by their ſubmiſſion: accordingly we find, that the title AWARDS makes no inconſiderable figure in almoſt every ſyſtem of law with which we are acquainted. The rules which have been eſtabliſhed with reſpect to awards, in the Engliſh law, in their general ſpirit and fundamental principles, bear ſuch a reſemblance to thoſe which are found in the pandect and code of Juſtinian,[1] that there can be little doubt that the latter are the ſource from whence the former ſprung. By what ſlow gradations the greater number of them were firſt received into the Roman law, it is impoſſible now to diſcover, as they are given as acknowleged and long eſtabliſhed rules at the time when the pandect and code were compiled: nor is it more eaſy to ſay, at what preciſe period they were adopted here, or whether they were admitted at once, or by degrees, as a component part of our judicial ſyſtem. In the moſt ancient repoſitories[2] of the deciſions of our courts, the greater part of them are mentioned as known and uncontroverted law. It is chiefly in the application of them to particular caſes, and with reſpect to the manner in which effect ſhall be

[1] Ff. l. 4. t. 8. Cod. l. 2. t. 56.——[2] Year Books.

given to them, by pleading or otherwiſe, that they have been the ſubject of litigation for many centuries paſt.

UNDER each head into which the ſubject of awards naturally divides itſelf, it is propoſed, not barely to lay down the law as it is received at the preſent day, but as far as the determinations of the courts on that ſubject, which have been preſerved in the books of reports, will permit, to trace the variations of opinion which have at different periods taken place, and the grounds on which every queſtion has been at laſt decided. In the execution of this plan it may ſometimes perhaps be neceſſary to detail a ſeries of technical ſubtleties, which, ſome may think, might as well have been omitted: to thoſe, however, who conſider that, in every ſyſtem, few laws owe their exiſtence to legiſlative wiſdom, contemplating the poſſible relations and general intereſts of ſociety, and providing at once, by a poſitive edict, a ſolution for every queſtion to which the various tranſactions of men with each other might in a ſeries of ages give birth, but that by far the greateſt number have been eſtabliſhed as each particular queſtion has ariſen; that the paſſions of the client have a tendency to influence the mind of the advocate, and that the advocate is often ready to aſſiſt the client in repelling the claim of his opponent, by all the ſubtleties with which his profeſſional purſuits have armed him—To ſuch readers this detail will probably appear the leaſt faulty part of the work.

DEFINITIONS.

THAT act, by which parties refer any matter in diſpute between them to the deciſion of a third perſon, is called a ſubmiſſion; the perſon to whom the reference is made, an arbitrator; when the reference is made to more than one, and proviſion made, that in caſe they ſhall diſagree, another ſhall decide, that other is called an umpire; the judgment pronounced by an arbitrator, or arbitrators, an award; that by an umpire, an umpirage, or, leſs properly, an award.[3]

DISTRIBUTION OF THE SUBJECT.

THE moſt natural diſtribution of the ſubject ſeems to be under the following heads:

I. The Submiſſion.
II. The Parties to it.
III. The Subject of Reference.
IV. The Arbitrator and Umpire.
V. The Award, or Umpirage.

[3] Domat. 1 vol. 223.

VI. The Remedy to compel Performance, when the Award or Umpirage is properly made.

VII. The Means of procuring Relief againſt it when improperly made.

VIII. And, laſtly, its Effect in precluding the Parties from ſuing on the original Cauſe of Action, which was the Subject of Reference.

CHAP. I.

The SUBMISSION.

How it ſhall be. THE Submiſſion may be purely by the act of the parties themſelves; or it may be by their act with the interpoſition of a court.

IN the ancient Roman law, whether the ſubmiſſion was made in the one or the other of theſe ways, there was no complete remedy for non-performance, unleſs the parties bound themſelves reciprocally, either to perform what ſhould be awarded, or to incur the forfeiture of a ſum of money, or of ſome other ſpecific thing;[4] except in the caſe where the parties were mutual debtors, and they promiſed mutually that he who did not obey the award ſhould not ſue for what

[4] Ex compromiſſo placet exceptionem non naſci, ſed pœnæ petitionem. Ff. l. 4. t. 8. ſ. 2.—Tametſi neminem prætor cogat arbitrium recipere——tamen ubi ſemel quis in ſe receperit arbitrium—quiſquamne poteſt negare æquiſſimum fore prætorem interponere, ut officium quod in ſe recepit, impleret? Ait prætor, "Qui arbitrium, pecuniâ compromiſſâ receperit." l. 4. t. 8. ſ. 3. n. 1, 2.—Arbitrum autem cogendum non eſſe ſententiam dicere, niſi compromiſſum intervenerit. Quod ait prætor, "Pecuniam compromiſſam:" accipere nos debemus, non ſi utrimque pœna *nummaria*, ſed ſi et *alia* res vice pœnæ, ſi quis arbitri ſententiæ non ſteterit, promiſſa ſit. ſ. 11, n. 1, 2.

was due to him, which was in ſubſtance the ſame thing as a ſubmiſſion under a penalty.[4]

JUSTINIAN, however, in ſome meaſure, though very inadequately, provided for the caſe of a ſubmiſſion with a ſimple promiſe to ſtand to the award. He enacted, that whether ſuch a ſubmiſſion was verbal or in writing, then if the parties, after the award made, ſubſcribed that the judgment did not diſpleaſe them; or if, within ten days, they did not expreſsly declare they were diſſatisfied with it, each ſhould have a remedy againſt the other, in caſe of non-performance.[5] And where the ſubmiſſion was accompanied by an oath to ſtand to the award; or the arbitrator, by the conſent of the

[4] Interdum——recte *nudo pacto* fiet compromiſſum: ut puta, ſi ambo debitores fuerunt, et pacti ſunt "ne petat quod ſibi debetur, qui ſententiæ arbitri non ſteterit." 11, n. 3.

[5] Si quis preſens arbitrum, ſententiam dicere prohibuit, pœna committetur. Sed ſi pœna non fuiſſet adjecta compromiſſo, ſed ſimpliciter "ſententiæ ſtari" quis promiſerit: incerti verſus eum foret actio. Ff. lib. 4, t. 8, ſ. 27, n. 6, 7. —Cum antea ſancitum fuerat in arbitris eligendis; quos neque pœna compromiſſi vallabat, neque judex dederat, ſed nulla ſententia præcedente communis electio, "ut illorum ſententiæ ſtaretur," procreabat—nihil ex eo procedere præſidii: ſancimus in eos arbitros—ut eorum definitioni ſtetur, ſiquidem ſubſcripſerint,—"quod non diſpliceat ambabus partibus eorum ſententia:" non ſolum reo exceptionem veluti pacti generari, ſed etiam actori in factum actionem. Sin autem poſt ſententiam minime quidem ſubſcripſerint, "ſe arbitri formam amplecti," ſed ſilentio eam roboraverint et non intra decem dies proximos atteſtatio miſſa fuerit--per quam manifeſtum fiat definitionem non eſſe amplectendam; tunc ſilentio partium ſententiam roboratam eſſe, et fugienti exceptionem, et agenti memoratam actionem competere. Cod. l. 2, t. 56, ſ. 5.

parties, bound himſelf by an oath to end the diſpute with all regard to truth, the ſame emperor enacted, that both parties ſhould be bound.[6]

In the law of England, where the ſubmiſſion is by the bare act of the parties, without the intervention of a court, it may be either verbal or in writing: where it is merely verbal, it may be ſimply an agreement to ſubmit the matters in diſpute to the deciſion of the arbitrator, without an expreſs promiſe to perform the award; it may be accompanied by ſuch a promiſe without the mention of any conſideration for it; or it may be with ſuch a promiſe, on a certain conſideration: in all theſe caſes, however, the effect is now the ſame; but the diſtinctions were formerly held to be material. At all times a ſubmiſſion, in any of the forms, was held

[6] Si inter actorem et reum nec non ipſum judicem fuerit conſenſum, ut cum ſacramenti religione lis procedat, et litigatores hoc ſuis manibus vel per publicas perſonas ſcripſerint, vel—propria voce depoſucrint, quod ſacramentis præſtitis arbiter electus eſt, hoc etiam additio, " quod et ipſe arbiter juramentum præſtiterit ſuper lite cum omni veritate dirimendâ—:" vel ſi de arbitro nihil tale fuerit compoſitum vel ſcriptum, ipſæ autem partes literis manifeſtaverint, quod juramenti nexibus ſe illigaverint, ut arbitri ſententiæ ſtetur--ſive ab initio hoc fuerit ab his ſcriptum, vel præfato modo depoſitum dum arbiter eligebatur, ſive poſt definitivam ſententiam hoc ſcriptum inveniatur, " Quod cum ſacramenti religione ejus audientiam amplexi ſunt:" vel " Quod ea quæ ſtatuta ſunt, adimplere juraverint." —Sed et ſi ipſe ſolus arbiter, hoc litigatoribus poſcentibus ——præſtiterit juramentum, " Quod cum omni veritate liti libramenta imponat."— In his omnibus caſibus liceat vel in factum, vel conditionem ex lege, vel in rem utilem inſtituere actionem, ſecundum quod facti qualitas poſtulaverit. Cod. l. 2, t. 56, ſ. 4.

ſufficient to maintain an action on the award, if it was only for the payment of money: but if the award was of any collateral act, there was no means of compelling performance.[7] It was however held, at a very early period, that if the parties "promiſed" to one another, on conſideration of any ſum, however trifling, to perform the award, an action might be maintained on ſuch promiſe, though the award was of ſomething elſe than the payment of money.[8] The next ſtep was to ſupport an action on ſuch an award, where the ſubmiſſion was by mutual promiſes only.[9] It was ſomewhat later before the very act of ſubmiſſion was conſidered as implying a promiſe in itſelf to abide by the determination of the perſon to whom the matter was referred; and that an action might in all caſes be ſupported on ſuch a ſubmiſſion.[1]

THOUGH the ſubmiſſion may be by parol, yet, when it is reduced into writing, it muſt, according to a late deciſion of the Court of King's Bench, be on paper ſuitably ſtamped.[2]

WHEN the ſubmiſſion is in writing, it is moſt commonly by mutual bonds, given by the parties each to

[7] Per Holt, 1 L. Raymond, 248.

[8] Gouldſborough, 92, pl. 4.

[9] 1 Ld. Raymond, 122.—Squire v. Greville, 6 Mod. 35. 2 Ld. Raymond, 961, 965. Vid. 6 Mod. 222. 2 Ld. Raymond, 1039. 1 Salk. 76.

[1] Vid. Knox v. Simmonds, 3 Br. 259, 361.

[2] That is, if the ſubmiſſion be in the form of a ſimple agreement, the ſtamp muſt be an agreement ſtamp; if by indenture with mutual covenants, a deed ſtamp—I do not find the caſe reported in which this was decided, nor do I recollect the name of it; but I was in Court when the point was decided.

the other, in a certain ſum penal, on condition to be void on performance of the award; but it is not eſſentially neceſſary that they ſhould be ſo given; they may be given to a third perſon, or even to the arbitrator himſelf:[3] and they may be given by other perſons than the parties themſelves, who will incur the forfeiture if the parties do not perform the award.

Nor is it neceſſary that, on each of the bonds, it ſhould appear of how many perſons the parties to the ſubmiſſion conſiſt. Thus, where[4] it appeared that there were three brothers, Richard, Robert, and William; that their father had deviſed certain lands to the two latter, and that ſeveral diſputes ariſing between them and Richard, they had, by bond, ſubmitted to arbitration; Richard entering into a bond to Robert and William jointly, but they giving him ſeparate bonds: it was held, after ſeveral arguments on an action brought by Richard againſt Robert, that the ſubmiſſion was properly made.

The ſubmiſſion may alſo be by indenture with mutual covenants to ſtand to the award.[5]

It is uſual, in articles of copartnerſhip, and not uncommon in other agreements, to inſert a proviſion or covenant, that all diſputes ariſing between the parties relative to their intended tranſactions, or to any covenant in the articles, ſhall be referred to arbitration. Whether ſuch a proviſion ſhall ſo far have the effect of a ſubmiſſion as to be a bar to either of the parties

[3] Vid. 36 H. VI. 8. 22 Ed. IV. 25 a. Owdy v. Gibbons. Comb. 100.

[4] Hayes v. Hayes, Cro. Car. 433.

[5] 2 Mod. 73.

ſuing the other on any matter within the terms or meaning of it, without having firſt had an actual reference, which has proved ineffectual, or a propoſal by the plaintiff to refer, and refuſal by the defendant, has been the ſubject of contrary deciſions.

In an early caſe[6] on this ſubject the queſtion ſeems not ſo much to have been whether ſuch a plea, if properly applied, would have been valid, but whether it clearly appeared that the ſubject of controverſy fell within the meaning of the covenant to refer.—In an indenture containing ſeveral covenants there was a proviſo that if any miſunderſtanding or controverſy ſhould ariſe in future by reaſon of any clauſe, article, or other agreement in the indenture contained, that then before any ſuit ſhould be attempted, the parties ſhould chooſe arbitrators for the determination of the diſpute. A bond was alſo given for the performance of covenants contained in the indenture: the defendant being ſued on this bond pleaded this proviſo, and alleged that the diſpute and controverſy, on which the action was brought, aroſe on the indenture. The court held the plea was defective, becauſe it did not ſpecially ſhew on what particular article the controverſy aroſe, and enable them to judge whether the matter was the proper ſubject of reference within the meaning of the indenture. They alſo held, that the words of this proviſo did not extend to bind the parties to ſubmit the "breach" of every covenant or article in the indenture, but were confined to the caſe where a diſpute aroſe on the "conſtruction" of any covenant.

[6] Parmort v. Griffina, 1 Leon. 37.

But in a later caſe it was expreſsly decided, that ſuch an agreement could not alone exclude the juriſdiction of a court of law. An action was brought on a policy of inſurance, in which a clauſe was inſerted, that in caſe of any loſs or diſpute about the policy, it ſhould be referred to arbitration. The plaintiff in his declaration averred that there had been no reference; on the trial at Guildhall, it was reſerved for the conſideration of the Court of King's Bench, whether the action could be maintained before a reference had taken place; and the whole court were of opinion, that if there had been a reference depending, or a reference had taken place and been determined, this might have been a bar to the action, but that the mere agreement of the parties could not exclude the juriſdiction of the Court.[7]

[8] To a bill filed for diſcovery and relief againſt frauds, the defendant pleaded, that the plaintiff and he had, on the 15th of November, 1728, executed articles of copartnerſhip, by which they had covenanted to become joint traders, as Blackwell-hall factors, for eight years, and agreed that in caſe any difference ſhould ariſe relating to their buſineſs, or with reſpect to any covenant in the articles, it ſhould be referred: and averred that all matters in the plaintiff's bill related only to the partnerſhip, and that they had never been ſubmitted to arbitration, nor had the plaintiff ever propoſed a reference, or nominated any perſon to be an arbitrator, though the defendant had offered and was always ready to ſubmit all matters to arbitration.

[7] Kill v, Holliſter. 1 Wilſ. 129.

[8] Wellington v. Mackintoſh. 2 Atk. 585 (569).

Lord Hardwicke is reported to have disallowed the plea, not because he thought that an agreement of this kind could not be pleaded, but because there was no power in the present instance given to the arbitrators to examine the parties, as well as witnesses, upon oath. The bill was to obtain discovery and relief against frauds, impositions, and concealments, which, without such a power, the arbitrators could not examine. If the plea were to be allowed as to the relief, therefore, it could not as to the discovery, and it was beneath the dignity of the court to admit a discovery, in order to assist the arbitrators.

In a subsequent case, also of a bill for discovery and relief, where a similar plea was pleaded, the [9] Master of the Rolls asserted that this opinion of Lord Hardwicke's must have been misreported, because the parties could not give the arbitrators such a power. There could be no doubt, he said, that the parties entering into an agreement that all disputes should be referred to arbitration, were bound by such agreement. If it had been actually referred, and the arbitrators had found the examination of the parties insufficient, they would have declined to determine, and then the jurisdiction of the court would have been restored; this was an answer to the objection that the plea should not go to the discovery. If it had become necessary for the information of the arbitrators, that there should be a discovery, the bill ought to have stated that fact: the first appeal must be to those judges pointed out by the articles; if they could not determine the controversy, they would remit it to the court.

[9] Kenyon. Halfhide v. Fenning. 2 Brown, 336.

But in a later caſe, the doctrine, "that the bill ought to ſtate that it had become neceſſary for the information of arbitrators that there ſhould be a diſcovery," has been over-ruled; and it has been decided that, notwithſtanding ſuch a clauſe in articles of agreement, a bill will lie to obtain a *diſcovery* for the purpoſe of enabling the plaintiff to ſupport an action at law.

The plaintiffs,[1] as partners in the Corniſh Copper Company, in the buſineſs of *ſmelting* copper ore, filed their bill againſt the defendants as partners in the Corniſh *Metal* Company, merely praying a diſcovery, and ſtating that by articles of agreement made between the defendants on behalf of themſelves and the reſt of the Corniſh *Metal* Company on the one part, and ſeveral other perſons, and the plaintiffs in the Corniſh *Copper* Company, on the other, the defendants had agreed from time to time during the term of ſeven years to deliver to the *Smelting* Company a certain ſhare of all the copper ore which ſhould be procured or purchaſed by the defendants in the county of Cornwall, in certain ſpecific proportions, that the plaintiffs ſhould ſmelt it, and diſpoſe of it in the manner deſcribed, and that the defendants ſhould pay for it, at the uſual times, the cuſtomary allowance being firſt made in the manner particularly deſcribed,—and that no copper ſhould be delivered by the defendants for the purpoſe of being manufactured by any perſon whomſoever other than the *Smelting* Company.—The bill further ſtated that the defendants having entered into partnerſhip, or into ſome contract with one Thomas Williams, who was then concerned in ſmelting and manufacturing copper

[1] Michel and others v. Harris and others. 4 Browne, 311.

[2] Vez. Jun. 129.

ore and copper, had difcontinued delivering copper ore to the plaintiffs, and had delivered large quantities to the account of Williams, to the great detriment of the plaintiffs, and in direct violation of the agreement.—The bill particularly charged that the defendants ought to *difcover* the feveral tranfactions between them and Williams, refpecting the delivering and manufacturing of fuch copper ore and copper, and the quantity of copper ore fo by them had and purchafed during the time mentioned, and fmelted and manufactured at other works and mills than thofe of the plaintiffs, and the value and amount of the profits, which would have arifen to them, had they been permitted to fmelt and manufacture their proper fhares, according to the articles of agreement.—The bill likewife charged that the defendants had in their cuftody feveral books, papers, accounts, writings, or letters refpecting fuch matters, and tending to fhew that fome fuch agreement, as alleged, exifted between them and Williams, and that from thefe it would appear that the defendants had fold very large quantities of copper ore obtained within the county of Cornwall, and had procured it to be fmelted and manufactured at other mills than thofe belonging to the plaintiffs, and that without fuch a difcovery the plaintiffs were totally unable to proceed at law againft the defendants to recover a compenfation for fuch breaches of the agreement.

The defendants pleaded that by the articles of agreement mentioned in the bill, it was agreed that in cafe any variance or difpute fhould at any time thereafter arife between the parties, refpecting the conftruction of any of the claufes therein contained, or any of their dealings, or tranfactions, under the faid

articles, or in conſequence of ſuch dealings and tranſactions, ſuch variance or diſpute ſhould be referred to arbitration in the manner particularly ſet forth; and they averred that all the ſeveral matters reſpecting which the plaintiffs ſought a diſcovery related to the conſtruction of clauſes in the ſaid articles of agreement, or dealings and tranſactions of the plaintiffs or defendants under them, or in conſequence of them, and therefore they pleaded this clauſe in bar to the diſcovery ſought.—The counſel who argued in ſupport of the plea, contended that the plaintiffs had not by their bill ſufficiently and clearly ſtated the abſolute neceſſity of a diſcovery of the ſeveral matters, ſo as to proceed to a reference to arbitrators; that the averment of the clauſe was ſufficient to ſupport the plea; that the matters in diſpute might be determined by the award of arbitrators, without reſorting to law; and that therefore the plaintiffs were not intitled to the aid of a court of equity for the purpoſe of a diſcovery to enable them to proceed in an action; and they relied on the authority of the caſe of Halfhide and Fenning.[1]

The counſel for the plaintiffs contended that the plea was bad in form and in ſubſtance; it merely alleged that the parties were bound by contract to ſettle matters in diſpute by arbitration; and that it ought to have alleged a *ſubmiſſion* to arbitration and a reference depending: The authority of the caſe of Halfhide and Fenning, they ſaid, was much doubted; but if it were ever ſo deciſive, no reliance could be had on it in the preſent caſe, from which it was very different, as the bill there prayed relief as well as diſcovery. As to the ſubſtance, the plea did not meet the

[1] Ante, p. 15.

caſe made by the bill, which was founded on certain frauds committed by the defendants, which were out of the reach of the articles. It would be impoſſible, they ſaid, for arbitrators to do juſtice, for the bill ſought a diſcovery of papers and writings in the poſſeſſion of the defendants, which, without the aid of a court of equity they could not be compelled to diſcloſe, ſo that juſtice would be completely evaded, if the plea were allowed: The caſe of Wellington and Mackintoſh, they ſaid, was preciſely in point; that Lord Hardwicke had held the plea in that caſe to be no bar to the *diſcovery*, and that he had over-ruled it on this ground appeared by the ſtatement in the regiſter's book: They ſaid further that ſuch a plea would not avail at law, unleſs there had been an actual reference, in ſupport of which they urged the authority of the caſe of Kill and Holliſter before mentioned.[3]

The Lord Chancellor[4] obſerved, that in the caſes at law, ſcarce a hint occurred, where an agreement of this nature had been ſet up as a bar to the action; but on the other hand, many authorities were to be found, that the award itſelf, or the ſubmiſſion to an award, might be pleaded; and on ſuch a plea, the Court examined the award.—In the preſent caſe, the bill did not ſtate that the parties were unable to proceed before the arbitrators, and that they could not have the effect of this covenant in the articles reſpecting the reference, for want of a diſcovery; but taking no notice of that clauſe, it ſtated a variety of circumſtances, in which the defendants had violated the articles of agreement,

[3] Vide ante, page 14. [4] Loughborough.

and committed fraudulent acts and conccalments on their part, to the detriment of the plaintiffs, and called for a diſcovery, not for the purpoſe of going before arbitrators, but in aid of an action at law.—It had been objected, that the parties having entered into a covenant to refer matters in diſpute to arbitration, this court ought not to aid ſuch an action, and that the covenant would be a plea to an action at law; and that, therefore, it would be nugatory for this court, by compelling a diſcovery, to lend its aid to an action, which muſt be completely barred by ſuch a plea.—He could not adopt this opinion.—In the caſe before Lord Hardwicke, relief as well as diſcovery was prayed; it was a ſingular caſe, and whatever reaſon the reporter had inſerted as his Lordſhip's ground of deciſion, the plea was over-ruled, and agreed with the caſe at law which had been cited.[5] Had the parties proceeded to a reference, and an award had been actually made, the award might ſtill have been examined, or impeached in this court on equitable grounds.—The preſent was a caſe where no reference had been made, and where the bill merely ſought a diſcovery in order to aid the parties in proceeding at law, and the plea was in truth a plea to the action, and unleſs it could hold as a bar to the action itſelf, it could not prevail here; and on this ground the plea muſt be over-ruled.[6]

And parties cannot be precluded from purſuing their right in the ordinary courſe, by any reſtriction laid

[5] Kill v. Holliſter. 1 Wilſ. 129.

[6] The Reporter, in a note, ſays, "a plea of this nature was over-ruled in the Exchequer, in Satterly v. Robinſon, Dec. 17, 1791."

upon them by another from whom they derive their title to the ſubject in diſpute:[7] as if a teſtator direct, that whatever controverſies ſhall ariſe on the conſtruction of his will, they ſhall be decided by ſuch and ſuch arbitrators; the legatees, or parties claiming under the will, may, notwithſtanding, have them decided at law, if they think proper.

All the caſes of awards, reported in the books for a long ſeries of years, appear to have been made on ſubmiſſions, by one or other of theſe methods, by the act of the parties only; but when mercantile tranſactions came to be frequently the ſubject of diſcuſſion in the courts, it was ſoon found that a judge and a jury were very unfit to unravel a long and intricate account, and it therefore became a practice, in caſes of that kind, and others which ſeemed to be proper for the ſame tribunal, to refer the matters, by conſent of parties, under a rule of *niſi prius*, which was afterwards made a rule of that court out of which the record proceeded, and performance of the award was enforced by proceſs of contempt. This practice does not appear to have begun before the reign of Charles II. for the reports of that period ſhew, that it was not before the latter end of that reign that the courts granted their interpoſition without reluctance; and in more inſtances than one a judge is ſtated to have ſaid, that theſe references were but newly introduced, and he never knew any good to ariſe from them. But their utility was ſo well felt a ſhort time afterwards, that, in the reign of William III. in imitation of them a ſtatute[8]

[7] Dict. per Powys J. 10 Mod. 59.

[8] 9 and 10 W. III. c. 15, ſ. 1.

was made, reciting, that 'It had been found, by ex-'perience, that references, made by the rule of court, 'had contributed much to the eaſe of the ſubject, in 'determining controverſies; becauſe the parties became 'thereby obliged to ſubmit to the award of the arbi-'trators, under the penalty of impriſonment for their 'contempt, in caſe they refuſed ſubmiſſion; and "enacting," 'for promoting trade, and rendering the 'awards of arbitrators the more effectual in all caſes, 'for the final determination of controverſies referred to 'them by merchants and traders, or others, concerning 'matters of account or trade, or other matters, "That "it ſhall and may be lawful for all merchants and "traders, and others, deſiring to end any controverſy, "ſuit, or quarrel, controverſies, ſuits, or quarrels, for "which there is no other remedy but by perſonal "action or ſuit in equity, by arbitration, *to agree that* "*their ſubmiſſion of their ſuit to the award or umpirage of* "*any perſon or perſons, ſhould be made a rule of any of his* "*Majeſty's courts of record which the parties ſhall chooſe*, "and to inſert ſuch their agreement in their ſubmiſſion, "or the condition of the *bond* or *promiſe*, whereby they "oblige themſelves reſpectively to ſubmit to the award "or umpirage of any perſon or perſons; which agree-"ment being ſo made and inſerted in their *ſubmiſſion* or "*promiſe*, or *condition of their reſpective bonds*, ſhall or "may, upon producing an affidavit thereof, made by "the witneſſes thereunto, or any one of them, in the "court of which the ſame is agreed to be made a rule "of court, and reading and filing the ſaid affidavit in "court, be entered of record in ſuch court, and a rule "ſhall thereupon be made by the ſaid court, that the "parties ſhall ſubmit to, and finally be concluded by

" the arbitration or umpirage which ſhall be made " concerning them, by the arbitrators or umpire, pur- " ſuant to ſuch ſubmiſſion; and in caſe of diſobedience " to ſuch arbitration or umpirage, the party neglecting " or refuſing to perform and execute the ſame, or any " part thereof, ſhall be ſubject to all the penalties of " contemning a rule of court, when he is a ſuitor or " defendant in ſuch court; and the court, on motion, " ſhall iſſue proceſs accordingly."

It has been lately decided by the Court of King's Bench that an award made under a verbal agreement to refer, is not within the meaning of this ſtatute, and in ſuch a caſe they refuſed, though both parties conſented, to make a ſubmiſſion a rule of court; alleging that the ſtatute, requiring the agreement to be *inſerted* in the ſubmiſſion, did not extend to it.[9]

Where parties have come to trial in a cauſe depending in one court, they may ſubmit to arbitration, and agree that their ſubmiſſion ſhall be made a rule of another: This lately happened in the Exchequer, where it was agreed that the ſubmiſſion ſhould be made a rule of the Court of King's Bench: and the Court of Exchequer, on an application made to them for relief by one of the parties, refuſed to interpoſe on the ground that they had no juriſdiction, and ſaid the application muſt be to the Court of King's Bench, of which the ſubmiſſion had been made a rule.[1]

When the ſubmiſſion is according to the proviſions of this ſtatute, the court will compel a witneſs to it,

[9] Anſell v. Evans, 7 Term Rep. 1.

[1] Chapman v. Lanſdown. 1 Anſtruth. Rep. Exch. 273.

to make an affidavit of it, in order to enforce the award: for though the words of the ſtatute be not compulſory, the very nature of the thing gives the court a juriſdiction over the witneſs. The act of parliament has appointed only this way by affidavit, and a witneſs muſt not be permitted to evade it by his refuſal: a witneſs to a bond is compelled, by a *ſubpœna*, to give evidence of the execution; and every man who ſubſcribes his name as a witneſs to an inſtrument, undertakes, by implication, to give evidence at a proper time, and in a proper manner: no objection to this ariſes from the ſuggeſtion that the award was unfairly made, and that the party has no other means of preventing the ſubmiſſion from being made a rule of court: the hardſhip of a particular caſe muſt not be permitted to vary a rule founded on general principles of utility.[2]

But in order to found the application for a rule againſt the witneſs to make the affidavit, it ſeems to be neceſſary to lay before the court ſome circumſtance to ſatisfy them of the probability of his being a witneſs; as an affidavit of his having acknowleged that he was; or an affidavit of the party applying, that he really is ſo.

Such an application is not frequently neceſſary, and therefore it does not appear whether the rule granted in conſequence of it may be abſolute in the firſt inſtance, or muſt be only a rule to ſhew cauſe. The few caſes that are reported have been of rules of the latter kind.[3]

[2] Clark v. Elwick. 1 Str. 1, 2. 10 Mod. 332, 333.

[3] Vid. Barnes, 58.

It is not neceſſary that the agreement to make the ſubmiſſion a rule of court ſhould be part of the condition, or that it ſhould be actually ſigned: if it be written under the condition, and the ſubſcription, by affidavit, appear to have been made before the execution of the bond, the court will take it to be part of the ſubmiſſion, as an indorſement by way of defeaſance is part of a deed.[4]

If the application be on behalf of one of the parties, and it appear by the bond of the other, produced in court, that it was executed by him, the motion will be granted of courſe; the conſent of the latter appears by the execution of the bond.[5]

A SUBMISSION was by bond, and in the end of the condition was this clauſe: "And if the obligor ſhall conſent that this ſubmiſſion be made a rule of court, then, &c." A motion to make this ſubmiſſion a rule of court was oppoſed, on the ground that theſe words do not imply his conſent; but that if he choſe to forfeit his bond, he might prevent its being made a rule of court: the words, however, were conſidered by the court as a ſufficient indication of conſent, becauſe they could have been inſerted for no other purpoſe, and the motion was accordingly granted.[6]

But if the agreement be only that the "award" ſhall be made a rule of court, that is not ſufficient, it is ſaid, to ground an application to have the "ſubmiſſion" made a rule of court.[7]

[4] Carter v. Manſbridge.—Barnes, 55.

[5] Rudd v. Coe. Barnes, 55.

[6] Baily v. Cheeſely. 13 W. III. 1 Salk. 72. Comyns, 114. 1 Lord Raym. 674.

[7] 2 Barnardiſton, K. B. 163. Str. 1178.

If a cauſe be referred by conſent at *niſi prius*, in London or Middleſex, application muſt be made for the order of *niſi prius*, to the clerk of *niſi prius*; if on the circuit, to the judge's aſſociate, whoſe buſineſs it is to draw it up: and the attornies ought to ſet down the names of the witneſſes propoſed to be examined on the reference, on a piece of paper, and deliver it to the crier, who will ſwear them at the bar of the court, otherwiſe they muſt attend a judge to be ſworn.[8]

It was formerly held, that the ſtaying of a cauſe was neceſſarily implied in a reference; and even that if one of the parties to a ſuit ſaid he would refer the matter to ſuch a one, the cauſe muſt ſtay of courſe; becauſe, ſays Twiſden, that man is made judge.[9] But it was afterwards declared by Lord Chief Juſtice Holt, that all the judges of the King's Bench had made a rule, that no reference whatever of any cauſe depending in that court ſhould ſtay the proceedings, unleſs it was expreſſed in the rule of reference to have been ſo agreed.[1]

Extent of the Submiſſion.

The extent of the ſubmiſſion may be various according to the pleaſure of the parties; it may be of one particular matter only, or of many, or of every ſubject of litigation between them; but what extent ſhall be given to the particular words of it will be more properly diſcuſſed in another place.

It is uſual, and even neceſſary, to fix a time within which the arbitrators ſhall pronounce their award; for on the one hand, a delay is neceſſary for inſtructing the

[8] 1 Compton, 263. Impey, 571.
[9] 1 Mod. 24.
[1] 2 Lord Raym. 789.

arbitrators, and putting the queſtion in a condition of being determined; and on the other the time ought to be limited, becauſe it would not be juſt, that it ſhould be in the power, either of arbitrators or of the parties, to put off the final deciſion for ever.[2]

Submiſſion, how conſtrued.

The ſubmiſſion, being the voluntary agreement of the parties, the words of it muſt be ſo underſtood as to give a reaſonable conſtruction to their meaning, and to make their intention prevail: therefore, where the ſubmiſſion was by deed, rehearſing that *each* of the parties was bound to the other in a ſum of 100l. and they, by the ſame deed, granted, that "if *each* of them ſhould ſtand to the award of A. B. then the obligation of him who performed the award ſhould be void, and that of him who did not ſhould be in full force:" and it was objected, that this ſubmiſſion was void, becauſe it imported that *each* of them was bound for the performance of the award by the other. This conſtruction was rejected as abſurd and nonſenſical, and contrary to the plain meaning of the parties: and it was held, that the words, "if each of them ſhall ſtand," &c. ſhould be taken in the ſame ſenſe as if the ſubmiſſion had been expreſſed thus, "that the one was bound to the other, and the other to him, each that himſelf ſhould ſtand to the award, if not, his obligation to be in full force."[3]

So, where the condition of a bond was to ſtand to the award of two arbitrators, with a proviſo that it ſhould be made on or before the 23d of January; but if the arbitrators ſhould not agree on the award, that

[2] Domat. 1 vol. 224.

[3] 39 H. 6. 9. b. 11. a.

then they ſhould chooſe an indifferent man, and "they" ſhould ſtand to the final end, determination and judgment, which he ſhould give on or before the 28th of January, under his hand and ſeal: it was ſeriouſly argued, that the laſt pronoun, "they," not having immediately before it any antecedent, to which, in the grammatical order of the ſentence, it could be referred, applied to the arbitrators, who were to perform the award of the umpire; but good ſenſe prevailed over this objection, and the court held that it ſhould be referred to the parties themſelves.[4]

WHERE the ſubmiſſion was to the award of four men by name, "ſo as the *fame* award be made, and delivered up in writing by them, or any three of them:" it was not till after ſeveral ſolemn arguments, that the court were prevailed on unanimouſly to hold, that theſe words gave an authority to any three of the arbitrators named to make the award, the latter words being explanatory of the meaning of the parties in the former: that though in technical exactneſs the "ſame" award referred to the former part of the ſentence, and might be taken to mean the award made by four, yet as this conſtruction would render the latter words perfectly uſeleſs, it muſt be rejected, and the obvious meaning of the parties, on the whole, adopted: that the "ſame" award ſhould be referred to the thing, and not to the perſon; ſo that it ſhould be interpreted "the ſame" award of the ſame things, to be made by the ſaid arbitrators, or any three of them.[5]

[4] Butler v. Wigge. 2 Keb. 204. 1 Saund. 65.

[5] Vid. 1 Rol. Rep. 375.—Cro. Jac. 400. Bridgeman, 91. Mo. 849. 3 Bulſtr. 62. 1 Bulſtr. 122, 123. Brownlow, 112. Yelv. 203. Cro. Jac. 277. The caſes of Sallows v. Girling, and Berrie v. Perrie.

THE reader, perhaps, anticipates the obſervation, that a mind unacquainted with the hiſtory of legal chicane, will hardly be able to conceive that a doubt could be raiſed on the ſubject.

WHERE there is a repugnancy in the words of any part of the ſubmiſſion, the latter ſhall be rejected, and the former ſtand: as if the condition of a bond, dated the 16th of March, be to ſtand to an award, with a proviſo that it be made on or before the laſt day of "this inſtant" month of "April;" here, as no month can anſwer to the deſcription of this "inſtant month," but that in which the words are uſed, namely March, the words "of April" ſhall be rejected; for there is nothing to determine them to the next April, any more than to the April of any other year: therefore, if the award be not made till the laſt day of April, or indeed at any time after the laſt of March, it will be made at a time out of the ſubmiſſion, and therefore of no effect; but had it been "on or before the laſt day of April," without the words, "of this inſtant month," in order to avoid the uncertainty, it ſhould have been taken to mean, the April of the ſame year.[6]

Submiſſion may be revoked.

ALL kind of authority is in its nature revocable, though made irrevocable by expreſs words; therefore, if one of the parties, before the making of the award, or before the expiration of the time for making it, revoke the authority of the arbitrators, the latter cannot proceed; or if they do, the party revoking is not bound to perform their award, but may plead the revocation in bar

[6] Sherry v. Richardſon. Popham, 15, 16.

of an action on the award itself; or he may himself recover against the other, in an action for the original cause of dispute:[7]—and, in this respect, our law corresponds with the civil law.[8] But if one on one side, and two on the other, submit, one of the two cannot revoke the authority of the arbitrator without the other; for being jointly given, it must be jointly taken away.[9]

If the submission be merely verbal, the revocation may be so too; "I discharge you from proceeding any further," said to the arbitrators, will be sufficient. But if the submission was by deed, so also must the revocation be,[1] according to that general principle of law, that every power, authority, or obligation, must be discharged with the same solemnities with which it was constituted.[2]

This principle, however, applies only to the case of an express revocation; it does not extend to that which must necessarily be implied by construction of law, from another act of the party; for a collateral act may sometimes amount to a revocation of the authority of the arbitrators. Thus, if a woman, while sole, submit to arbitration, and marry before the making of the award, or before the expiration of the time for making it, the marriage is a revocation; because, by that, all the personal property of the wife, and a per-

[7] Ff. l. 4. t. 8. s. 27. v. fin.
[8] 5 Ed. 4. 3. b. 8 Co. 82. a. Br. A[illegible]. 35. 21 H. 6. 30. a. 28 H. 6. 6. b. 6 H. 7. 10. 28 H. 6. 6. Fitzh. 51. a. Br. 44. b.
[9] Barker v. Lees. 2 Keb. 64, 79.
[1] 43 E. 3. 9. Fitzh. 52. b. vid. 8 Co. 80. b.
[2] Unumquodque dissolvitur eo ligamine quo ligatur.

manent intereſt in her real property, which would be bound by the award, veſts in the huſband.[3]

So, where a man brought an ejectment againſt another, to recover a mill of which the latter was in poſſeſſion, the defendant ſuffered judgment to be entered by "nil dicit;" but afterwards they agreed to refer the queſtion, "Who ſhould have it," and other matters which were in difference between them, to arbitration by bond. The plaintiff, in the ejectment, before the expiration of the time limited for making the award, ſued out an "habere facias poſſeſſionem" on the judgment, and had the mill delivered to him; and on an action of debt being brought on the ſubmiſſion bond, it was held, that by taking away the ſubject of the arbitration, he had taken away the poſſibility of making the award.[4]

In the year books, a diſtinction is taken between a ſubmiſſion by obligation, and a ſubmiſſion *without* obligation. In the firſt caſe it is ſaid, that the obligor cannot diſcharge the arbitrator, becauſe he is bound to ſtand to his award; but that in the latter it is otherwiſe.[5] Lord C. J. Coke explains this diſtinction in this way; that in both caſes the authority of the arbitrator may indeed be revoked; but that where the ſubmiſſion is without obligation, the party revoking loſes nothing; whereas, in the other caſe, he forfeits the penalty of his bond: for by countermanding the authority of the arbitrators, he has not fulfilled the condition, by ſtanding to, and abiding by their award; and becauſe, when a man, by his own act, renders the condition of the

[3] Wm. Jones, 388. 3 Keb. 9.
[4] Green v. Taylor. Sir T. Jones, 134. [5] 5 Ed. 4. 3 b.

bond impoſſible, the bond becomes ſingle, as if no condition had been annexed.[6]

This difference in the effect of a revocation in the two caſes, was certainly good law at the time, when it was held, that no action could be maintained on an award of a collateral thing made in conſequence of a parol ſubmiſſion; but now that it is held, that an action may be maintained on ſuch an award, it may reaſonably be ſuppoſed the courts would alſo ſuſtain an action on the caſe for countermanding the authority of the arbitrator. A caſe is reported in two books, in one of which a doubt is expreſſed, whether all being by parol, the plaintiff could maintain that action, or have any other remedy; but that is evidently nothing more than a looſe note of the reporter, and the pleadings are there very inaccurately ſtated.[7] In the other book,[8] the caſe is reported at length, and the manner of the pleadings diſtinctly given; the breach being aſſigned in a diſcharge by the defendant of the arbitrators from making any award; and the judgment of the court, without much heſitation, in favour of the plaintiff.

The rule of the civil law is, that when the arbitrator is diſcharged by one of the parties, or prevented by his act from making his award, then, if a penalty was added to the ſubmiſſion, the oppoſite party ſhould have a remedy ſimilar to our action on the caſe.[9]

[6] Vynior's caſe, 8 Co. 82. a. Brownlow 62. 2d part 290.

[7] Newgate v. Degelder, 18 Car 12. 1 Sid. 281.

[8] 2 Keb. 10, 20, 24.

[9] Si quis litigatorum defuerit: quia per eum factum eſt, quo minus arbitretur, pœna committetur. Et ſi quis preſens arbitrum ſententiam dicere prohibuit, pœna committetur. Sed ſi pœna non fuiſſet adjecta compromiſſo, ſed ſimpliciter *ſententiæ ſtari* quis promiſerit: incerti adverſus eum foret actio.—Ff. l. 4, t. 8. f. 27.

If one of the parties firſt revoke the authority of the arbitrators, and afterwards requeſt them to make an award, that will not ſave the forfeiture. But where the ſubmiſſion limits no time for the making of the award, that ſhall be underſtood to be within convenient time; and if in ſuch a caſe the party requeſt them, and they do not, a revocation afterwards will be no breach of the ſubmiſſion.[1]

One party may alſo revoke with conſent of the other; but conſent after the revocation will not ſave the penalty of the bond.[2]

In the caſe too of a revocation, by the marriage of a feme ſole, if the huſband and wife ſubmit again, the courts will not encourage the oppoſite party in ſuing for the forfeiture.[3]

There may be ſeveral acts done by either of the parties before the award made, which, though they cannot properly be called a revocation, yet amount to a breach of the ſubmiſſion. Thus, where a man ſubmitted to pay ſuch coſts as ſhould be ſtated by arbitrators choſen indifferently by the parties, it was held to be a breach in him not to have carried in his bill to the arbitrators, becauſe he was the cauſe that no award was made.[4]

Whether the parties may revoke, when the ſubmiſſion is by rule of court, by conſent at *niſi prius*, or in purſuance of the ſtatute of William, it is immaterial formally to lay down. It has been ſeen, that, in the latter caſe, the courts have made the ſubmiſſion a rule

[1] 2 Keb. 10, 20. [2] Noble v. Harris. 3 Keb. 745. [3] 3 Keb. 91.
[4] Baldway v. Ouſton. 1 Vent. 71.

of court, notwithſtanding the oppoſition of the parties; and, in both caſes, they will puniſh as a contempt any act by which the arbitrators are diſturbed or hindered from making their award.[5] Thus where a matter was referred by conſent at *niſi prius* to the three foremen of the jury; and before the award was made, one of the parties ſerved the arbitrators with a ſubpœna out of Chancery, which hindered them proceeding to make an award; the court held this to be a breach of the rule, and granted a rule to ſhew cauſe why an attachment ſhould not go againſt him.[6]

In the civil law the better opinion ſeems to have been, that if the party to a ſubmiſſion, while the matter was before the arbitrator, appealed to the ordinary courts, he forfeited the penalty.[7]

[5] Vid. 1 Cromp. Practice. 262.

[6] Davila v. Almanza. 1 Salk. 73.

[7] Si quis rem, de qua compromiſſum ſit, in judicium deducat; quidam dicunt, prætorem non intervenire ad cogendum arbitrum ſententiam dicere: quia jam pœna non poteſt eſſe, atque ſi ſolutum eſt compromiſſum. Sed ſi hoc obtinuerit; futurum eſt, ut in poteſtate ejus quem pœnitet compromiſiſſe, ſit compromiſſum eludere. Ergo adverſus eum pœna committenda eſt, lite apud judicem ſuo ordine peragendâ. Ff. l. 4, t. 8, ſ. 30.

CHAP. II.

The PARTIES.

IT is a general rule, that every one who is capable of making a diſpoſition of his property, or a releaſe of his right, may make a ſubmiſſion to an award: but no one can, who is either under a natural or civil incapacity of contracting.[1] Therefore a married woman cannot be party to a ſubmiſſion, whatever may be the ſubject of diſpute, whether ariſing before or after her marriage: but the huſband may ſubmit for himſelf and his wife.[2] *Who may ſubmit.*

ON the principle that an infant cannot bind himſelf for any thing but neceſſaries, it is clear he cannot be party to a ſubmiſſion, whether the matter in diſpute be an injury done to him, as for a battery committed on him, or for a treſpaſs on his land;[3] or an injury done by him to another. The laſt caſe, however, was not always conſidered as clear law; and it has been inſiſted that he might ſubmit a treſpaſs committed by himſelf, becauſe that might be for his benefit; and if he could

[1] Com. Dig. Arbitrament. D. 2. [2] Sti. 351.
[3] 10 H. 6. 14. Fhbt. 51. a. 13 H. 4. 12. Dub. Rol. Arb. 2 A. 1. Rol. Arb. 2 A. 2, ſays cont. 10 H. 6. 14.

not, inſtead of being favoured by the law, he would be in a worſe condition than other men: but that reaſon fails; for though it *may* be for his benefit, it may as probably be otherwiſe; for the arbitrator may award a greater ſatisfaction than might be given in the due courſe of law, or the damages awarded may be increaſed on account of things, for which, by the law, the infant cannot be charged; and the rule with reſpect to an infant is, that he cannot bind himſelf to any thing which, by poſſibility, may be to his diſadvantage. It has alſo been ſaid, that the infant ought to have an election, whether he will perform the award or not, and that therefore an award made, in conſequence of a ſubmiſſion by him, is not abſolutely void, but voidable only:[4] but this is contrary to the very intention of a reference to arbitrators, which is to put a final period to diſputes.

And as the infant himſelf cannot be bound by a ſubmiſſion to arbitration, ſo it has alſo been decided, that if another enter into a bond, conditioned, that an infant ſhall perform an award, this is alſo void, and the obligor could not be ſued upon it. But this, it is to be obſerved, was without any argument applicable to this particular caſe, but only taken as an immediate concluſion, from the principle that the infant himſelf could not be bound.[5]

Lord Chancellor Nottingham, however, appears to have acted on this principle in the following caſe. A cauſe depending in Chancery, where an infant by his guardian ſeems to have been a party, the matters in

[4] Rudſton v. Yates. March 111, 141. [5] Id. ibid.

difference were, by conſent and order of court, ſubmitted to arbitration; and the arbitrators, among other things, awarded that a bond ſhould be given by the guardian that the infant at his full age ſhould convey the lands in queſtion. On one ſide an application was made that the award ſhould be ſet aſide, and on the other that it ſhould be enforced by the decree of the court. The Lord Chancellor, premiſing as a general principle, that the court would not decree the execution of an award made in conſequence of a reference by order of the court, where the award appeared inequitable, applied this principle to the preſent caſe, and ſaid it was unreaſonable that the guardian ſhould give ſuch a bond, as the infant might die before age, or if he lived to attain his age might refuſe to convey, and therefore he would not decree performance: he ſaid further, that he would never decree an award to bind an infant.[6] Yet it ſeems to be carrying the indulgence to an infant by much too far, and to be contrary to the analogy of law in other caſes, that a bond given by a perſon of full age, for the performance of an award by an infant, ſhould not be enforced. It is in fact ſaying, that in all caſes, where an infant cannot bind himſelf, no one elſe can be bound for him; which cannot be pretended to be true. The infant himſelf indeed cannot be compelled to perform the award, neither is it in the power of his ſecurity to force him; but it is by no means a ſingular thing that a man ſhall forfeit his bond, though it be not in his own power to ſave the penalty, by performing the condition. There is, in-

[6] Cavendiſh v. ——. 1 Ch. Ca. 279. 1 Eq. Ca. Abr. 49.

deed, an implied exception in the caſe of ſubmiſſion to an award; that if the award itſelf be void, he ſhall not forfeit his bond by non-performance.[7] But this exception extends only to the caſe where the objection appears on the award itſelf; and, if this be good, there appears not the ſhadow of a reaſon why the ſecurity for the infant's performance ſhould not forfeit his bond on the infant's default.

The ſame point was again agitated in another caſe—the ſame argument urged in avoidance of the award: "The ſubmiſſion on behalf of an infant is void, the award therefore is void, depending on a void ſubmiſſion, and a bond for performance of a void award is neceſſarily void; therefore the ſecurity cannot forfeit his bond." The ſame kind of anſwer was given as is ſuggeſted above; and though the opinions of the court are not ſtated in very deciſive language, yet, on the whole, their inclination ſeemed to be, that the ſecurity forfeited his bond if the infant did not perform the award. In this caſe, indeed, the action was brought by the infant, and her ſecurity, for non-performance by the other party; but as the defendant's objections were founded on the ſuppoſition that the infant was not bound to perform her part, and that therefore there would be no reciprocity, the general principle is the ſame, whether the ſecurity for the infant be plaintiff or defendant.[8]

The ſame queſtion was again agitated, but no deciſive opinion given; becauſe it appeared that the father had been bound for *himſelf* and his infant ſon; and it was

[7] Vid. Jenk. 116. [8] Stone v. Knight. Latch 207.

held, that whatever might be the caſe with reſpect to the father's being bound for his *ſon*, yet his ſubmiſſion was good as to himſelf, and judgment was accordingly given for the plaintiff.[9]

But it was afterwards expreſſly decided, againſt the authority of the caſe[1] on which the doubt had at firſt been raiſed, that the guardian may ſubmit for the infant, and bind himſelf that he ſhall perform the award.[2]

Thus we have at length adopted the good ſenſe of the Roman law, by which it was held, that an infant himſelf could not be bound by his ſubmiſſion; but that if he ſubmitted by a ſurety, the latter forfeited the penalty in default of the infant.[3]

An executor, or adminiſtrator, may ſubmit a matter in diſpute between another and himſelf, in right of his teſtator or inteſtate. Therefore, when the executor of a parſon ſubmitted to arbitration a diſpute between the preſent incumbent and himſelf, as executor of the laſt, on account of ſome dilapidations of the parſonage, alleged to have been permitted by the default of the teſtator, and in his life, no objection was made to the want of power in the executor to ſubmit;[4] but if the arbitrator do not give him the ſame meaſure of juſtice as he would be entitled to at law, the executor, or adminiſtrator, muſt account for the deficiency to thoſe

[9] Bowyer v. Blorkſidge, 33. Car. 2. 3 Lev. 17. Gill v. Ruſſell. Hil. 1673. Freem. 62, 239.

[1] Rudſton v. Yates, ante, p. 36.

[2] Roberts v. Newbold, 6 W. 3. Comb. 318.

[3] Si pupillus ſine tutoris auctoritate compromiſerit, non eſt arbiter cogendus pronunciare, quia, ſi contra eum pronuncietur, pœnâ non tenetur; præterquam ſi fidejuſſorem dederit, a quo pœna peti poſſit. Ff. l. 4, t. 8, ſ. 35.

[4] Dyer, 216. b. 217. a.

who are intereſted in the effects of the teſtator or inteſtate.[5] As, if an executor ſubmit to arbitrament, and it be awarded, that for 70l. he releaſe an obligation given to his teſtator in 100l. for performance of covenants which were broken by the obligor, the 100l. ſhall be aſſets, for the ſubmiſſion is his own act.[6]

If a man in the character of executor or adminiſtrator expreſſly bind himſelf, his heirs, executors, or adminiſtrators, to perform an award to be made on the ſubject of diſputes between his teſtator or inteſtate and another, and the arbitrator award generally that as executor or adminiſtrator he ſhall pay a certain ſum, he cannot to an action on the bond avail himſelf of a plea, "that he had fully adminiſtered, and that he had no aſſets of his teſtator or inteſtate at the time of the ſubmiſſion or ſince:" Such a plea is inapplicable to the caſe; for the party by ſuch a ſubmiſſion, enters into a perſonal engagement to pay whatever the arbitrator ſhall direct, without regard to the queſtion of aſſets.[7] But the mere act of ſubmiſſion is not an *admiſſion* of aſſets, and if the arbitrator ſimply declare a debt due from the teſtator or inteſtate, ſpecifying the amount, the executor or adminiſtrator is not precluded from the plea of "fully adminiſtered:" And the plaintiffs, in an action of aſſumpſit againſt him in that character, cannot give evidence of a perſonal promiſe to pay whatever ſhall be found due; becauſe, in the firſt place, the action ſeeks to recover the demand out

[5] Off. Exr. 229, cited Com. Dig. Adminiſtration (I. 1.)

[6] R. 3 Leon. 53.

[7] Barry v. Ruſh. 1 Term Rep. 691, et vid. 5 Term Rep. 8

of the teſtator's or inteſtate's effects, and if there be no aſſets, the perſonal promiſe by the repreſentative is a *nudum pactum.*[8]

So, the aſſignees of a bankrupt may ſubmit to arbitration, any diſputes between their bankrupt and others, provided they purſue the directions of the ſtatute, which enacts, "that the aſſignee, or aſſignees, of any bankrupt's eſtate and effects, with the conſent of the major part in value of the bankrupt's creditors, who ſhall have duly proved their debts under the commiſſion, and who ſhall be preſent at any meeting of the ſaid creditors, purſuant to notice to be for that purpoſe given in the *London Gazette*, to ſubmit any difference or diſpute between ſuch aſſignee or aſſignees; and any perſon or perſons whatſoever, for or on account, or by reaſon or means of any matter, cauſe or thing whatſoever, relating to the bankrupt, his eſtate or effects, to the final end and determination of arbitrators to be choſen by the ſaid aſſignee or aſſignees, and the major part in value of ſuch creditors, and the party or parties with whom they ſhall have ſuch difference, and to perform the award of ſuch arbitrators—and the ſame ſhall be binding on all the creditors of the bankrupt."[9]

By virtue of the authority of this ſtatute, the creditors preſent at a meeting cannot give a general power to the aſſignees to refer matters to arbitration according to their own diſcretion; there muſt be a particular

[8] Pearſon et al' Aſſignees of Scott, v. Henry, Adminiſtrator of Henry. 5 Term Rep. 6.

[9] 5 G. 2. c. 30. ſ. 34.

meeting, on notice for that particular purpoſe, in the London Gazette, to conſider of each particular caſe.[1]

Who ſhall be bound by an Award.

It is a general rule, that thoſe only who are parties to the ſubmiſſion ſhall be bound by the award.

Thus, if a man ſubmit, for himſelf and partner, all matters in difference between the partnerſhip and another, the partner ſubmitting ſhall be bound to perform the award; but the other ſhall not, becauſe he is a ſtranger to the ſubmiſſion.[2]

So, if the parſon on the one hand, and ſome of the pariſhioners on the other, in behalf of themſelves and the reſt of the inhabitants of the pariſh, but without the authority of the reſt, ſubmit to arbitration by bond, the pariſhioners ſubmitting ſhall alone be anſwerable for a breach of the award by any of the other pariſhioners.[3]

So, in general, a man is bound by an award to which he ſubmits for another.[4]

But, if a man authorize another on his behalf, to refer a diſpute between the principal and another, an award made in conſequence of ſuch a ſubmiſſion is binding on the principal alone; and it is no objection that the agent had no intereſt in the ſubject of the diſpute.[5]

When there are ſeveral claimants on one ſide, and they all agree with the oppoſite party to ſubmit the matter in diſpute to arbitration, and ſome only of the

[1] Ex parte Whitchurch. 1 Atk. 91.

[2] Strangford v. Green. 2 Mod. 228.

[3] Mudy v. Oſam. Litt. 30.

[4] Alſop v. Senior. 2 Keb. 707, 718.

[5] Dyer, 216. b. 217.

numerous party enter into a bond to perform the award, the award ſhall bind the reſt. Thus, where A and B, two merchants, freighters of a ſhip, on one ſide, and C and D, part owners, and all the other part owners and mariners, on the other, ſubmitted to the award of J. S. of all matters concerning a prize taken by way of repriſal: A and B entered into a bond, and C and D into another, to perform the award; and the arbitrator awarded, that the merchants ſhould pay to C and D, for the uſe of themſelves and the reſt of the part owners and mariners, 1000l. This was held to be a good award; for if A and B did *not* pay the money, the part owners and mariners might have an action of debt againſt them on the award, becauſe they were all parties to the ſubmiſſion, though only two were obligees in the bond: and if they paid the money to C and D, to the uſe of them and the reſt of the part owners and mariners, though the proportion that each ſhould have was not pointed out, yet, as they had jointly ſubmitted, the award might be to pay them jointly; and although (the award, in fact, being to pay to C and D, for their own uſe, and that of others) it was on that account objected, that the reſidue of the part owners and mariners had no remedy to have their ſhare but by action, yet, notwithſtanding that, it was held they were bound by the award: and this caſe was aſſimilated to that of an award that one party ſhould enter into a bond to pay a ſum of money to the other at a future day, which was good, though it was only a thing in action; and the reſt of the part owners might have their remedy, at leaſt, in Chancery, againſt C and D, as truſtees for them, if not at common law. And now that the liberality of the courts of common law

has ſo greatly favoured the action for money had and received, there is no doubt, but that if a certain proportion of prize-money had been agreed on for each individual, before the adventure; or if their reſpective rights could be aſcertained, each individual of the remaining number might maintain an action againſt C and D for ſo much money had and received to his uſe.[6]

Where there are two on one ſide, though they will not be bound the one for the other, yet if the award be general that they ſhall do one entire thing, not pointing out diſtinct parts to be done by each, both ſhall be bound to performance of the whole, and an action may be ſuſtained againſt either for non-performance.

Thus, where there was a controverſy concerning certain lands between A, B, and C; and A on the one part, and B and C on the other, ſubmitted to the award of J. S. A becoming bound in an obligation to B and C in the ſum of 1000l. to perform the award on his part; but B and C, unwilling to be bound the one for the other, entering into ſeveral bonds of 1000l. each to A, with ſeveral conditions: the arbitrator awarded, that A ſhould releaſe all his right in the land to B and C; and that, in conſideration of this, B and C ſhould pay 300l. to A. On an action of debt brought by A againſt B, on this bond, for non-performance of the award, and a breach aſſigned, that neither B nor C had paid the 300l. at the time limited by the award, it was held,

[6] Wood et al. v. Thomſon et Clements. M. 24 Car. B. R. Rol. Arb. F. 11.

that each was bound to the performance of the whole award; for they had jointly ſubmitted, though by ſeveral obligations.[7]

But, in ſuch a caſe, if the award had been ſeveral, certainly the one could not have been ſued for non-performance on the part of the other.

If an attorney, without the expreſs authority of his principal, enter into a bond to a third perſon, under a condition to be void on performance of the award by the principal, otherwiſe to be in full force, this ſhall bind the attorney, and not the principal.[8]

Yet, it is the common underſtanding, that the aſſent of the attorney in a cauſe, to a reference by a rule of *niſi prius*, will bind the client: and the reaſon of the difference ſeems to be this, that in the firſt caſe the general character of attorney does not imply a commiſſion from the principal to do any thing ſo much out of the ordinary courſe of the buſineſs of a general attorney, as to refer a matter to arbitration; but the employment as attorney in a particular ſuit, implies the client's aſſent that he may do every thing which the court may approve in the progreſs of the cauſe.

But it has been held in Chancery, that the aſſent of a ſolicitor to a reference by a rule of court does *not* bind the client; though in the very ſame caſe it is admitted, that in the courts of law that of the attorney does; and that if the decree be made to perform the award, and there appear in the decree only the aſſent of the ſolicitor, it is not incumbent on the plaintiff, in

[7] Hayes v. Hayes. H. 11 Car. B. R. Rol. Arb. E. 9. Cro. Car. 434.

[8] Bacon v. Dubarry. 1 Lord Raym. 246. 12 Mod. 129. Comb. 439. 1 Salk. 79.

a bill of review for the reverſal of the decree, to ſhew the want of aſſent in the principal; and that even the attendance of the ſolicitor, with counſel, before the arbitrator, on behalf of his client, will not bind the latter without his actual aſſent.[9]

It may well be doubted, however, how far the authority of this caſe would be recognized at preſent: the character of ſolicitor is equally known to the law as that of an attorney: their duty and their privileges are the ſame—the confidence repoſed in them the ſame: they only differ in name, and practiſe in different courts.

If the huſband ſubmit to arbitration any thing of which he might diſpoſe in right of his wife, the wife ſhall, after his death, be bound by the award. As if the huſband and wife be poſſeſſed of a term in the right of the wife, as executrix of her former huſband; and the preſent huſband, and a ſtranger, who claims title to it, ſubmit the intereſt and title of the leaſe to the award of certain perſons, who award one part to the pretender, and the other to the huſband and wife, the latter, after the death of the huſband, ſhall be bound by this award.[1]

So, under a ſubmiſſion of all matters between a married man and another, the arbitrator may comprehend in his award a matter in diſpute in the right of the wife. As if a woman be indebted to J. S. in a ſum of money, as adminiſtratrix to J. D. and then marry: if the huſband and J. S. ſubmit all matters

[9] Colwell v. Child. 1 Rep. Ch. 104. 1 Ca. Ch. 86.

[1] Dict. 2. El Rol. Arb. D. 1. with a quère.

between them, an award, comprehending the debt due by the huſband and wife, though in the right of the wife and as adminiſtratrix, ſhall bind the huſband, if the wife had aſſets; for in that caſe he is chargeable by the marriage.[2]

UNDER a ſimilar ſubmiſſion, an award, comprehending a debt due to the wife as executrix, will bind the wife after her huſband's death, as it will the huſband himſelf during his life.[3]

BUT where a ſubmiſſion by the huſband reſpects any property of the wife, which the huſband by his own act cannot alien, an award which gives that property to another, it would ſeem, would not be conſidered as binding on the wife: as if the huſband, among other things, ſubmit the right of a manor, and the arbitrators award that the huſband ſhall give up to the other party a deed, by which an annuity is ſecured to the wife out of the manor; this award cannot be enforced, becauſe the right of the huſband extends only to the accruing arrears of the annuity, and not to the annuity itſelf. But if the ſubmiſſion were jointly by the huſband and wife, it ſeems not to be queſtioned in the book in which this caſe is reported, that both the huſband and wife would be bound by this award:[4] yet ſome doubt might be raiſed, from the conſideration, that the only mode by which the freehold intereſt of the wife can be transferred, is by the ſolemnity of a fine. The

[2] Lumley v. Hutton. M. 15. Jac. B. R. M. 13. Jac. B. R. S. C. 1 Rol. Rep. 268. Rol. Arb. D. 2. Cro. Jac. 447. Morſe v. Surry, 1 pt. Ca. Law and Eq. 212.

[3] 21 H. 7. 29. 6. cited Bridg. 91. Rol. Arb. D. 3.

[4] Vid. 21 H. 6. 19. and 1 Rol. Rep. 269.

aſſignees of a bankrupt, ſucceeding only to the right of the bankrupt, muſt, it is evident, be bound by an award made before the bankruptcy, in conſequence of a ſubmiſſion by him.

It was formerly thought, that an action of debt could not be maintained againſt an adminiſtrator on an award made between the plaintiff and the inteſtate, even though the award was in writing; but the reaſon given, though often in the ancient books uſed as an argument to impeach an award, ſeems to be altogether inapplicable: it is no other than this, that the inteſtate might have waged his law; or, in other words, by the intervention of certain ceremonies, ſworn that he did not owe the money awarded.[5]

But this opinion has been ſince over-ruled; and it has been held, that an award creates a duty, which ſurvives to the executor or adminiſtrator, and that they ſhall be compelled to perform the thing awarded to be done on the part of their teſtator or inteſtate.[6]

Whether, by the Roman law, the repreſentative of the deceaſed was bound by an award made in the life-time of his predeceſſor, does not appear very clearly, though the faireſt interpretation of the law is, that he was.[7]

Who may take advantage of an Award.

It may ſafely be laid down as a general rule, that all thoſe who would be bound by an award may take advantage of it, if made

5 Bowyer v. Garland. Cr. El. 600.

6 2 W. and M. Dawney v. Veſey. 2 Ventr. 249. Vid. 1 L. Raym. 248.

7 Nec utimur Labeonis ſententiâ, qui exiſtimavit, ſi arbiter, aliquem *pecuniam dare* juſſerit, et is deceſſerit antequam daret, pœnam committi, licet heres ejus paratus ſit offerre. Ff. l. 4, t. 8, ſ. 27.

in their favour, or in the favour of thoſe in whoſe right they would be bound.

THEREFORE the aſſignees of a bankrupt may take advantage of an award made in favour of the bankrupt before his bankruptcy.

AND for the ſame reaſon executors or adminiſtrators may take advantage of an award made in favour of their teſtator or inteſtate before his death.

CHAP. III.

The SUBJECT *of* REFERENCE.

THOUGH at all times the courts have manifeſted a general diſpoſition to give efficacy to awards, yet there are ſome caſes in which they have refuſed them their protection; becauſe the ſubjects, on which they were made, were not the proper objects of a reference to a domeſtic tribunal.

IT is therefore eſſential, diſtinctly to point out what ſubjects of controverſy the law permits to be referred, and to what others it refuſes that privilege. The *general* anſwer to this queſtion will be beſt obtained, by adverting to the great principle on which every reference is made, and the obligation impoſed on the arbitrator, by implication, from the nature of his duty. That anſwer, indeed, will not exactly apply to all the caſes that may occur: ſome of them can only be explained by the aſſiſtance of technical reaſons.

THE only motive which can influence a man to refer any ſubject of diſpute to the deciſion of an arbitrary judge, is to have an amicable and eaſy ſettlement of ſomething which in its nature is uncertain. It would be contrary to the duty of an arbitrator to do any thing that were unjuſt between the parties; and if the demand

of the one upon the other were either certain in its original creation, or ſubſequently aſcertained by any other means, an arbitrator would do manifeſt injuſtice were he to order, either that more ſhould be given, or that leſs ſhould be received, in ſatisfaction. It would therefore be nugatory to refer that to the deciſion of an arbitrator, in which the law, following the dictates of juſtice, will not permit him to make any change.

On theſe principles an award is of no avail, when made of debt on a bond for the payment of a ſum certain, whether it be ſingle, or with a condition to be void on the payment of a leſs ſum, or of debt for arrears of rent aſcertained by a leaſe, nor of covenant to pay a certain ſum of money;[8] nor of debt on the arrears of an account taken before auditors, whether aſſigned by the maſter of the accountant, or by the court, in an action of account.[9] Nor of damages recovered by a judgment;[1] for in all theſe caſes the demand is aſcertained.

[8] 10 H. 7. 4. 4 H. 6. 17. Rol. Arb. R. 2. 5. Blake's caſe, 6 Co. 43, 44.

[9] 4 H. 6. 17. 6 H. 4. 6. a. Fitzh. Abr. 51. a. b. Rol. Arb. R. 1. 6. ſ. 1. 1 Lev. 292.

At common law, before either the ſtatute of Marlebridge or Weſtminſter the ſecond, there were two methods of proceeding againſt an accountant: one by which the party to whom he was accountable, called, in the language of thoſe times, his maſter, might, by the conſent of the accountant, either take the account himſelf, or aſſign an auditor or auditors to take it, and then have his action of debt for the arrears. Or he might, in the firſt inſtance, have a writ of account, on which, after judgment, *quod computet*, auditors were aſſigned by the court, and final judgment pronounced on their report. The report of the auditors, in both caſes, was conſidered as matter of record.

[1] Gouldſb. 91, 92.

It ſeems to be on the ſame principles that a ſubmiſſion cannot be made of a queſtion relative to the detention of the title deeds of an eſtate, nor of the demand of an annuity; for, in the firſt caſe, the writings only are to be recovered; and, in the other, the annuity itſelf and the arrears. In ſome of the old books, however, reaſons more technical, but leſs ſatisfactory, are aſſigned for theſe caſes: that in the action of detinue of charters, neither the wager of law, nor outlawry, lies; and that it concerns land, and comprehends a warranty in itſelf, which is an inheritance; and that a writ of annuity is an action mixt with the realty.[2]

But an *action* of account may be ſubmitted; for, till the account be taken, the ſum remains uncertain.[3] So alſo a treſpaſs for taking away the charters of an eſtate; for there uncertain damages are to be recovered for the injury of taking them away, though in detinue the recovery is only of the charters themſelves.

And, in general, where the party complaining could recover by action only uncertain damages, the ſubject of complaint may be the object of a reference to arbitration: as any demand not aſcertained by the agreement or contract of the parties, though the claimant demands a ſum certain; as a *claim* of 5l. for different expences in the ſervice of the other party.[4]

So, debt ariſing on a ſimple contract;[5] a demand of rent for uſe and occupation;[6] a complaint of ſlander;[7]

[2] 9 H. 6. 60. Fitzh. 51. a. Rol. Arb. V. 1. A. 6. V. 3.

[3] Rol. Arb. R. 4.

[4] Sower v. Bradfield. Cro. El. 422.

[5] 45 Ed. 3. 16. a. b.

[6] 4 H. 6. 17. b. Rol. Arb. V. 8.

[7] 1 Keb. 848.

treſpaſs of every kind, whether perſonal or on the land of the complainant;[8] and, in general, all kinds of perſonal wrong, where, by the policy of the ſtate, the injury done to the individual is not conſidered as merged in the public crime, or where it does not include an offence againſt the public manners.[9]

THERE is alſo a diſtinction with reſpect to demands ariſing on a deed. Where the demand is wholly aſcertained by the deed at the time of making it, as it is by covenant, bill or bond, to pay a ſum of money; there this certain demand cannot be avoided, but by matter of as high a nature, and therefore cannot be ſubmitted to arbitration, as has been before mentioned: but when no certain duty accrues by the deed alone, but the demand ariſes from a wrong or default ſubſequent, together with the deed, as in the caſe of a bond to perform covenants, or covenant to repair a houſe, there the demand, being for damages for a breach, may be ſubmitted.[1]

ON the ſame principle, an action on the old ſtatutes, for enticing away the plaintiff's ſervant, might have been anſwered by a ſubmiſſion of that injury, and an award in conſequence of it; becauſe the action was not grounded merely on the ſtatute, but alſo on the departure of the ſervant, which was matter of fact.[2]

MOST of thoſe caſes too, which cannot be ſubmitted by themſelves, may, when joined with other things of

[8] 13 R. 2.

[9] Vid. infra.

[1] Blake's caſe. 6 Co. 43, 44. Cro. Jac. 99. Rol. Arb. T. 1, 2, 3, 4, 5, 6.

[2] Rol. Arb. S. 2. Vid. ſtatute of labourers, 23 Ed. 3. ſt. 1, and the other old ſtatutes on that ſubject.

an uncertain nature; becauſe then there is an uncertainty in the whole of the diſputes;[3] as debt on a bond, whether ſingle or with condition;[4] debt for arrears of rent aſcertained by a leaſe for years;[5] damages recovered by verdict and judgment.[6]

But it was determined, in very early times, that the arrears of an account taken before auditors, aſſigned by the maſter of the accountant, cannot be referred even amongſt other things; becauſe, ſay all the juſtices, an award is not of ſo high a nature, as debt found before auditors, the latter being matter of record;[7] and they certainly would have ſaid the ſame thing, had the caſe been that of debt found before auditors aſſigned by the court.

The ſame reaſon, however, applies, even in a ſuperior degree, to the caſe of damages recovered by verdict and judgment; for theſe are ſurely matter of record, and of as high a nature as arrears found before auditors: and, perhaps, had the latter caſe remained to be decided in more modern times, it would have received a different determination.

However, in all caſes where the demand ariſes on a deed, it would ſeem the ſubmiſſion muſt alſo be by deed; becauſe a ſpecialty cannot be anſwered but by a ſpecialty.[8]

[3] Fhbt. 51. b. 6 H. 4. 6. a. b. Rol. Arb. R. 3. Tr. 22 Car. Faver v. Bates. S. C. Al. 4. Morris v. Creech. 2 Keb. 623, 659.

[4] Lumley v. Hutton. M. 13 Jac. B. R. H. 15 Jac. B. R. Rol. Arb. B. 8. Coxal v. Sharp. 1 Keb. 937.

[5] 10 H. 7. 4. Rol. Arb. R. 5.

[6] Gouldſb. 91, 92.

[7] 6 H. 4. 6. a. 4 H. 6. 17, 18. Fhbt. 51. a. b. Rol. Arb. R. 1. 6. S. 1. vid. 1 Lev. 292.

[8] 3 H 4. 1. Brooke, 44. a

THEREFORE, where A was indebted to B in 2cl. by a ſingle bond, and they ſubmitted all matters between them, by parol, and it was awarded, that A ſhould pay to B a leſs ſum in ſatisfaction; it was determined, that though he had paid this ſmaller ſum, according to the award, yet this was no diſcharge of the bond. But it was alſo held, that if the ſubmiſſion had been by bond, by which each bound himſelf to perform the award, A would have been obliged to pay the money awarded, otherwiſe he muſt have forfeited his bond of ſubmiſſion; and if he had paid it, or tendered payment, B would alſo have forfeited *his* bond of ſubmiſſion, by bringing an action on the ſingle bond.[9]

MUCH doubt and uncertainty ſeem anciently to have prevailed on the queſtion, "How far a diſpute concerning land could be referred to the deciſion of an arbitrator; and how far, on an actual reference, the parties were bound by his award."

THUS, we are told, in one book,[1] that "it was ſaid "by Grevill and Pollard, that land in variance, on the "title, right, and poſſeſſion ſubmitted to arbitration, "without other debates, and variances of other things "perſonal, are not arbitrable, nor have the arbitrators "authority to meddle with the title of real land only, "but ſuch award is void; and ſo a bond, with con-"dition to obey ſuch award, is void." The reporter, however, adds a *quere*, for that "others think clearly "the contrary, if there be ſuch words as ſubmit title "and poſſeſſion: alſo they think," continues he, "that

[9] Lumley v. Hutton, H. 15 Jac. B. R. M. 13 Jac. B. R. Rol. Arb. B. 8. Coxal v. Sharpe. 1 Keb. 937. [1] Keilway, 99, b.

" if I and another ſubmit to an award of all *demands*, " without more, in the word demands are implied all " matters between us concerning the lands of both " parties, which are in variance between us."

In other places, we are told, that " arbitrators cannot " make an award of freehold, and therefore cannot " award the freehold of one to another." This was ſaid by Culpepper, " which nobody denied but Skrene, " who ſaid, that an arbitrator cannot award frank- " tenement without deed; but that if parties ſubmitted " themſelves to arbitration by deed indented, then the " award was good, and a man might plead it in bar, to " which no anſwer was given."[2]

Again, " a man cannot have a remedy to enforce " an award of frank-tenement, unleſs he has bond for " performance."[3] " The *right* of freehold cannot be " the ſubject of a reference; but the arbitrator may " award, that the one party ſhall infeoff the other " in ſatisfaction."[4] " An award that one ſhall infeoff " another in an acre of land, and immediately after " deliver up the charters, is good."[5] But Rolle ſays, " that arbitrators cannot make an award of freehold, " though the ſubmiſſion be by deed, or even by deed " indented;" but his authorities[6] do not go ſo far.

So, he ſays, " that an arbitrator cannot make an " award of a leaſe for years, as to adjudge the land of " one to another, by which the intereſt and eſtate of " one ſhall be transferred to the other, becauſe," ſays

[2] 14 H. 4. 18, 19. Brooke, 44. b.

[3] 9 E. 6. 26. Brooke, 53.

[4] Dict. per Moyle, cont. per Littleton. M. 9. E. 4. 44.

[5] 18 Ed. 4. 21, cited Rol Arb. E. II. 2.

[6] 9 E. 4. 44. 14 H. 4. 19.

he, "it is a chattel real:" from whence it might be concluded that his opinion was, that any thing in the realty could not, by any mode, be referred to arbitration. But he cites no authority, nor does he make any diſtinction, whether the arbitrator cannot do this at all, or only that he cannot do it unleſs it be within the ſubmiſſion.

He alſo lays it down for law,[7] "that there cannot "be partition by an award;" but his reaſon ſeems only to extend to the manner in which the award of partition is expreſſed: it is, "that freehold does not paſs "but by livery," which was true, before the introduction of the modern forms of conveyancing; and therefore an award, in ſuch words as theſe, "The "one ſhall have one moiety of the lands in queſtion, "and the other the other moiety," would not have been effectual.

But it appears, by a number of caſes, adjudged even while theſe doubts were conſtantly expreſſed, that the real difficulty was how to *enforce* an award made on a reference of a diſpute concerning land; for whenever the ſubmiſſion was by bond, it was almoſt univerſally held, that the party who did not perform the award forfeited the bond.

Thus, it is ſaid, "if two, by bond, ſubmit the title "of certain land to the arbitrament of a third perſon, "who awards, that the one ſhall levy a fine to the "other of that land, he muſt do it, otherwiſe he will "forfeit his bond."[8]

[7] 1 Rol. 242. l. 16. cites P. 1 Jac. B. Horton v. Horton.

[8] Keilway, 43, a. b. 45. b.

So, "where two bound themſelves in mutual obli-"gations to ſtand to the award of certain perſons, on "the right, title, and poſſeſſion of 20 acres of land; "and the award was, that one of them ſhould enter "and have poſſeſſion of 10 acres to him and his heirs, "and that the other ſhould have the remaining 10 "acres for life:" though an objection was taken to this award, as being only of *parcel* of the things ſubmitted, yet that was overruled, and no objection taken to the ſubmiſſion, as being of freehold, nor to the award on any other account.[9]

In another place,[1] it is ſaid, "that if the condition "of a bond be that the parties ſhall ſtand to the award "of J. S. concerning the *title* of certain land, and the "arbitrator award, that the one ſhall give a releaſe to "the other of his right, and that the latter ſhall give "to the former 20l. in lieu of it; this is a good award." And Rolle,[2] citing the ſame caſe, ſays that "though "*ſuch* an award be void to determine the right, and to "change the eſtate, becauſe it is real, yet being within "the ſubmiſſion, the party is bound to perform it."

So, where there was a ſubmiſſion of the title of copyhold land, and an award that one of the parties, in conſideration of money paid him by the other, ſhould releaſe to the latter all his right in the copyhold, at a certain day; and three years afterwards make further aſſurance; no objection was made to the *ſubject* of the award, though ſeveral were made to the award itſelf.[3]

[9] 19 H. 6. 6. b.
[1] 9 E. 4. 44.
[2] Rol. Arb. B. 14.
[3] Markham v. Jennings.—H. 4. Jac. B. R. Rol. Arb. K. 15.

YET, the idea of there being ſomething in the nature of real property, which rendered it an improper ſubject of reference, continued long to be entertained: "If an "award be made, ſays Coke, of a real thing, although "that be no bar in the action for the thing, yet if this "be performed, the bond is forfeited;"[4] by which, I ſuppoſe, he means, 'the bond of the party, who, not-'withſtanding the award, and performance by the other, 'ſues on the original cauſe of action, is forfeited by 'his ſo ſuing; unleſs, it muſt be ſuppoſed, that the 'word "not" is omitted before the word "performed," 'and then the meaning will be, that the party not *per-'forming* the award will forfeit *his* bond.'

AND ſo late as the time of William the third, it is obſerved, by one of the judges,[5] "that it is a queſtion, "whether the title to land is ſubmiſſible, ſince it is in "the realty;" and he is anſwered by the Chief Juſtice,[6] "that things in the realty may be ſubmitted, as "well as things in the perſonalty; but that they could "not be recovered on the award.[7]

THERE ſeems to be ſomething ſingularly abſurd in the manner in which, in many caſes, this opinion of the inarbitrable nature of real property is expreſſed: "any thing concering the realty," it is ſaid, "cannot "be referred; an arbitrator can make no award of it; "he cannot award the freehold of one man to another;" and yet, in the next ſentence, it is frequently added, "but, if there be a bond to ſtand to the award, the "party who does not perform it forfeits the penalty;"

4 1 Rol. Rep. 270.
5 Powell.
6 Treby.
7 Marks v. Marriot. 1 Ld. Raym. 115.

which is contrary to the principle which univerſally governs every other caſe on this ſubject; for in all other caſes it is held, that if the award be void, the bond is not forfeited by non-performance.[8]

In none of the books, which I have had an opportunity of conſulting, is there any reaſon given for this opinion; perhaps the principle on which it was founded had ceaſed to operate before any regiſter was kept of the proceedings of the courts; it probably had its riſe from the feudal reſtraints on the alienation of real property; at a time when the lord had an intereſt in the perſon of his vaſſal, who could not be changed without his conſent; when the vaſſal had a reciprocal reſtraint on the change of his lord; and when the anceſtor could not diſinherit his heir; it was perfectly conſonant to reaſon, that the poſſeſſor of land ſhould not be permitted, by a reference to an arbitrary tribunal, to infringe on theſe collateral rights; and when, by the removal of the reſtraints on alienation, the principle on which the opinion was founded no longer exiſted, and was forgotten, the opinion itſelf ſtill continued to be favoured.

In the Roman law, there is no queſtion but that real property might be referred, and the parties bound by an award concerning it;[9] and indeed there appears to

[8] 22 H. 6. 46.

[9] Inter Caſtellianum et Seium, controverſia de finibus orta eſt, et arbiter electus eſt; ut *arbitratu ejus res terminetur*; ipſe ſententiam dixit, præſentibus partibus, et terminos poſuit: quæſitum eſt, an, ſi ex parte Caſtelliani arbitro paritum non eſſet, pœna ex compromiſſo commiſſa eſt? Reſpondi ſi arbitro paritum non eſſet in eo, quod utroque preſente arbitratus eſſet, pœnam commiſſam.—Ff. l. 4. t. 8. f. 44.

be nothing in the nature of real property itſelf which makes it an unfit ſubject of arbitration, where no adventitious reaſon prevails to render it ſo.

It may therefore ſafely be conſidered as law, that where the parties might, by their own act, transfer real property, or exerciſe any act of ownerſhip with reſpect to it; they may refer any diſpute concerning it to the deciſion of a third perſon, who may order the ſame acts to be done which the parties themſelves might do by their own agreement: therefore, when we are told that an arbitrator cannot make an award of freehold, that he cannot award the freehold of one man to another, or that partition cannot be by an award; we are to underſtand theſe expreſſions to mean no more than that land cannot be transferred, or a diviſion made of it, by the mere magic of the words of the award; but that it is neceſſary that the award ſhould order ſuch acts to be done as would, if done by the voluntary agreement of the parties, amount to a proper transfer or partition at law.

Thus, where it appeared by the recital of an award, that the parties to the ſubmiſſion were joint tenants of certain land, and the award ordered that they ſhould make partition by mutual conveyances, no objection was taken to the power of the arbitrator to order partition to be made; but to the uncertainty of the manner in which it was ordered, it not being pointed out what moiety or part the one ſhould have, and what the other: but even this objection was over-ruled, and it was reſolved, that, whereas they were joint-tenants before, they would now become tenants in common.[1]

[1] Knight v. Burton. 3 Anne. 6 Mod. 231.

And where the law did not require any particular ſolemnities, to transfer the poſſeſſion from one to another, the words of the award alone have been held ſufficient for that purpoſe; as where a controverſy aroſe between two, concerning a leaſe of lands, and they ſubmitted to the award of a third perſon, who awarded, that one of them ſhould have the lands; this was held in evidence before a jury to be a good gift of the intereſt of the term; but it was likewiſe held, that, had it been, that the one ſhould permit the other to enjoy the term; this would not have given an intereſt in it.[2] And in another book,[3] where the ſame caſe is cited, and the diſtinction here taken recognized, it is ſaid, that if the arbitrators award *that the poſſeſſor ſhall hold the term*, it ſeems, that this would not bind the right of the other; for that the award does not extinguiſh the right there, as it does to paſs the poſſeſſion in the other caſe. I confeſs I do not ſee any thing material in theſe diſtinctions; and I apprehend, that ſince the ſtatute of frauds,[4] ſuch an award would not be ſufficient to bind the parties, but that it muſt order a transfer of the poſſeſſion, or a releaſe of the right, by a written inſtrument.

As real property cannot be transferred by the parties themſelves, without deed, except by the old ſolemnities of a feoffment on the land, it ſeems to be a neceſſary conſequence that, where that makes a part of the diſpute, the ſubmiſſion, as well as the award, where the ſubmiſſion is by the act of the parties, muſt alſo be by deed.

[2] Truſloe v. Aſcwre. Cro. El. 223. Dy. 183, in marg.

[4] 29 Car. 2. c. 3. ſ. 1.

It has been ſaid, that all kinds of perſonal wrong may be ſubmitted to arbitration, where, by the policy of the ſtate, the injury done to the individual, is not conſidered as merged in the public crime, or where it does not include an offence againſt the public manners.

This exception was not originally dictated by any thing which had appeared in *our* books; it aroſe from that principle appearing in the civil law; but as it is founded in reaſon and good ſenſe, it was ſuppoſed there could be no doubt that, if the queſtion ſhould ever occur in our courts, it would receive a ſimilar determination.

As arbitrators, ſay the writers on the civil law,[5] have no power, but that which the parties can give them, we cannot ſubmit to arbitration certain cauſes which the laws and good manners do not ſuffer to be expoſed to any other event, but that which the natural authority of juſtice gives them, and which cannot be brought before other judges than thoſe who are cloathed with public authority. Thus we cannot ſubmit accuſations of crimes, ſuch as murder, robbery, ſacrilege, adultery, forgery, and others of the like nature; for on the one ſide the public intereſt is concerned, to have theſe crimes puniſhed in a public manner; and on the other, the party accuſed can neither defend his honour nor his innocence but in public, and before the judges who exerciſe the miniſtry of juſtice; and it would be contrary to good manners, and uſeleſs for the accuſed, to ſubmit voluntarily to juſtify his innocence before arbitrators, who having

[5] Domat. 1 vol. 225.

no ſhare in the adminiſtration of juſtice, could neither juſtify nor condemn him.[6]

In Eaſter term, 1797, a caſe occurred in the court of King's Bench, in which this principle was expreſſly recognized.—One James Rant and others had, at the ſeſſion for the county of Middleſex, held in the month of October preceding, preferred a bill of indictment for a riot and aſſault againſt one Hannah Coombs and others, who at the ſame ſeſſion preferred a ſimilar bill againſt Rant, and his party; both bills were found, aud were called on for trial at the ſeſſion held in December following; but by the conſent of the parties on both ſides, all matters in diſpute between them were referred to arbitration: mutual bonds of arbitration were executed, which contained a proviſo that the ſubmiſſion ſhould be made a rule of the court of King's Bench; no award was made within the time originally limited by the bonds; the time was enlarged, as the ſucceſsful parties alleged, by mutual conſent; an award was made within the enlarged time: the unſucceſsful parties having procured the ſubmiſſion to be made a rule of court, moved to have the award ſet aſide on an affidavit, which, among other things, ſtated that they had neither by themſelves, nor their attorney, conſented to the enlargement of the time: the counſel,[7] who was inſtructed to ſhew cauſe, though

[6] Julianus indiſtincte ſcribit; ſi per errorem de famoſo delicto ad arbitrum itum eſt, vel de eâ re de quâ publicum judicium ſit conſtitutum, veluti de adulteriis, ſicariis et ſimilibus; vetare debet prætor, ſententiam dicere, nec dare dictæ executionem. Ff. l. 4. t. 8. ſ. 32. w. 6.

[7] The author of the preſent work.

of opinion that, for ſeveral reaſons, the award could never by any mode of proceeding be enforced, yet thought he could ſucceſsfully oppoſe the preſent rule, on two grounds: 1ſt, That it appeared from the affidavit on which it was obtained, that the court had no juriſdiction over the ſubject, as the conſent to enlarge the time was denied.* 2dly, That a criminal proſecution could not be made the ſubject of reference.—He had hardly ſtated the fact of the ſubmiſſion by bond, when the court expreſſed a conſiderable degree of ſurprize that a criminal proſecution ſhould be ſo ſubmitted; they obſerved that it was uſual, indeed, in proſecutions of this kind, before a verdict was given, or after verdict of conviction, and before ſentence, for the parties to talk together by the recommendation of the court, and if they agreed, the court ſet a nominal fine; but the whole was done under the inſpection of the court, and *their* ſentence formally followed.—The rule was diſcharged.[g]

It is to be obſerved here that the objection to the propriety of the reference, aroſe not ſo much from the nature of the complaint, as from the form of the proſecution; for there can be no doubt that a perſonal

* Had the *ſucceſsful* party procured the ſubmiſſion to be made a rule of court, and then moved to *enforce* the award by attachment, the denial of this conſent would have been a proper anſwer to that application; but it ſeems hardly reconcileable to common ſenſe to procure a ſubmiſſion to be made a rule of court, and then to move to ſet aſide an award, made under the authority of that ſubmiſſion, on the denial of its exiſtence.

[g] The King v. Coombs et al. on the proſecution of Rant, and the King v. Rant et al. on the proſecution of Coombs.

aſſault may in itſelf be the ſubject of arbitration, as well as any other treſpaſs; and where it is made the ſubject of an action, inſtead of an indictment, it may with propriety be referred.

NOTWITHSTANDING this ready recognition of the principle in queſtion, in the caſe juſt ſtated, it ſeems in the following to have been forgotten or overlooked.

SOME conſiderable time previous to the year 1795, Stephen Phillips purchaſed of Lord Viſcount Falkland, Henry Speed, and Delves Broughton, ſeveral annuities, the payment of which was oſtenſibly ſecured to him by aſſignments of ſeveral ſuppoſed eſtates alleged to be the property of thoſe three perſons.—Some time after the purchaſe, applications were made to the court of King's Bench to ſet the annuities aſide, on affidavits ſworn by Lord Falkland, John King, who in ſome part of the tranſaction had acted as the agent of the grantors, and one Alexander Livingſtone: theſe applications, however, were unſucceſsful, and Mr. Phillips having afterwards, as was alleged, diſcovered that all or the greater part of the eſtates aſſigned as a ſecurity, either had no exiſtence, or did not belong to the parties who had taken upon themſelves to aſſign them, inſtituted a proſecution by indictment againſt Lord Falkland, Mr. Speed, and Mr. King, for a conſpiracy to cheat him of his money by falſely repreſenting the three perſons before mentioned as the owners of the ſuppoſed eſtates; three ſeveral indictments were alſo found on the proſecution of Mr. Phillips, againſt Lord Falkland, King, and Livingſtone, for perjury aſſigned to have been committed in the affidavits before mentioned.—Theſe four indictments ſtood for trial before Lord Kenyon at the ſittings at Weſtminſter after Hilary term in the year 1795.—On the indictment for

the conſpiracy, the defendants were acquitted, whether on the real merits of the caſe, or on account of ſome defect in the indictment, or from want of ſufficient evidence on the part of the proſecution, is immaterial for the preſent purpoſe: a propoſition was then made from the bar that the ſubjects of diſpute between the proſecutor and the ſeveral defendants ſhould be referred to arbitration; this receiving the acquieſcence of Lord Kenyon, and the conſent of the parties, verdicts of acquittal, by his Lordſhip's direction, were entered on the three indictments for perjury.—Rules were then drawn up in all the four indictments, which ſtated, that "It was ordered by the court, by and "with the conſent of the proſecutor and the ſeveral "defendants, their counſel, and attornies, that it ſhould "be referred to a perſon there named as arbitrator, "to ſettle all matters in difference between Stephen "Phillips, the proſecutor, and the *ſaid ſeveral de-* "*fendants*, in the *ſaid indictments*, and to ſettle and "aſcertain what ſum of money ought to be ſecured to "the ſaid Stephen Phillips by the ſaid defendants Lord "Viſcount Falkland, Henry Speed, Eſq. and Delves "Broughton, Eſq. and that it ſhould be in the power "and judgment of the ſaid arbitrator to ſettle and "determine the nature of ſuch ſecurity to be given; "and alſo to order and determine what he ſhould "think fit to be done by the parties reſpecting the "matters in difference between them, and that the "court of King's Bench might be prayed that this "order might be made a rule of court."[9]

[9] The King on the proſecution of Stephen Phillips v. Lord Falkland, John King, and Alexander Livingſtone.

Had the defendants been acquitted of the criminal charges on the merits, but it had appeared in the courſe of the inveſtigation that there were ſubjects of difference between them and the proſecutor, which might give riſe to future litigation, thoſe differences might have been referred to the deciſion of an arbitrator, by the recommendation of the judge and counſel, without violation of the principle which is now the ſubject of diſcuſſion; even then, however, it would have been improper in point of form that the reference ſhould be by rule of court alleged to be made in the indictments; theſe were at an end by the acquittal of the defendants, and the court could have no authority to interpoſe in any diſputes ſtill ſubſiſting between the parties:—But here, when the propoſition to refer was made and accepted, the defendants remained charged with a groſs crime, in proſecution of which the public intereſt was materially concerned, and no evidence had been offered of their guilt or innocence: in that ſituation, therefore, the reference, in ſubſtance as well as in form, has the *appearance* of a compromiſe of public juſtice under the ſanction of a court; and if what was done in this caſe were to be conſidered as legally correct, it is apprehended it might be cited as an authority, not only that a criminal *proſecution*, but a *public crime*, might legally be referred to arbitration.

It is further laid down by the writers on the civil law, that cauſes which relate to the ſtate of perſons cannot be ſubmitted to a private tribunal; as if the queſtion were to know, whether a man were legitimate or a baſtard—whether a gentleman or a plebeian. Nor can ſuch cauſes be ſubmitted to arbitration, the conſequence of which may intereſt our honour or dignity

in ſuch a way, that good manners do not allow us to ſubmit the event of them, or to chooſe judges for deciding them.[1]

[1] Domat. 1 vol. 225. De liberali cauſa compromiſſo facto, recte non compelletur arbiter ſententiam dicere: quia favor libertatis eſt, ut majores judices habere debeat; eadem dicenda ſunt, ſive de ingenuitate, ſive de libertinitate quæſtio ſit: et ſi ex fideicommiſſi cauſâ, libertas deberi dicatur. Idem dicendum eſt in populari actione. Ff. l. 4. t. 8. ſ. 32. n. 7.

CHAP. IV.

The ARBITRATOR *and* UMPIRE.

Who may be an Abitrator.

EVERY one whom the law ſuppoſes capable of judging, whatever may be his character for integrity or wiſdom, may be an arbitrator or umpire; becauſe he is is appointed by the choice of the parties themſelves, and it is their folly to chooſe an improper perſon;[2] but a perſon cannot be an arbitrator, who, by nature or accident, has not diſcretion; as one of non-ſane memory, or one who is deaf and dumb, becauſe being deprived of the uſe of thoſe ſenſes, which are more peculiarly the medium through which knowledge is conveyed to the mind, he cannot be ſuppoſed capable of judging; nor an infant, nor a perſon who is under the controul of another: as a married woman, a ſlave among the Romans, or a villein in the times of villeinage; neither can a man attainted of treaſon or felony.[3] But with us an

[2] Com. Dig. Arbitrament. B.—parvi refert, ingenuus quis, an libertinus ſit; integræ famæ quis ſit arbiter, an ignominioſus. Ff. l. 4. t. 8. ſ. 7.

[3] Com. Dig. Arb. C.—In ſervum Labeo compromitti non poſſe ſcribit; et eſt verum. Ff. l. 4. t. 8. ſ. 7. Sed neque in pupillum, neque in furioſum, aut ſurdum aut

unmarried woman may be an arbitratrix,[4] though by the civil law ſhe could not, it being contrary to the proper character of the ſex, according to the ideas of Juſtinian, to intermeddle with the office of a judge.[5]

It is a general rule of law, founded on the firſt principles of natural juſtice, that a man cannot be judge in his own cauſe; and on this foundation the Roman law has expreſsly provided, that if a man be conſtituted arbitrator in a diſpute to which he is himſelf a party, he cannot pronounce an award; adding this ſatisfactory reaſon, that he muſt, from the nature of the thing, either order himſelf to do ſomething, or prohibit himſelf from aſſerting ſome claim; and that no man can either impoſe a command or a prohibition on himſelf.[6] There are, however, one or two caſes mentioned in our books of reports, which ſeem to infringe on this

mutum compromittetur, ſ. 9. Cum lege Julia cautum ſit, *Ne Minor viginti annis judicare cogatur*, nemini licere minorem viginti annis compromiſſarium judicem eligere: ideoque pœna ex ſententia ejus nullo modo committitur. Majori tamen viginti annis, ſi minor viginti quinque ſit, ex hac cauſa ſuccurrendum, ſi temere auditorium receperit, multi dixerunt—ſ. 41.

[4] Vid. the Ducheſs of Suffolk's caſe. 8 E. 4. 1. Br. 37.

[5] Sancimus, mulieres, ſuæ pudicitiæ memores et operum quæ eis natura permiſit, et a quibus eas juſſit abſtinere, licet ſummæ atque optimæ opinionis conſtitutæ, ſe arbitrium ſuſceperint, vel ſi fuerint patronæ, etiamſi inter libertos, ſuam interpoſuerint audientiam, ab omni judiciali agmine ſeparari, ut ex earum electione nulla pœna, nulla pacti exceptio adverſus juſtos earum contemptores habeatur. Cod. l. 2. t. 56. ſ. 6.

[6] Si de re ſuâ quis arbiter factus ſit, ſententiam dicere non poteſt: quia ſe facere jubeat, aut petere prohibeat; neque autem imperari ſibi neque ſe prohibere quiſquam poteſt. Ff. l. 4. t. 8. ſ. 51.

principle, but which probably may admit of ſuch a modification as to be reconcileable to it.

SERJEANT Hards took a horſe as a deodand from the bailiff of the archbiſhop of Canterbury, for which the archbiſhop brought his action, and that coming to a trial at the aſſizes in Kent, the Serjeant offered to refer the matter to the archbiſhop himſelf, which was accordingly done by rule of court; and the Serjeant afterwards applied to the court to have the award ſet aſide, on the principle above mentioned; but the court thought the objection of no force; probably becauſe the reference to the archbiſhop was by the Serjeant's own propoſal, by which they thought he ought to be bound: perhaps, too, they thought, that the principle in queſtion applies only to the caſe where a man takes on himſelf to judge in his own cauſe, without the conſent of the oppoſite party. However this may be, it is certain, that on the authority of this caſe, cited from recollection by one of the judges,[7] and reported by him to have been approved of by Lord Chief Juſtice Hale, a ſubſequent caſe received a ſimilar deciſion, though the circumſtances are not mentioned.[8]

ANOTHER caſe is reported[9] of a ſubmiſſion by two on each ſide, to ſeveral arbitrators, of whom one of the two on one ſide was one, and an objection taken to the award on that account by his partner, when made defendant to an action on the bond of ſubmiſſion; and the objection was ſupported by another obſervation, "That it was a principal challenge to a juror, that he

[7] Dolben J.

[8] Matthew v. Ollerton.—5 W. and M. B. R. Comb. 218. 4 Mod. 226.

[9] Hunter v. Benniſon.—Hardr. 43.

had been an arbitrator between the parties in the cauſe:" but it does not appear that the court gave any attention to this obſervation; probably becauſe they thought it inapplicable to the caſe in queſtion. The circumſtance of having been an arbitrator between the parties in the ſame cauſe is an objection to the juror, becauſe he may be already prejudiced in the diſpute; and the obligation under which the party was bound to ſtand to his award is at an end, before the cauſe can again be brought to trial by a jury, and does not eſtop him from objecting to the juror on account of a prejudice ſo naturally implied; but, by ſubmitting to have his partner in the diſpute one of the arbitrators, he had waved all ſubſequent objection, on that account, to his award.

The Roman law recognizes two kinds of arbitrators, thoſe who are appointed by a formal ſubmiſſion, and act in the capacity of a judge, and thoſe to whom it is ſimply referred to ſet a price on any thing which is the ſubject of ſale; to eſtimate the value of a rent, to decide on the quality of a piece of workmanſhip, to ſettle the ſhares of gain and loſs between partners, or to determine any queſtion of a nature ſimilar to theſe.[1] Arbitrators of the firſt kind had an uncontroulable authority, from which there was no appeal, where they kept within its limits, whether their award was an

[1] Arbitrorum genera ſunt duo: unum ejuſmodi, ut ſive æquum ſit, ſive iniquum, parere debeamus; quod obſervatur, cum ex *compromiſſo* ad arbitrum itum eſt: alterum ejuſmodi, ut ad boni viri arbitrium redigi debeat, et ſi nominatim ſit comprehenſa perſona, cujus arbitratu fiat; veluti cum lege locationis comprehenſum eſt, ut opus arbitrio locatoris fiat. *Ff.* l. 17. t. 2. ſ. 76, 77.

equitable deciſion between the parties or not, and therefore the party could never be inveſted with that authority: but in the latter caſe it was conſidered to be the meaning and intention of the litigants, that the matter in diſpute ſhould be referred to the judgment of perſons of probity and ſkill in the particular ſubject, who were not permitted to exceed the bounds of reaſon and equity; and if they did, their deciſion was void:[2] in this caſe, therefore, there was no inconvenience in permitting one of the parties, by the conſent of the other, to be an arbitrator of the diſpute; and accordingly ſuch a reference was frequently made.[3]

[2] Ea mens eſt perſonam arbitrio ſubſtituentium, ut quia ſperent eum recte arbitraturum id faciant, non quia vel immodice obligari velint. Domat. 1 vol. 44. Si in lege locationis comprehenſum ſit, *ut arbitratu domini opus adprobetur*, perinde habetur, ac ſi viri boni arbitrium comprehenſum fuiſſet: idemque ſervatur, ſi alterius *cujuſlibet* arbitrium comprehenſum ſit, nam fides bona exigit, ut arbitrium tale præſtetur quale viro bono convenit. Ff. l. 19. t. 2. ſ. 24.

[3] Si ſocietatem mecum coieris, ea conditione, *ut partes ſocietatis conſtitueres*, ad boni viri arbitrium ea res redigenda eſt: et conveniens eſt viri boni arbitrio, ut non utique ex æquis partibus ſocii ſimus, veluti ſi alter plus operæ, induſtriæ, pecuniæ in ſocietatem collaturus ſit. Ff. l. 17. t. 2. ſ. 6. Societatem mecum coiſti, ea conditione *ut Nerva amicus communis partes ſocietatis conſtitueret*: Nerva conſtituit, *ut tu ex triente ſocius eſſes, ego ex beſſe*: quæris, utrum, ratum id jure ſocietatis ſit, an nihilominus ex æquis partibus ſocii ſimus? exiſtimo autem melius te quæſiturum fuiſſe, utrum ex his partibus ſocii eſſemus, quas is conſtituiſſet, an ex his, quas virum bonum conſtituere oportuiſſet:—arbitrium boni viri exiſtimo ſequendum eſſe: eo magis, quod judicium pro ſocio, bonæ fidei eſt. Unde ſi Nervæ arbitrium ita pravum eſt ut manifeſta iniquitas ejus appareat corrigi poteſt per judicium bonæ fidei. Quid enim ſi Nerva conſtituiſſet, ut alter ex milleſima parte, alter ex duabus mille-

THE caſe of Serjeant Hards, and others of the ſame kind, would, in the Roman law, have been conſidered as more properly belonging to the latter claſs.

IT is highly improper, however common it may be, for a perſon nominated as an arbitrator, to conſider himſelf as the agent of the perſon on whoſe behalf he was nominated.[4]

IT appears, however, to be no objection to an arbitrator, that he is related to one of the parties, or connected with him in any other way, which might raiſe a preſumption of an inclination in his favour; for by conſenting to the nomination of ſuch a perſon, the other party has ſhewn his opinion, that ſuch an inclination will not affect the juſtice of his determination.[5]

Umpire.

WHEN a ſubmiſſion is made to the award of two or more, it is frequently thought prudent, in order to provide a remedy for the caſe of their finally differing, or not making an award at all, to inſert a clauſe of agreement, that in ſuch caſe the queſtion ſhall be referred to the deciſion of a third perſon, who is called an umpire.

THE nomination of this perſon is frequently made by the parties themſelves at the time of the ſubmiſſion, and frequently left to the diſcretion of the arbitrators. In the latter caſe, the Engliſh law differs eſſentially from that which was conceived to be law by the

ſimis ſocius eſſet: illud poteſt conveniens eſſe viri boni arbitrio, ut non utique ex æquis partibus ſocii ſimus, veluti ſi alter plus operæ, induſtriæ, gratiæ, pecuniæ, in ſocietatem collaturus erat. Ff. l. 17. t. 2. ſ. 76, 78, 79, 80.

[4] 1 Vez. Jun. 226.

[5] Quinetiam de re patris dicitur filium familias arbitrum eſſe: nam et judicem eum eſſe poſſe pleriſque placet. Ff. l. 4. t. 8. ſ. 6.

opinion moſt prevalent among the Roman lawyers; for though they acknowlege it to have been a common practice to refer any thing to the deciſion of *two* arbitrators, yet they ſay, that "a ſubmiſſion to two, with a proviſion, that, in caſe of difference in opinion, they ſhall nominate a third," is not valid, becauſe they may alſo differ in the object of their nomination: but at the ſame time they admit, that in caſe of a ſubmiſſion to two without ſuch proviſion, the prætor, when they cannot agree in an award, ought to compel them to nominate a third perſon to decide between them.[5]

The Engliſh law expreſſes no ſuch anxiety for the poſſible difference of opinion in the choice of an umpire; and, in fact, it is more uſual to appoint two arbitrators with the power of this nomination, than any greater number: but it provides, that the choice ſhall be fair and impartial, and that it ſhall not even be left to chance; therefore, where two arbitrators, having ſuch power by the ſubmiſſion, did not make an award within the time limited, and could not agree in the choice of an umpire, but threw *croſs* and *pyle* which of their nominees ſhould prevail, this was thought by the Maſter of the Rolls a ſufficient reaſon for ſetting aſide the umpirage made by the ſucceſsful nominee; becauſe an election, he ſaid, was an act of the will and under-

[5] Si in duos fuerit ſic compromiſſum, *ut ſi diſſentirent, tertium adſumant*, puto tale compromiſſum non valere, nam in adſumendo poſſunt diſſentire. Sed ſi ita ſit, *ut eis tertius adſumeretur Sempronius*, valet compromiſſum: quoniam in adſumendo diſſentire non poſſunt. Sed uſitatum eſt, etiam in duos compromitti, et debet prætor cogere arbitros, ſi non conſentiant, tertiam certam eligere perſonam, cujus auctoritati pareatur. Ff. l. 4. t. 8. ſ. 17. n. 5, 6.

ſtanding, but the arbitrators in this caſe had followed neither, but had truſted the matter to chance.[6]

THERE is no part of the law relative to awards, in which ſo much uncertainty and confuſion appear in the reported caſes, or on which ſo many contradictory judgments have been given, as on this reſpecting the umpire. The time when the power of the arbitrators ceaſes, and that of the umpire begins; the time when the umpire may be nominated, and the effect of his nomination, have, each in its turn, proved to be queſtions of ſufficient magnitude to exerciſe and diſtract the genius of Weſtminſter-Hall. The beſt way to diſcover ſome glimmering of light through this chaos of opinion will be, to conſider minutely the different forms of ſubmiſſion by which the appointment of an umpire is regulated. It has already been obſerved, that he is either appointed by the expreſs nomination of the parties at the time of the ſubmiſſion, or that the nomination is left to the diſcretion of the arbitrators, Theſe are the leading forms, of which each has its ſubordinate diſtinctions. In each, the time limited for the umpire to make his umpirage has ſometimes been the ſame with that limited for the arbitrators to make their award: in each, it is moſt uſual, and ſeems moſt correct, to prolong the time beyond that period.

IN the caſe of a prolongation of time, when the umpire has been either appointed by the parties, or nominated by the arbitrators, in conſequence of a power given them for that purpoſe in the ſubmiſſion, the authority of the latter is determined, and that of

[6] Harris v. Mitchell. 2 Vern. 485.

the former immediately begins on the expiration of the time allowed to the latter. Thus, if the ſubmiſſion be to certain arbitrators, and if they *cannot* agree, or be not ready to deliver the award, in writing, before the firſt of May, it be provided, that then J. S. ſhall be umpire, and make his umpirage by a certain day after; though the arbitrators never *ſpeak* of the matter, ſo that there can be no *diſagreement* between them, yet, if they make no award before the firſt of May, the umpire has authority, by his ſubmiſſion, to make his umpirage; for the words, "if they *cannot* agree," are not to be taken literally, but in the ſame ſenſe as "if they *do* not agree," or "if they make no award."[7]

But the point on which, in all the forms of ſubmiſſion, the greateſt difficulty has been felt, has been, to decide whether any conduct of the arbitrators, before the expiration of the time limited for their making their award, can authoriſe the umpire to make his umpirage *before* the expiration of that time.

The condition of a bond was, to ſtand to the award of J. S. and J. D. ſo as the award were made and delivered on the next day; and if they could not *then* agree, then to ſtand to the umpirage of J. N. ſo that he made and delivered his umpirage on the next day, or the day after that. On the argument of this caſe, we are told,[8] that Rolle held, that if it had been alleged, that the arbitrators, before the expiration of the next day, had refuſed to determine, and had deſerted their power, that would have enabled the umpire to

[7] Lumley v. Hutton, on demurrer. H. 15 Jac. B. R. Rol. Arb. P. 1.

[8] Per. Twiſden. 1 Mod. 275.

make his umpirage on the next day, the time limited for the arbitrators. But the judge, who cites this opinion, does it with diſapprobation; and obſerves, that Rolle muſt himſelf have altered his opinion, becauſe he reports his own judgment otherwiſe; which he certainly does, for he ſays, "that in ſuch a caſe, though it be alleged that the arbitrators could not agree on any award, and that they had altogether refuſed and neglected to make any award, yet the umpire cannot make his umpirage the next day; for that though the arbitrators could not agree at any time of the day, and neglected and refuſed to make an award, yet at *any* time after, during the day, they *might* have made an award; becauſe the words, "if they cannot *then* agree," imply, that they have to the laſt moment of the day, and it is a condition precedent to the power of the umpire extending to the whole day, and no act of the arbitrators can haſten it beyond the power; and if both the arbitrator and the umpire had power at the ſame time, both might make awards, and it could not be decided which ſhould prevail.[9]

According to this opinion, if in ſuch a caſe no further time had been given to the umpire, his appointment would have been void. And accordingly, where the ſubmiſſion was "to the award of certain arbitrators, and if they *diſagree*, then to the umpirage of J. S. ſo that the award or umpirage were made *before* the firſt of May;" in this caſe it was held, that the umpire could make no award, 'till a final diſagreement between the arbitrators, and that, as they had time to

[9] Barnard v. King, on demurrer. Rol. Arb. P. 6.

make their award, 'till any time before the day, there was no time given to the umpire, who therefore could make no award.[1]

From theſe caſes and others[2] under ſimilar circumſtances, decided on the authority of theſe, it appears evidently to have been the opinion of the courts in thoſe times that, where the umpire was named in the ſubmiſſion, if no further time was given to him than to the arbitrators, his nomination was a mere nullity, and he could, under no circumſtances, make an award; and that, where there was a prolongation of time, he could not interfere before the expiration of that allowed to the arbitrators.—It was not long, however, before this opinion began to be doubted; a ſubmiſſion was to arbitrators, with a proviſo, "that their award ſhould be made on or before the 29th of July; otherwiſe to an umpire, provided he ſhould make his umpirage before the 2d of Auguſt." The arbitrators refuſing to make an award, the umpire made his umpirage on the 29th of July; and though the court held that, in this caſe, the umpire could not make an award on that day, becauſe 'till the expiration of it the authority of the arbitrators ſtill ſubſiſted; yet Chief Juſtice Keeling ſaid, hypothetically, that had the ſubmiſſion been to A, "provided he made his award on or before the firſt of May; but if he declined it, then to B, as umpire, provided he ſhould make his umpirage the *ſame* day;"

[1] Barber v. Giles. Rol. Arb. P. 2. S. P. 2 Vern. 100.

[2] Copping v. Hurnard. 1 Sid. 428, 454. Sr. T. Raym. 187. 2 Keb. 462, 619. 2 Saund. 132.

an umpirage made on that day would have been good, on an averment of refuſal by the arbitrator.[3]

And in that report of one of the former caſes,[4] which ſeems to be the fulleſt and moſt accurate, the judgment of the majority of the court is ſaid to have proceeded rather on the defective manner of pleading, than on any decided opinion of the umpire having acted without authority.—The ſubmiſſion was to the award of two, provided it ſhould be made before Michaelmas, and if they could not agree then to the umpirage of a third, who ſhould decide within the ſame time. The plaintiff declared, that the arbitrators made no award, but that the umpire had made an umpirage, which was ſet forth; but becauſe it appeared to have been made within the time appointed by the arbitrators, judgment was given for the defendant, after a conſideration of two or three terms; and the principal reaſon was, that the averment in the declaration, "that the arbitrators did not nor could make any award," was not ſufficient, and that, tho' the arbitrators had not at the time of the umpriage made any award, yet they might have done it afterwards; and therefore the umpire had acted before it came to his turn; that the averment, that the arbitrators could not make any award, was idle, for nothing appeared to the court againſt the poſſibility of their making an award, if they had been willing; but that, had any fact been laid before the court, from which it muſt neceſſarily have appeared that the arbitrators could make no award, as if it had

[3] Luſh v. Crabbe. 19 and 20 Car. 2. 2 Keb. 263, 332.

[4] Copping v. Herauld, or Hurnard. 2 Saund. 129.

been ſhewn that one of them was dead, it might have been otherwiſe; and the whole court, except Twiſden, were of opinion, that, if it had been averred that the arbitrators had diſagreed as to the terms of their award, and had declared they would intermeddle no further with the ſubject, the umpire might have proceeded within the time.

And in a ſubſequent caſe,[5] the opinion was totally over-ruled, and thoſe caſes which proceeded on it denied to be law; the reaſon on which it was founded being conſidered as unſatisfactory: for it was ſaid, if the arbitrators did in fact make an award within the time allowed to them, that ſhould be conſidered as the real award; and if they made none, then the umpirage ſhould take place: and there was no confuſion as to the concurrence of authority with reſpect to the time. The umpire had no concurrence abſolutely, but only conditionally if the arbitrators made no award within their time.—This was meant to apply equally to the caſe where the umpire was confined to the ſame time with the arbitrators, and to that where a further time was given to him.

Where the nomination of the umpire is left to the arbitrators, it ſeems[6] anciently to have been the prevailing opinion, that they could not proceed to this nomination before the laſt moment of the day when their own authority expired. While that opinion prevailed, unqueſtionably the power given them in the ſubmiſſion, to nominate an umpire, when the latter

[5] Chaſe v. Dare. P. 33. Car. 2. Sir T. Jones 168.

[6] Vid. the caſes cited infra.

was expreſſly limited to the ſame time, muſt have been a mere nullity; and where further time was given him, an award could not poſſibly be made by him before the expiration of the time allowed the arbitrators, and therefore no queſtion could be raiſed on the ſubject.—This opinion however was relinquiſhed about the time of James the firſt; and a nomination of an umpire before the expiration of the time allowed to the arbitrators, was firſt ſupported in favour of thoſe ſubmiſſions where no additional time was given to the umpire; therefore where the ſubmiſſion was to two, with this clauſe, "Nevertheleſs if they do not end it within ten days, they ſhall nominate another, who ſhall end it within the ten days," it was held, that if they thought they could not agree within the ten days, they might appoint another, who might make an umpirage *within* the ten days.[7]

THE ſame indulgence was afterwards extended to the caſe, where further time was given to the umpire, as to the power of the arbitrators to nominate him before the expiration of their own time; thus where A and B ſubmitted to the award of J. S. provided his award ſhould be made on or before the laſt day of May next enſuing; and if he made no award on or before that day, then they ſhould ſtand to the award of ſuch perſon as ſhould be nominated by J. S. to be made before the tenth of June after: the arbitrator, *on* the laſt day of May, nominated an umpire, who made an

[7] Fyall v. Varier. M. 11. Jac. B. Godbolt. 241 Rol. Arb. P. 3.—S. P. Twiſleton v. Travers. 1 Lev. 174. cited 1 Ld. Raym. 671. 12 Mod. 512.

award before the tenth of June, and this was held to be good; though it was objected, that the arbitrator had the whole of the laſt day of May to make his award in;[8] but the reaſon given for the determination in theſe caſes is, that by the nomination of an umpire, the authority of the arbitrators is at an end, and that the reaſon which induced them to make the nomination, might be, that they felt themſelves unable to make an award within the time.—The judgment in this caſe has been ſince confirmed by ſimilar reſolutions; but the reaſon is ſomething different, being merely, that the arbitrators having made no award within the time, the umpirage ſhall be good.[9]

SOMETIME before this laſt caſe, occurred that of Jennings and Vandeput, of which the circumſtances were theſe:[1] The ſubmiſſion was to the award of four merchants, provided it ſhould be made and delivered in writing, before the twentieth of July following; and if they could not agree, then to the award of ſuch an umpire as they ſhould name, provided he made his umpirage in writing before the twenty-fifth of July following. The arbitrators made no award, on or before the 20th of July; but three of them, on the 18th, by their writing dated on that day, nominated an umpire, who took the charge upon him, and the fourth agreed to this nomination on the 21ſt.—The umpire made his umpirage before the 25th, according to the proviſo in the ſubmiſſion: an action being

[8] Watſon v. Clement. M. 24 Car. B. R. Rol. Arb. P. 5.

[9] Elliot v. Cheval. Lutw. 541, 544. Tr. 11 W. 3.

[1] Cro. Car. 263. T. 8. Car.

brought on the award, and a verdict given for the plaintiff, it was moved in arreſt of judgment, that the nomination of the umpire, before the 20th of July, was void; for that the arbitrators had the whole 20th day in which to make their award, and that they could not nominate an umpire till afterwards; but the objection was over-ruled, becauſe there was no compleat nomination until the agreement of the fourth arbitrator with the other three, and the writing was not to have effect till that time. But it was alſo obſerved, that if the nomination of the umpire had been compleat, before the expiration of the time for making their award, yet it would have been good, as no award was made by them within the time.

On the authority of this latter obſervation, Twiſden J. held[2] that where the arbitrators have authority to nominate an umpire, they may do it before the expiration of the time for making their award, and that ſuch nomination does not extinguiſh their authority. But, at the ſame time, he ſeems to have conſidered it as a neceſſary conſequence of the continuance of their authority, that the umpire has no power to interfere, notwithſtanding any refuſal of the arbitrators to decide the queſtion, till the time allowed to them be expired: and he went ſo far as to aſſert, that if ſuch a power were given to the umpire by the ſubmiſſion, it was void in its conſtruction, for the ſame reaſon as had been given in ſome of the preceding caſes, "that two could not have a ſeveral juriſdiction at the ſame time;

[2] In Delaval v. Maſchall. 29 Car. 2. 1. Mod. 274. Sr. T. Raym. 205. 1 Lev. 285. there called Denovan v. Maſcall

and that the arbitrators, though they had once declined their office, might reſume it whenever they pleaſed within their time."

In the caſe before the court, the condition of a bond was to ſtand to the award of two, who were to make their award on or before the nineteenth of February, with a proviſo in theſe words, " and if they do not make an award *before* the nineteenth of February, then I impower them to chooſe an umpire; and by theſe preſents bind myſelf to perform his award." The umpire choſen according to this power made his umpirage *on* the nineteenth of February, and the other judges then preſent[3] aſſenting to the principles laid down by Twiſden, concurred with him in deciding, that the umpirage was void.

However, notwithſtanding this caſe of Twiſden's, the idea ſtill continued for a conſiderable time, that by electing an umpire, before the expiration of their own time, the arbitrators gave up their authority to make an award.—The following caſe occurred late in the reign of William the third:[4] A ſubmiſſion was " to ſtand to the award of two, provided it ſhould be made on or before the twenty-ninth of June, and if they made no award, then to the umpirage of ſuch perſon as they ſhould chooſe," without limiting any time for the umpirage. The arbitrators chuſe an umpire on the 29th of June, who then made his award: it was objected, in the terms of former caſes, that the arbitrators had choſen the umpire too ſoon, becauſe they

[3] Rainsford and Morton.

[4] Mitchel v. Harris. 13 W. 3. 1 Salk. 71. 1 Ld. Raym. 671. 12 Mod. 512.

had chofen him before the determination of their own authority, they having the whole of the day, in which they might make their award; and that, notwithſtanding their having chofen an umpire, they might ſtill make an award, before the expiration of the time allowed to them.

But it was anſwered and reſolved, by the Chief Juſtice, with the concurrence of the reſt of the court, that by the ſubmiſſion, the arbitrators had an election to make an award, or to chooſe an umpire by ſuch a day, and that by doing the latter they had determined their election, and, together with that, their authority. But he diſtinguiſhed between this caſe, and that where the umpire is named in the ſubmiſſion; for that, in the latter, the umpire could not make an award before the expiration of the time allowed to the arbitrators.

And it is ſaid to have been ſettled in the Common Pleas, ſo late as the eighth of George the ſecond, that arbitrators cannot proceed on a reference, after they have once named an umpire, for that then their authority ceaſes, though the time for making their award be not expired.[5]

It is now however finally determined, that arbitrators may nominate an umpire before they proceed to conſider the ſubject referred to them; and that this is ſo far from putting an end to their authority, that it is the faireſt way of chooſing an umpire.[6] And it is in fact not unuſual for the parties to make it a condition

[5] Rep. Pract. in C. B. 116. Paſch. 8 G. 2. Danes v. Monſay, cited Vin. Abr. Arbit. P. 18.

[6] 2 Term Rep. 645

in the ſubmiſſion that the umpire ſhall be choſen by the arbitrators, before they do any other act.

THEY may alſo, when a further day is given to the umpire, and the choice left to them in general terms, chooſe him at any time *after* the expiration of their own time, provided it be before the time limited for him.[7]

CONSIDERING the intention of the parties, as the proper criterion on this ſubject, independently of decided caſes, there does not appear the ſemblance of a reaſon, why, in the caſe where no further time is given to the umpire than to the arbitrators, an umpirage made before the expiration of that time, ſhould not be ſupported, whether the umpire be named in the ſubmiſſion, or the choice of him be left to the arbitrators: it ſeems to be acting againſt the very policy of the law, in recognizing theſe domeſtic juriſdictions, to conſider that as nugatory which the parties have manifeſtly ſhewn to be their intention, unleſs that intention be contrary to ſome eſtabliſhed maxim of law plainly applicable to the ſubject, or repugnant to common ſenſe: what maxim of law is contradicted by a wiſh in the parties to have a diſpute decided within a certain limited time, either by two, or by a third, in caſe of a failure by the two, it is difficult to diſcover; and that ſuch a thing is repugnant to common ſenſe it will hardly be aſſerted.

THE concluſion from the whole of the caſes taken together, ſeems to be in favour of ſuch a ſubmiſſion, and of an umpirage made according to it.

[7] Burdet v. Harris. 3 Keb. 387. Freem. 378. Adams v. Adams. 2 Mod. 169.

WHILE the opinion prevailed that, by nominating an umpire the arbitrators renounced their office, and could not afterwards make an award, there was some foundation for a distinction between the case of an umpire expressly named in the submission, and that where his nomination was left to the arbitrators, when a further time was given to the former beyond that which was limited to the latter.—In the second case there could be no apprehension from that concurrence of authority so much dreaded in the first, and no inconvenience could arise from supporting an umpirage made before the expiration of the time allowed to the arbitrators; but now that that opinion is exploded, the distinction which was founded on it necessarily fails; that which is law in the one case must be considered as law in the other. It has been seen, that in the case where the umpire is expressly named in the submission, the old opinion, that the umpire could not make an umpirage before the expiration of the time allowed the arbitrators, was over-ruled, by the case of Chase and Dare: that case, though not always attended to in the subsequent cases, has not been directly contradicted; but the general current of decisions, since that time, has rather tended to confirm it. There does not appear any direct authority that, where the nomination of an umpire is left to the arbitrators, and a further time given him, he may, when nominated before the expiration of that time, make his umpirage within it. But there is a case which shews, that, had that question been decided, it would probably have been decided that he might.

H plaintiff and defendant had, in the beginning of December, entered into bonds of arbitration, with

a proviſo, that the arbitrators ſhould make their award by the 17th of January following; and if they ſhould not, then the parties bound themſelves to ſtand to the umpirage of ſuch perſon as the arbitrators ſhould indifferently chooſe, provided it ſhould be made by the firſt of February. They chooſe an umpire on the 24th of December, who made his umpirage on the 14th of January. The counſel for the defendant, who impeached the umpirage, confeſſed, that a caſe between Ogel and Cogdel, which in circumſtances exactly reſembled this, had been lately decided in the Common Pleas, and that the court had ſhewn an inclination to conſider the umpirage as binding; but he ſaid, that the judgment of the court had proceeded on another point. Not depending much on this circumſtance, however, he took an exception to the form of the affidavit on which the application was founded for enforcing the award: the court thought the exception fatal, and therefore ſaid they did not think it neceſſary to declare any final opinion on the point of law; yet, they ſaid, they had not much doubt but the umpirage might be maintained.[3]

Upon the whole, there ſeems to be little reaſon to doubt, that in all caſes where an umpire is introduced into the ſubmiſſion, whether he be there expreſsly named, or his nomination be left to the arbitrators; whether the time allowed to him be the ſame with that allowed to them, or extend beyond it, he may, unleſs in the latter caſe reſtrained by expreſs words, or by plain implication, make his umpirage

[3] Cowel v. Waller. Trin. 5 Geo. 2. 2 Barnard. K. B. 154.

before the expiration of the time allowed to the arbitrators.

THE only remaining queſtion on this point is, whether, in an action, or on a ſummary application to enforce this umpirage, it muſt not be ſhewn expreſsly to the court, that the arbitrators, before the umpire actually undertook the buſineſs, neglected, or refuſed, to proceed, or expreſsly renounced their authority: unleſs this was in fact the caſe, it is manifeſt the umpire could not take upon himſelf to decide, the meaning of the parties being clearly to have recourſe to an umpire, only in caſe of default in the arbitrators.—But it would ſeem, that the very circumſtance of no award having been made by the arbitrators within their time, is a foundation for preſumption, that they had actually declined making a deciſion on the ſubject, and that therefore an allegation, that they had in fact made no award, is ſufficient. And this opinion is apparently juſtified by the terms in which the judgment of the court is given, in the caſe of Chaſe and Dare, the leading caſe on this point.

FROM the opinion that the arbitrators, having once elected an umpire, had executed their authority, it has been thought to follow as a neceſſary conſequence, that if they elected one who refuſed to undertake the buſineſs, they could not elect another. In the caſe of Trippet and Eyre,[9] which occurred in the Common Pleas, in the firſt of William and Mary, this opinion was ſtrenuouſly maintained by the Chief Juſtice,[1] in

[9] Trippet v. Eyre. 1 W. and M. in C. B. 3 Lev. 263. 2 Vent. 113.

[1] Pollexfen.

oppoſition to the reſt of the court, who ſupported the contrary poſition. The reaſons on which he founded his opinion were theſe: firſt, he ſaid, the nature of an authority was ſuch, that, when once executed, it was determined, and the parties to whom it was given had no further power: the arbitrators, therefore, having once named an umpire, could not name another, though the firſt refuſed; becauſe, ſecondly, the perſon firſt named, though he had refuſed, might ſtill have proceeded if he had pleaſed; for no caſe could be put of a man, veſted with a bare authority, being concluded, by his refuſal, from afterwards executing it; and, therefore, if the ſecond were to be conſidered as well nominated, there would be a concurrence of authority in ſeveral perſons to make an award, which, on the authority of the old caſes of Barnard and King, and Barber and Giles, he ſaid the law would not permit.

THESE arguments were anſwered by the other three judges in this manner: that they were to conſider the penning of the condition of the bond, which was, "to ſtand to the award of ſuch umpire as the arbitrators ſhould nominate," which could not be confined to the circumſtance of barely naming a man, but muſt be taken to be an effectual nomination, by the perſon named accepting of the office; and his refuſal made it amount to no more than a bare propoſal to him, which did not conclude the arbitrators from naming another. It was true, that an authority once fully executed was determined, and could not be executed again; but the condition to ſtand to the award of ſuch perſon as the arbitrators ſhould name, could not, they ſaid, be with propriety called an authority; the terms imported rather a deſcription or qualification of the perſon who

was to make the award, than an authority conferred on the arbitrators; yet, admitting the condition to amount to an authority, there was no complete execution; and if the perſon authoriſed make a void, or ineffectual execution of his authority, he may execute it again. If a letter of attorney were to deliver ſeiſin, and the attorney delivered it within the view, which was not a good execution of his authority, that would not conclude him from delivering ſeiſin afterwards upon the land: a writ of poſſeſſion was executed by the ſheriff in delivering poſſeſſion of a houſe, and afterwards it was diſcovered that a perſon was hidden in a room of the houſe, on which he was turned out, and the ſheriff delivered poſſeſſion again, which was reſolved to be well.[2] It could never be the meaning of the parties, that if the arbitrators named a man who refuſed to take upon him the office of umpire, they ſhould be concluded from naming another.

With reſpect to the opinion, that the perſon firſt named might afterwards have taken upon him the umpirage, notwithſtanding his refuſal, it might be anſwered, that admitting that to have been the caſe, if he had done it before the effectual nomination of another, yet it was clear he could not have accepted the office of umpire, after ſuch effectual nomination: a ſecond nomination took away the effect of the firſt; and if, before they had named another, the firſt had taken on himſelf the office, that would have prevented them from proceeding to a ſecond nomination, and therefore there could be no concurrence of authority.

[2] Palm. 239.

As to the cafes cited by the Chief Juftice, relative to this latter point, thefe were cafes, in which the umpire was named in the fubmiffion, and therefore could not apply to the prefent; and had, befides, been expreffly over-ruled by that of Chafe and Dare. But, where the nomination was left to the arbitrators, without further time given to the umpire, it had been decided, according to the beft report of the cafe,[3] that, on an allegation that the arbitrators *refufed* to make any award, the umpirage would have been good—On thefe grounds judgment was given for the plaintiff—Yet, notwithftanding the good fenfe apparent in the reafoning of the three juftices, Lord Chief Juftice Holt held, not long after, that having once chofen an umpire, the arbitrators had executed their authority, and therefore could not chooſe another, though the firft refufed, unlefs the nomination was under a condition that he ſhould accept, for then he was no umpire 'till the condition was fulfilled: but Juftice Rokeby doubted the foundnefs of this diftinction; becaufe, he faid, every election implied a condition that the office ſhould be accepted.[4] Is it neceffary to add, that good fenfe, on the prefent queftion, is at variance with the opinion of the two Chief Juftices? That the felfifhnefs of parties, and their defire to defer the payment of a juft demand, ſhould prompt them to bring fuch a queftion before a court, is not furprifing; the wonder is, that grave and learned judges ſhould be able to perfuade themfelves that there was any ground for raifing it.

[3] Copping v. Hurnard. 2 Saund. 129.

[4] Reynolds v. Gray. 9 Will. 3. 1 Salk. 70. 1 Ld. Raym. 222. 12 Mod. 120.

Proceedings by Arbitrators.

When the perſon to whom the parties have agreed to refer the matters in diſpute between them has conſented to undertake the office, he ought to appoint a time and place for examining the matter, and to give notice of ſuch appointment to the parties, or to their attornies: if the ſubmiſſion be by rule of reference at *niſi prius*, the reſpective attornies ſhould ſet down the names of the witneſſes propoſed to be examined before the arbitrator on a piece of paper, and deliver it to the crier, who will ſwear them at the bar of the court: the parties alſo, if that be part of the rule, muſt be likewiſe ſworn; but if this precaution be neglected, both witneſſes and parties muſt be ſworn before a judge. It is uſual for the plaintiff's attorney to obtain the order of reference from the aſſociate or clerk at *niſi prius*, and attend the reference to have an appointment; and that being obtained, to ſubſcribe it to a copy of the order of reference, and ſerve it on the defendant or his attorney: but if he fail in theſe reſpects, the defendant's attorney may take the ſame ſteps which he ought to have done: and this frequently becomes neceſſary, when the plaintiff, by the circumſtances appearing at the trial, begins to apprehend that the matter may go againſt him.

The parties muſt attend according to the appointment, either in perſon or by attorney, with ſuch witneſſes, and ſuch documents, as they may think neceſſary to ſubſtantiate their reſpective claims. The arbitrator is then to examine thoſe witneſſes and documents, as far as he may find ſuch examination neceſſary or proper, to enable him to form a decided opinion on the merits of the caſe: he may alſo examine the parties

themſelves, or either of them, if he ſee good reaſon for ſo doing; or he may call for any other information he may judge neceſſary.

If the matter be long or intricate, or if he cannot ſatisfy himſelf with reſpect to the deciſion he ought to give, he may adjourn the matter from time to time, giving notice, as at firſt, of the time and place of every ſubſequent meeting;[5] provided, that when a time is limited in the ſubmiſſion, he make his award within that time.—Where no time is limited, he may, by the Engliſh law, take what time he pleaſes, unleſs either of the parties ſpecially requeſt him to make an award within a reaſonable time, and, in caſe of refuſal, revoke his ſubmiſſion; for the parties will not be bound by an award, after ſuch revocation.[6] Where a time is limited, he cannot make an award after that time, unleſs it be prolonged. When the ſubmiſſion is by the act of the parties, without the intervention of a court, that prolongation can only be by their mutual conſent. If the ſubmiſſion was by bond, conditioned to be made a rule of court, according to the ſtatute, or by reference at *niſi prius*; the ſubmiſſion, or the rule of reference, may firſt be made a rule of court; and then, if the parties conſent to have the time enlarged, the court will grant leave for the enlargement, as of courſe: when it is not ſuſpected by the party who undertakes to make the application, that there will be any oppoſition from the other, it is ſufficient to give notice to him of his inten-

[5] Diem proferre vel preſens, vel per nuncium, vel per epiſtolam poteſt. Ff. l. 4. t. 8. ſ. 27.

[6] Vid. ante, p. 32, 33.

tion; and, on an affidavit of that notice, the court will grant the rule; at leaſt, if the other party conſent by counſel, as is uſually the caſe.—But if any oppoſition be apprehended, the beſt way of proceeding for the party who wiſhes to enlarge the time, will be to apply, on an affidavit, ſtating the circumſtances on which he conceives the time ought to be enlarged, for a rule on the other party, calling on him to ſhew cauſe why it ſhould not: if the rule be ultimately granted, the party, on whoſe motion it was, muſt have it drawn up with the proper officer, and ſerve a copy of it on the arbitrator; and, on procuring from him an appointment of another time for hearing the parties, ſerve the rule, with a copy of the appointment on it, on the oppoſite ſide.

In the Roman law, it was not unuſual, for a clauſe to be inſerted in the ſubmiſſion, giving the arbitrator a power, in caſe of neceſſity, to prolong the time; and then he might do it without a new authority from the parties; but where no ſuch clauſe was inſerted he could not do it without their conſent.[7] The proviſions of

[7] Si arbiter, cum in compromiſſo cautum eſſet—ut poſſet diem proferre, diem protulit, Labeo ait, valere prolationem.——Hæc autem clauſula, *diem compromiſſi proferre* nullam aliam dat arbitro facultatem, quam diem prorogandi: et ideo conditionem primi compromiſſi neque minuere, neque immutare poteſt. Ff. l. 4. t. 8. ſ. 25.—— Arbiter ita ſumptus ex compromiſſo, *ut et diem proferre poſſit*, hoc quidem facere poteſt: referre autem contradicentibus litigatoribus non poteſt. S. 33.—Arbiter ex compromiſſo ſumptus, cum ante diem, qui conſtitutus compromiſſo erat, ſententiam dicere non poſſet, diem compromiſſi proferri juſſerat; alter ex litigatoribus dicto audiens non fuerat: conſulebatur, poſſetne ab eo pecunia

that law however were such, that it was not in the power of the arbitrator, from negligence or design, to deprive the parties of the benefit intended by their submission, by an unnecessary and unreasonable delay; for every man who took upon himself the office of arbitrator, might in general be compelled by the prætor to decide between the parties within a reasonable time; unless he was some superior magistrate actually in office, or unless he could shew some satisfactory reason why he ought not to be compelled: as if he would swear that he had not yet been able to form a decisive opinion on the subject; that he had been defamed by the parties; or that a mortal enmity had arisen between himself and them, or one of them: or that he was prevented by the infirmities of age; or by ill health since he had undertaken the office; or that he was prevented by the pressure of his own affairs, or his necessary attendance on the duties of some public employment; if no time was limited by the submission, he might at any time be compelled to fix a day, by the consent of the parties, for taking the matter into consideration.— If he excused himself on account of attendance on public duty, his excuse would have been admitted, if there was no clause in the submission empowering him to prolong the time, but if there was, then he might be compelled to prolong it. And even if there was no clause of that kind, yet if the time

ex compromisso peti? Respondi non posse: ideo quod non esset arbitro compromissum, *ut id haberet*. S. 50.—Arbiter nihil extra compromissum facere potest et ideo necessarium est adjici de die compromissi proferenda. Cæterum impune jubenti non parebitur. 32. n. 21.

limited was nearly expired, and the parties agreed to continue their ſubmiſſion to him, he could not otherwiſe be excuſed, on account of a public office, than by conſenting to decide under a freſh ſubmiſſion.—If the time was expired, without any award made, and the parties again agreed to refer the matter to the ſame perſon, then, if he could not ſhew, that it was not owing to any default of his, that the matter was not decided, he was obliged to undertake it anew; if he could, he was of courſe excuſed.[8]

[8] Et quidem arbitrum cujuſcunque dignitatis, Prætor coget officio, quod ſuſceperit, perfungi: etiamſi ſit conſularis: niſi forte ſit in aliquo magiſtratu poſitus, vel poteſtate, Conſul forte vel prætor: quoniam in hoc imperium non habet. Ff. l. 4. t. 8. ſ. 1. n. 3. Nam magiſtratus ſuperiore, aut pari imperio, nullo modo poſſunt cogi: nec intereſt ante, an ipſo magiſtratu arbitrium ſuſceperint. Inferiores poſſunt cogi. S. 4.—Proinde ſi forte urgeatur a Prætore ad ſententiam dicendam: æquiſſimum erit, ſi juret *ſibi de cauſa nondum liquere*, ſpacium ei ad pronunciandum dari. S. 13. n. 4.—Licet Prætor diſtricte edicat, *ſententiam ſe arbitrum dicere coacturum*, attamen interdum rationem ejus habere debet, et excuſationem recipere cauſa cognitâ: utputa ſi fuerit infamatus a litigatoribus; aut ſi inimicitiæ capitales inter eum et litigatores, aut alterum ex litigatoribus interceſſerint; aut ſi ætas, aut valetudo, quæ poſtea contigit, id ei munus remittat, aut occupatio negotiorum propriorum, vel profectio urgens, aut munus aliquod reipublicæ. S. 15. Et ſiqua alia incommoditas ei poſt arbitrium ſuſceptum incidat. S. 16.—Si compromiſſum ſine die confectum eſt: neceſſe eſt arbitro omnimodo dies ſtatuere, partibus ſcilicet conſentientibus, et ita cauſam diſceptari. Quod ſi hoc prætermiſerit, omni tempore cogendus eſt ſententiam dicere. S. 14.—Arbiter judicii ſui nomine, quod publicum aut privatum habet excuſatus eſſe debet a compromiſſo: utique ſi dies compromiſſi proferri non poteſt. Quod ſi poteſt, quare non cogat eum, cum poteſt, proferre, quod ſine ulla diſtrictione ipſius in-

THE Engliſh law has made no ſimilar proviſions againſt the neglect of duty in the arbitrator; but it has ſecured each of the parties againſt the voluntary procraſtination of the other, by permitting the arbitrator, on due notice given, to proceed without his attendance;[9] and if the arbitrator, from the nature of the caſe, ſhould find that inconvenient, it enables the willing party, in the caſe of a reference by rule of *niſi prius*, or by rule of court according to the ſtatute, to preſs his opponent by an application to the court for a rule to ſhew cauſe why he ſhould not attend the arbitrator, or why the latter ſhould not be directed to make his award, without ſuch attendance. Thus, where on a trial at *niſi prius* it appeared, that the demand of the plaintiff aroſe on a long and intricate account, which in almoſt every article was impeached by the defendant, who alſo ſet up a counter demand of the ſame nature by way of ſet-off; it was referred by conſent, and, the plaintiff neglecting to carry in his vouchers to the arbitrator, before the time limited for making the award, the time was ſeveral times enlarged, till at length the defendant, after upwards of ſix months

terdum futurum eſt? ſi tamen uterque velit eum ſententiam dicere, quamvis cautum non ſit de die proferenda, non alias impetret, quia judicium habeat, ne cogatur, quam ſi conſentiat denuo in ſe compromitti: Hæc, ſcilicet, ſi dies exitura eſt. S. 16.—Si, cum dies compromiſſi finiretur, prolato die, litigatores denuo in eum compromiſerint, nec ſecundi compromiſſi arbitrium receperit: non eſſe cogendum recipere, ſi ipſe in mora non fuerit, quo minus partibus ſuis fungeretur. Quod ſi per eum factum, eſt æquiſſimum eſſe, cogi eum à prætore ſequens recipere. S. 21. n. 5.

[9] Waller v. King. Ca. in Law and Eq. 2 pt. 63.

delay on the part of the plaintiff, made an application to the court, on an affidavit, ſtating theſe circumſtances, for a rule to ſhew cauſe why the plaintiff ſhould not carry in his vouchers within a certain day, and why the time ſhould not be further enlarged, or why, on the plaintiff's further default, the arbitrator ſhould not be directed to proceed on hearing the defendant alone; the rule was granted without heſitation, and the plaintiff, inſtead of ſhewing cauſe againſt it, peremptorily undertook to deliver in his vouchers within the time ſpecified.[1]

In this reſpect the Roman law is ſomething ſimilar to ours, for the party by not attending, and thereby preventing the arbitrator from making his award, forfeited the penalty of his ſubmiſſion.[2]

Where an umpire is appointed, and he has occaſion to interfere, his duty is the ſame as that of the arbitrators, and therefore it has been held, that he cannot proceed on their report, but muſt hear the whole matter from the parties themſelves, or at leaſt, by proper notice, give them an opportunity of being heard, in the ſame manner, as if the arbitrators had never examined the matter, or as if he himſelf had been originally appointed ſole arbitrator.[3] And if the ſubmiſſion be in the common form, the arbitrators cannot decide on one part of the caſe and leave the reſt to the umpire; for he has the whole authority

[1] Hetley v. Hetley, in the Exchequer. M. 1789.

[2] Siquis litigatorum defuerit; quia per eum factum eſt, quo minus arbitretur, pœna committetur. Ff. l. 4. t. 8. ſ. 27. n. 4.

[3] 9 H. 6. 9. Rol. Arb. P. 7.

which they had:[4] thus, where the arbitrators determined the whole of the matters referred to them, except one ſingle point, which related to an account of intereſt; and, in order to ſettle that, nominated an umpire, according to the power given them by the ſubmiſſion; the umpire took the facts to be as the arbitrators reported them, and made his umpirage on the intereſt account only; and on both theſe accounts, the court ſet the umpirage aſide.[5]

THE authority of this caſe, however, from the character of the reporter, as well as from the circumſtance of its appearing to have been decided in the abſence of the Chief Juſtice, and one of the other judges, is not much to be relied on; and the reaſons given for the deciſion are not very ſatisfactory. Where the arbitrators have agreed on the facts, and only differ on a ſingle point, either with reſpect to the law ariſing on thoſe facts, or the extent of the recompence to be made by one party to the other; or even where they agree on ſome facts, but differ with reſpect to others, unconnected with the firſt, there ſeems to be no good reaſon, why the umpire, if he think proper, may not take thoſe points on which the arbitrators agree, to be as they report them. The nature of his duty is only to make a final determination on the whole ſubject of diſpute, where the arbitrators cannot do it; and by adopting their opinion, as far as they agree, and incorporating it with his own on the other points, he effectually makes that final determination; in fact, it is not uncommon for an umpire to act in this manner.

[4] 39 H. 6. 11. b. per Priſot. Rol. Arb. P. 8.

[5] Taſker v. Keary. 2 Barnard. 317.

Let this practice, however, be right or wrong, yet, as the whole authority, both of the arbitrators and umpire, is regulated by the ſubmiſſion, and depends entirely upon it; if that be of ſeveral diſtinct matters, with a proviſo, that if the arbitrators ſhould, by the time limited, make no award of the whole, or of ſome parcel, then that the umpire ſhall have power, in the reſpective caſes, to make an award of the whole, or of the remainder. On ſuch a ſubmiſſion, it has been ſaid, that if the arbitrators make an award of part, and not of the reſt, then the umpire may make an award of the reſt; the whole put together ſhall be conſidered as one award, and good, if not inconſiſtent in its ſeveral parts, or at leaſt ſhall have the ſame effect as if the whole had been made by one; becauſe it was made according to the authority given by the ſubmiſſion.[6]

A case of more recent date confirms this reaſoning. The parties had referred all matters in difference to two perſons as arbitrators, or, in caſe of their diſagreement, to another as umpire; the arbitrators regularly heard all the evidence; but diſagreeing in their concluſion, ſtated the evidence to the umpire, on which he made his award without re-examining the witneſſes: after he had made the award, the party againſt whom it was made applied to him to hear the evidence himſelf, and on his refuſing, moved the court of King's Bench to ſet the award aſide: but the court thought that as no application had been made to the umpire to examine the witneſſes before he had made his award, the rule ſhould be diſcharged with coſts.[7]

[6] 39 H. 6. 11.b. per Priſot. Rol. Arb. P. 8.

[7] Hall v. Lawrence. 4 Term Rep. 589.

THOUGH the words in the ſubmiſſion, which regulate the appointment of an umpire, be not perfectly correct, but might, from the grammatical order in which they ſtand, ſeem to imply, that thoſe named as arbitrators, and he who is named as umpire, ſhould all join together to make an award, yet an award made by the firſt, without the participation of the latter, will be conſidered as ſatisfying the terms of the ſubmiſſion.

THE condition of an obligation was, to ſtand to the agreement of A and B, "being arbitrators choſen for that purpoſe, to end a controverſy between the obligor and obligee, and J. S. being umpire for both parties." In this caſe it was held,[8] that an award made by A and B, without J. S. was valid; for though the words appeared at firſt ſight uncertain, yet, as it was the common practice, it was ſaid, to appoint an umpire to make an end of the matter, if the arbitrators could not agree, this ſhould be ſo taken, and the words "J. S. being umpire," ſhould be taken as an affirmative nomination of him as umpire.

THE condition of a bond was, to perform the award which four, named as arbitrators, with the umpirage of a fifth, ſhould make, concerning the title of certain lands. The four named, as arbitrators, together with the fifth, as umpire, made an award concerning the premiſes: an objection was taken to the condition, that it was repugnant in itſelf; that an umpire was a judge by himſelf, and could not be joined with the arbitrators, their authority being diſtinct. Whether this ob-

[8] M. 12 Car. B. R. Oſborn v. Roydon, on a writ of error on ſuch judgment in the court of Kingſton upon Thames.—Rol. Arb. P. 6.

jection was considered as having any weight does not appear; for we have only the report of the argument of the defendant's counsel, without answer or judgment from the court. It may be observed, however, that it is perfectly immaterial, whether the parties formed an accurate idea of the distinct offices of an arbitrator and an umpire, their meaning having been clearly, that the first four, with the assistance and approbation of the fifth, should make an award, and that, being made by all five, satisfies their intention.[9]

It has indeed been adjudged, that "if the submission be to the award of four, and if they cannot agree, then to the umpirage of a fifth," the five cannot join to make one award; though it was, at the same time, admitted, that "if the submission be to four, *and* the umpirage of a fifth," an award made jointly by the five will be good.[1] But this case has since been held to be absurd, and that the joining of the arbitrators with the umpire is but surplusage; their approbation, which is shewn by joining with him, does not render the instrument, purporting to be his umpirage, in any degree less the act of his judgment.[2]

By the Roman law, where there was an unequal number of arbitrators, it was not necessary that all should concur in the award; the judgment of a majority was sufficient to satisfy the terms of submission, though no express provision was made to guard against a difference of opinion. That precaution was seldom taken, but in the case of a submission to two, and then it was

[9] Hunter v. Bennison.—Hardr. 43.

[1] 1 Bulst. 184.

[2] Soulsby v. Hodgson. 1 Bl. Rep. 463. East. 4 G. 3. K. B.

not unuſual to expreſs it in the alternative, to ſtand to the award of the one or the other: but it was held, that, in the common caſe of a ſubmiſſion to three, two could not make an award in the abſence of the third; becauſe the latter, had he been preſent, might have drawn over the others to his opinion.[3]

In this reſpect the law of England is ſomewhat different: for unleſs it be expreſſly provided in the ſubmiſſion, that a leſs number than all the arbitrators named may make the award, the concurrence of all is neceſſary; and where ſuch a proviſo is made, all muſt be preſent, unleſs the reſt having notice do not attend.

Matters in difference were, by conſent of parties, referred to three, with a proviſo that they, or any two of them, ſhould make an award before a certain time: an award being made by two in favour of the plaintiff, the defendant moved to have it ſet aſide; objecting, that two had not a juriſdiction without the third. On

3 In impari numero idcirco compromiſſum admittitur, non quoniam conſentire omnes facile eſt, ſed quia etſi diſſentiant, invenitur pars major, cujus arbitrio ſtabitur. Ff. l. 4. t. 8. ſ. 17. n. 6. Si, in tres fuerit compromiſſum, ſufficere quidem duorum conſenſum, ſi preſens fuerit et tertius: alioquin, abſente eo, licet duo conſentiant, arbitrium non valere; quia in plures fuit compromiſſum, et potuit præſentia ejus trahere eos in ejus ſententiam, n. 7. Sed ſi ita fit compromiſſum, *arbitratu Titii aut Seii fieri*: Pomponius ſcribit et nos putamus, compromiſſum valere, n. 4. Si plures arbitri fuerint, et diverſas ſententias dixerint:—licebit ſententiæ eorum non ſtari, ſed ſi major pars conſentiat, ea ſtabitur, alioquin pœna committetur: inde quæritur, ſi ex tribus arbitris unus quindecim, alius decem, tertius quinque condemnent cui ſententiæ ſtetur? et Julianus ſcribit quinque debere præſtari; quia in hanc ſummum omnes conſenſerunt, ſ. 27. n. 3.

ſhewing cauſe againſt this motion, it appeared, that the third arbitrator had ſufficient notice of the meetings of the other two, and might have attended if he would. The court obſerved, that it was ageed by both ſides, that if the third had attended, two might have made an award: two had a juriſdiction, but their meetings ought to be according to the rules of law. If the third had been preſent, his reaſons might have altered the opinion of the other two; he was not therefore to be excluded by fraud; nor were the two to act without the third's having an opportunity to be preſent; but where the third had ſufficient notice, as in the preſent caſe, and would not attend, the meeting of the two was regular, and their authority ſufficient.[4]

It was once a queſtion of great difficulty, whether, when the ſubmiſſion was by bond, without providing that the award ſhould be delivered or notified to the parties, it was incumbent on the arbitrator to give notice, or whether the parties did not forfeit their bonds by not taking notice of it at their peril. In the reign of Edward the fourth this queſtion was agitated, in a caſe remarkable for nothing elſe than the many laboured arguments on one ſide and on the other; and for its having been argued three times by all the judges in the Exchequer chamber, without their being able to come to any decided opinion. It may not, perhaps, be thought improper to ſtate the circumſtances of the caſe, and give a ſummary of the arguments, that it may appear with what difficulty many points have been eſtabliſhed, which afterwards appear ſo plain, that we

[4] Dalling v. Matchett.—Barnes 57.

are at a loſs to conceive how the mind could ever have entertained a doubt upon the ſubject.

The dutcheſs of Suffolk brought an action of debt on bond, to which the defendant pleaded, that the condition of the bond was, that if he, the defendant, ſhould ſtand to the award of the dutcheſs concerning all matters in difference between him and one B. H, then the obligation ſhould be void, provided that the award were made before the feaſt of All Saints, and written and ſealed with the ſeal of the dutcheſs, and delivered to the parties *demanding it*; that, in fact, on the fifth of January the dutcheſs awarded, that the defendant ſhould pay to B, on the fourth of March then following, twenty pounds, and in April another ſum, and ſeveral other things: that on the 10th of April next after the fourth of March before mentioned, the defendant hearing of the award having been made, went to the dutcheſs, and demanded it in writing, and had it; and that he had performed it in all things except the payment of the ſum which ought to have been paid on the fourth of March, and inſiſted that he ought to be excuſed of that, becauſe he had not notice. Againſt the plea, it was argued, that it would be againſt reaſon that the arbitrators ſhould be driven to give notice to the parties, becauſe they had no advantage, but only a trouble; that it was the buſineſs of the parties to be conſtantly attendant on the arbitrators, and to know when the award was made; that if it was a hardſhip, the defendant ſhould forfeit his obligation, by not performing that which he did not know; it was his folly to bind himſelf in that manner: that a man might be bound by his own deed to take notice, at his peril, of many things to which reaſon and the law

would not compel him: that if a man were bound by obligation to make amends to another for all treſpaſſes committed by him, it was not neceſſary for that other to give him notice of them, he muſt take notice of them at his peril: that if one man bound himſelf to attend another every time the other came to a certain manor, it was not requiſite that the other ſhould give him notice every time he went to the manor, he muſt take notice of it at his peril: that if a man were bound by recognizance to appear on a particular day before the King himſelf, wherever he ſhould be in England, which means to appear in the King's Bench, which is ambulatory, and attendant on the King, he muſt be on that day wherever the court ſhall be, without notice from any body: that if I take a houſe for a term of years, I am only bound to repair it; and if it fall down from the weakneſs of the timber, I am not bound to rebuild it; yet, if I had bound myſelf to leave the houſe in as good a condition as I found it, I muſt rebuild it: that if I command my ſervant to buy certain goods for me, or conſtitute a man my factor for that purpoſe, in ſuch a caſe I ſhall be charged for whatever goods they buy, though they never come to my hands, and though I have no notice of the purchaſe: that if I make a man my bailiff of my manor, and give him power to let the lands of it, in that caſe, if he let an acre, and do not give me notice of it, if I enter into that acre, and trample down the graſs, the leſſee ſhall have an action of treſpaſs againſt me, though I had no notice that it was let: ſo, if a man were bound to pay a certain ſum to another after the death of his father, and the father ſhould die in a deſert, without the knowlege of the ſon, yet the latter muſt take notice

of it, and pay the money, otherwiſe the bond will be forfeited: ſo, it was ſaid, if a man were arreſted, and found bail to the ſheriff for his appearance on the day of the return of the writ, in that caſe, if the defendant became ſick, ſo that he could not have him at the day, yet they ſhould not be excuſed to the ſheriff.

Beside theſe arguments, from the analogy of other caſes it was urged, that an award was, by common intendment, a matter of notoriety, of which the party muſt, at his peril, take notice; and if that were not ſo, then any one, when he perceived that the award was likely to go againſt him, might conceal himſelf, in order to avoid notice.

In favour of the plea it was argued, that an award was in the nature of a judgment, which could not be given but in the preſence of the parties; it was therefore the duty of an arbitrator, like a good and upright judge, to give notice to the parties when he was to make his award; and that, if one of them avoided that notice, it might on the other ſide be ſhewn that he abſented himſelf for the purpoſe: and with reſpect to the aſſertion, that he was bound by his own act to take notice of the award, and that it was his folly if he ſubmitted to the arbitration of one who would not give him notice; all the caſes cited on the other ſide differed materially from this.—The man who was bound to make amends to another for treſpaſſes committed by him, cannot inſiſt on notice of any treſpaſs, becauſe they muſt neceſſarily be within his own knowledge.—He who was bound to attend another every day he ſhould come to a certain manor, was bound to take notice of the day, which it was in his power to do, becauſe it was a matter that muſt be notorious; but,

in the preſent caſe, the arbitrator might make his award, and put it in his pocket.

As to the recognizance in the King's Bench, every man might eaſily know a thing ſo notorious as the place to which the court moved; and, by general intendment of law, every man was bound to know it. The caſe of the houſe falling down had no analogy to this, for it could not poſſibly fall down without the tenant's knowlege. Thoſe of the ſervant, the factor, and the bailiff, admitted of one anſwer: he who acts by another acts by himſelf, and therefore he muſt be ſuppoſed to know what the other has done. The caſe of the man who was bound to pay a ſum of money at the death of his father could not be compared to this; there was nobody who was bound to give him notice, or could do it; he muſt take notice of it himſelf, becauſe every man's deed was to be conſtrued moſt ſtrongly againſt himſelf: but, in the preſent caſe, the obligation could not be forfeited before the award was made; and, as to him, it was as if not made, till he had notice of it. In anſwer to the caſe of bail to the ſheriff, it was ſaid, that if the defendant were ſick, they were excuſed, for that his *death* before the return was clearly a diſcharge of the bond: it was, however, denied on the other ſide, that the caſe of ſickneſs was like that of death. It might, however, have been ſaid, that they might ſtill have brought him into court, notwithſtanding he was ſick; and now that it is underſtood, that nothing but entering bail above will ſatisfy the bond for appearance, they may enter an appearance though the defendant be ſick.

Beside anſwering theſe caſes, ſeveral were inſiſted on as being more analagous to the preſent queſtion,

which all tended to ſhew, that a man ſhall not be bound by any thing of which he had not notice, nor to do a thing impoſſible; and it was ſtrongly urged, that it was impoſſible for a man to pay money at a day which had elapſed before he had notice of the award; and this was compared to the caſe of an award of money to be paid on a day before the ſubmiſſion, which it was confeſſed was void. That caſe, however, is clearly diſtinguiſhable from the preſent; for there the thing is impoſſible from the beginning, but here it becomes impoſſible only from the want of notice at the time of making the award: and indeed the whole queſtion ſeems to depend more on principles of general reaſoning, than on any analogy it may bear to caſes cited on the one ſide or on the other.

The impoſſibility of performance for want of notice ſeems altogether out of the queſtion, for the defendant, by a conſtant application to the arbitrator, might have known *when* the award was made, if the latter had been willing to inform him; and if, in fact, ſhe had made her award, but either ſaid that it was not made, or refuſed to deliver it till the day of performance was paſt, that would clearly have excuſed him. But the true criterion is, whether, from the nature of his duty, the arbitrator be bound to give notice of the award to the parties, without any condition of that kind expreſſed in the ſubmiſſion; or whether the parties themſelves muſt, at all events, take notice of the time when he makes the award; and conſidering the ſubject in this light, theſe obſervations ſeem to have weight.

The duty of the arbitrator, we have ſeen, is to give notice to the parties at what time and place he will ſit to hear their complaints, and that it is their duty to

attend him on ſuch notice; but it is abſurd to ſuppoſe that they are to go of their own accord every day to know when he will be attended, or whether he has yet made his award. When, indeed, the day appointed in the ſubmiſſion is come, it may be reaſonable that they ſhould call upon him, becauſe that day is within their own knowledge; and if the award be not then made, his power is at an end. The true diſtinction, therefore, ſeems to be this, that if the award be made before the day limited in the ſubmiſſion, the party ſhall not be bound by any thing awarded to be done before that day, unleſs he has notice, but that he muſt take notice, at his peril, of any thing ordered at the day.[5] And there is an aſſertion of counſel, to which the court aſſent, that though the arbitrator make his award *before* the day, yet, if he give no notice of it to the party, it is void.[6] This was ſaid, in a caſe of debt, on a bond for the performance of an award, provided it were made before a certain feaſt, without any proviſo that it ſhould be notified to the parties; but it had not its effect, becauſe the want of notice was not properly pleaded, the defendant having, in his plea, denied that any award was made before the day appointed; and, on an award made before that day being ſet forth in the replication, having rejoined that he had no *notice* of the award before that day, which the court held to be a departure from his plea.

It is true, that in the eighteenth of Edward the fourth, it is ſaid by three juſtices, "that where an award is made, the parties muſt take notice of it at

[5] 8 E. 4. 1. Br. 37. [6] Keilway, 175.

their peril, and that this had been before adjudged in the King's Bench in the fame King's reign."[7] It is true, that in the firſt of Henry the ſeventh, to an action on a bond, the defendant ſhewing the condition to have been to ſtand to an award, provided it were made *before* a certain day, pleaded that the arbitrators gave him no notice of any award made *before* that day, and that the court held clearly "that this was not a good plea, becauſe having bound himſelf to *perform* the award, he was *bound* to take *notice* of it," and that they diſtinguiſhed between this caſe and *that* where a proviſo was added to the condition of the bond, that the award ſhould be made; for "that then ſuch a plea would have been good."[8]

It is alſo true, that Lord Coke adds the authority of his name to theſe caſes, and ſays, "that ſo is the law without queſtion;" but he is clearly miſtaken when he ſays, "that this is againſt a ſudden opinion in the eighth of Edward the fourth:"[9] no decided opinion was in fact given at that time, notwithſtanding the number of times the caſe was argued, and the variety and extent of the arguments.

The ſame doctrine is alſo conſidered as eſtabliſhed law in many other books;[1] but that may well be admitted without impeaching the ſoundneſs of the diſtinction before made. The caſes in which the point is decided ſeem, from the manner of pleading, to have related to a breach of the award in ſome thing awarded

[7] Brian, Vaviſor, and Cateſby. 18 Ed. 4. 18 a.
[8] 1 H. 7. 5.
[9] 8 Co. 92. b.
[1] Vid. Cro. El. 97. Cro. Car. 132, 133.

to be done *after* the day appointed for making it; and the other books, in which the doctrine is recognized, only mention it as eſtabliſhed law, without reference to any particular caſe.

THE Roman law did not impoſe ſuch a hardſhip on the parties, for the arbitrators were not only obliged to give them notice of the time when they intended to make their award, but to pronounce it in their preſence; and, if on notice given for that purpoſe, either of the parties did not attend, he forfeited the penalty of the ſubmiſſion, but no award could be made,[2] unleſs it had been ſpecially expreſſed in the ſubmiſſion, that ſentence might be pronounced in the abſence of one or of both of the parties.

WHERE the ſubmiſſion is not by bond, there can be no queſtion but the arbitrators muſt give notice of their award, otherwiſe the parties are not bound to performance; and indeed this ſeems, by the whole tenor of the arguments in the caſe of a ſubmiſſion by bond, to be taken for granted: and where the ſubmiſſion *is* by bond, it has long been the practice to guard againſt the conſequences of want of notice, by inſerting a proviſo in the condition, not only that the award ſhall be made, but that it ſhall be delivered to the parties by a certain day; and then the bond will not be forfeited by non-

[2] Si quis litigatorum defuerit; quia per eum factum eſt, quo minus arbitretur, pœna committetur. Proinde ſententia quidem dicta non coram litigatoribus non valebit; niſi in compromiſſis hoc ſpecialiter expreſſum ſit, ut vel uno, vel utroque abſente, ſententia promatur: pœnam autem is qui defuit, committit, quia per eum factum eſt, quo minus arbitretur. Ff. l. 4. t. 8. ſ. 27. n. 4.

performance, unleſs the party not performing had notice: and if ſuch a ſubmiſſion be made by the plaintiff on one ſide, and two defendants on the other; if the award be made before the day, and delivered to the plaintiff and one of the defendants, but not to the other, this will not be ſufficient: ſo, neither, it is ſaid, will it be ſufficient, where there are two perſons on one ſide, and two on the other, and where the proviſo is, that the award be delivered to each of the parties, if it be delivered to one on one ſide, and one on the other, for "that the word *party* is to be intended of the whole party."[3]

But it has been adjudged, that "a proviſo that the award ſhould be *delivered* by a certain day is ſatisfied by the pronouncing of a parol award, unleſs it was alſo provided, that it ſhould be in writing. Thus, in Dyer,[4] a caſe is reported where the ſubmiſſion was in theſe words, "ſo that the award be made and *delivered* before a certain day:" to an action on the bond, the defendant proteſting that no award was made, pleaded that the arbitrators did not deliver in *writing* any award; but judgment was given againſt him, becauſe he had not denied that a *parol* award was pronounced; for the court held, that a *parol* delivery was ſufficient.

But whether a proviſo, in theſe words, "ſo that the award be made and *ready* to be delivered," can be ſatisfied by a parol award, has been thought a queſtion of more difficulty.

[3] Hungate's caſe. 5 Co. 103. Cro. El. 885. Mo. 642. pl. 885.

[4] 218. b. Paſch. 3 El. Rot. 927. The record of this caſe is ſaid to be in the new book of entries, tit. Delt. pl. 10. fol. 126.

An action was brought on a bond for performance of an award, in the condition of which it was provided, that it ſhould be made and *ready* to be delivered to the parties, or ſuch of them as ſhould be ready to receive it: the defendant pleaded that no award was made; the plaintiff replied, and ſet forth a *parol* award, averring, that it was *ready* to be delivered according to the terms of the condition: to this the defendant demurred, inſiſting, that the words "ready to be delivered," neceſſarily imported that the award was to have been in writing; and, in ſupport of this, his counſel cited a caſe which he ſaid had been lately decided in the Common Pleas, and was directly in point,[5] and inſiſted much on Hungate's caſe before mentioned from Coke. On the other ſide it was urged, that the word "delivery" was to be underſtood according to the ſubject to which it was applied; that in common language a meſſage was ſaid to be delivered, and a man was ſaid to deliver himſelf well, when he expreſſed his thoughts with elegance and grace; that if the proviſo had been, that the award ſhould be made in writing, the delivery muſt have been manual; but no ſuch reſtraint being impoſed in the preſent caſe, an oral delivery was ſufficient, and in ſupport of this was cited the caſe in Dyer, which, it was ſaid, was full in point.

It may be obſerved, however, that that caſe is *not* ſo directly in point as was here alleged, the proviſo there being, that the award ſhould be *delivered*, not that it ſhould be *ready* to be delivered. The court, at firſt, ſeemed inclined to think, that a parol award

[5] Wood v. Ardiſt. Tr. 1 Ann.

could not properly be the object of delivery, but that the words muſt be underſtood of a delivery in writing: afterwards, however, Lord Chief Juſtice Holt, having looked into the caſe in Dyer, and the record of it in Coke's Entries, ſaid they were very ſtrong authorities for the plaintiff; that the award might have been made in the abſence of the parties, and delivered, or pronounced over again in their preſence; and if ſo, what *may* be *delivered*, may be *ready* to be delivered. Powell J. however, ſaid, that if the words had been only, "ſo as it be made and delivered," he would have taken the delivery to be notice of the award given to the parties; but that *ready* to be delivered muſt be taken to mean a delivery in writing: and he aſked, if iſſue had been taken on the readineſs of delivery, how it ſhould have been tried? Holt agreed that he ſhould have been of the ſame opinion with Powell, if the queſtion had been new; but ſaid, that finding ſo *clear* an authority, and *ſome* reaſon for that authority, he could not depart from it: ſo ſaid Gould; but they all ſaid they would be well informed of the caſe in the Common Pleas, and no judgment was given.[6]

WHETHER an arbitrator could change an order he had once made, was a queſtion much agitated among the Roman lawyers; and it ended in this diſtinction, that where the ſentence pronounced, from the nature of it, and the terms in which it was conceived, amounted to an abſolute determination of the whole ſubject of diſpute, he could not alter it, though he afterwards found reaſon to believe he had erred, becauſe, by pro-

[6] Oates v. Bromell. 6 Mod. 160.

nouncing ſuch a ſentence, he had executed his office, and ceaſed to be arbitrator; but if it comprehended only ſome interlocutory matter, he might alter it, becauſe his authority ſtill continued.[7]

And where the ſubmiſſion comprehended different ſubjects of controverſy, diſtinct and independent of one another, his power to change a ſentence pronounced with reſpect to one of them, without having yet decided on the others, was held to depend on the form of the ſubmiſſion; if by that it was provided, that he ſhould pronounce ſentence on all the ſubjects together, then he might change his opinion given only on one, becauſe he had not, in fact, yet decided the whole queſtion ſubmitted to him; but if it was provided that he ſhould give his opinion ſeparately, then he could not change it, becauſe this was the ſame thing as if there had been ſeveral ſubmiſſions.[8]

[7] *Dicere ſententiam* exiſtimamus eum, qui eâ mente quid pronunciat, ut ſecundum id diſcedere eos a tota controverſia velit. Sed ſi de pluribus rebus ſit arbitrium receptum: niſi omnes controverſias finierit, non videtur dicta ſententia; ſed adhuc erit â prætore cogendus. Unde videndum erit, an mutare ſententiam poſſit? et alias quidem eſt agitatum, ſi arbiter juſſit *dari*, mox vetuit: utrum eo, quod juſſit, an eo quod vetuit, ſtari debeat? et Sabinus quidem putavit, poſſe. Caſſius ſententiam Magiſtri ſui bene excuſat: et ait, Sabinum non de ea ſentiſſe ſententia quæ arbitrium finiat, ſed de præparatione cauſæ; ut puta ſi juſſit litigatores Calendis adeſſe, mox Idibus jubeat, nam mutare eum diem poſſe: cæterum, ſi condemnavit, vel abſolvit, dum arbiter eſſe deſierit, mutare ſententiam non poſſe. Quia arbiter, etſi erraverit in ſententia dicenda, corrigere eam non poteſt. Ff. l. 4. t. 8. ſ. 19, 20.

[8] Quid tamen ſi de pluribus controverſiis ſumptus eſt nihil ſibi communibus, et de una ſententiam dixit, de aliis non-

SOMETHING ſimilar to this queſtion appears in our books, though it be not ſtated exactly in the ſame form.—If two ſubmit to the award of ſeveral, concerning all manner of debts, treſpaſſes, demands, and diſputes, provided that it be made by a certain day, and the arbitrators make their award on one day with reſpect to the debts, on another with reſpect to the treſpaſſes, and on a third with reſpect to the other things; the parties are not bound to perform any part but the firſt, ſay all the juſtices but Moyle, and not even that, ſays Priſot.[9] And Rolle, in abridging the caſe, adopts the latter opinion.[1] But it is admitted, that the arbitrators may conſult together, on one day, on one point, and make up their minds upon it, and ſo of another point, another day, and ſo of a third, on a third, provided they do not make their award of any part before the reſt.[2]

UNLESS, however, it muſt be underſtood, that, in the former caſe, the parties are ordered to perform the things ſeparately awarded, before the whole award be made, this ſeems to be a diſtinction unſupported by any eſſential difference; for if the arbitrators have in fact made up their minds on one point, one day, and

dum? nonquid deſiit eſſe arbiter; videamus igitur an in primâ controverſia, poſſit, mutare ſententiam de quâ jam dixerat? et multum intereſt, de omnibus ſimul ut dicat ſententiam, compromiſſum eſt, an non. Nam ſi de omnibus, poterit mutare: nondum enim dixit ſententiam, quod ſi et ſeparatim, quaſi plura ſunt compromiſſa: et ideo, quantum ad illam controverſiam pertinet, arbiter eſſe deſierat. Ff. l. 4. t. 8. f. 21.

[9] 39 H. 6. 12.

[1] Rol. Arb. H. 1. 2.

[2] 39 H. 6. 12. Bro. Arb. pl. 29. Rol. Arb. H. 3.

on another, another day, it is in effect the ſame thing as if they had reduced their opinion into the form of an award on the ſeveral points, on the ſeveral days, and the whole award muſt be taken to have effect only from the time when the whole award is finiſhed. The only good reaſon that can be alleged againſt their making one part at one time, and another, at another time, is, that on hearing the whole, they may ſee reaſon to alter their opinion on ſome of the parts. If in fact they ſee ſuch reaſon, they may change their award on the particular parts; and if they make no alteration, it is a proof they are ſatisfied with their firſt determination on each particular point.

Reſervation of their Authority.

But that which bears the neareſt reſemblance to this queſtion in the Roman law, is the doctrine relative to the reſervation of authority. The object of every reference is the attainment of a final and certain determination of the controverſies referred; a reſervation of any point for the future deciſion of the arbitrator is inconſiſtent with that object: and therefore it is eſtabliſhed as a general rule, that ſuch a reſervation is void;[3] as if the arbitrators order that one of the parties ſhall give ſecurity to the other for the payment of a ſum of money, but reſerve to themſelves the power of conſidering the propriety of that ſecurity; or if they reſerve to themſelves the power of explaining any doubt that may ariſe on the meaning of any part of the award.[4] So, it has been reſolved, though not till after many arguments,

[3] 19 E. 4. 1. Rol. Arb. H. 4. vid. Selby v. Raſſel. 12 Mod. 139.

[4] 2 Rol. Rep. 214, 215.

that, if they reſerve to themſelves the power of altering the whole, or part of the award, this is clearly void.[5]

It was awarded, that one of the parties ſhould pay ſo much money to the other, and that if more ſhould appear to be due to the latter, and due proof made of it within a month, then he ſhould alſo pay that. The ſubmiſſion contained a proviſo, that the award ſhould be made before a certain day, which was before the end of the month. Rolle, in his abridgment of this caſe, ſays, that this ſeems a void award, becauſe it is not final. But he adds a doubt, "the iſſue being, that the arbitrators made no award, and that found in favour of the plaintiff; that the judgment in the Common Pleas was confirmed "on the words of the ſubmiſſion, admitting that part to be void, becauſe it was not averred, that there was any doubt about it before the ſubmiſſion." What was the judgment of the Common Pleas does not very diſtinctly appear by this account, nor what is meant by "admitting *that* part of the award to be void:" but it is moſt probably meant to be expreſſed, that the judgment of the Common Pleas was in favour of the plaintiff, and that that part only which related to the payment of a further ſum on due proof was void, the reſt of the award being valid.[6]

A Submission reſpected the privilege of cutting down trees in a certain wood, and it was awarded, as to part, that the defendant ſhould leave ſo many of the trees to the plaintiff for houſebote and hedgebote: as the arbitrators, on advice with counſel at the aſſizes,

[5] 2 Rol. Rep. 189, 214. Palmer 110, 146.
[6] Rol. Arb. H. 13.

ſhould appoint; it was held, that this was a reſervation of authority, and therefore void.[7]

But an award, "that one of the parties ſhall pay to the other 105l. on a certain day; and if he do not pay it then, that he ſhall pay at a future day 110l. is ſaid to be good; becauſe it is not a reſervation of a future authority, but a penalty to enforce payment at the day, which is within the power of the arbitrators.[8]

A Submission to an award contained a proviſo, that it ſhould be made before Michaelmas, and the arbitrators awarded, that the one ſhould pay 5l. to the other for ten loads of hay, and ſeveral other ſums for other things; and further awarded, that if he who was to pay ſhould diſprove the receipt of the commodities, or ſhould give better proof of the payment of ſome ſums of money, before the arbitrators, or one of them, before the ſaid feaſt of Michaelmas; then ſo much as ſhould be ſo proved, ſhould not be paid at that feaſt.[9] In two reports, both apparently of this caſe, it is agreed, that this is a reſervation of authority; but they do not agree in ſtating the effect of it on the whole award. Rolle ſays, that the reſervation is void, "but that the former part of the award being good ſhall ſtand, becauſe the authority of the arbitrators was determined." But Hobart ſays, that the court took time to adviſe, "whether this reſervation ſhould fruſtrate all reaching to the award, or whether the award ſhould ſtand, and the reſervation be void."

[7] Thinne v. Rigby. Cro. Jac. 315.

[8] Royſton v. Ryall. 2 Jac. Rol. Arb. H. 8.

[9] Beckwith v. Warley. 16 Jac. Rol. Arb. H. 9. Warley v. Beckwith. Hob. 218.

If it be a rule in the conſtruction of awards, that they ſhall be certain and definite, it would ſeem in this caſe, that the reſervation rendered the whole award void, becauſe it renders it altogether uncertain; and this is conſonant to what is laid down in another book,[1] as a general diſtinction, "that where the arbitrator reſerves a power over any thing ſubmitted, the award is not final, and therefore it is void; but where the thing over which he reſerves the power is not within the ſubmiſſion, the power is void, and the award, as far as that extends, void alſo; but in the thing ſubmitted, the award is final and peremptory."

The following ſeems an example of the application of the firſt part of this diſtinction: a queſtion, relative to certain currants, was ſubmitted, and an award was made in theſe terms; that if the defendant could make it appear, before the 20th of December, that the currants were delivered to the plaintiff, then the arbitrators would make a further award within fourteen days after, if they could agree; otherwiſe, that J. S. as umpire, ſhould conclude it in ſeven days after; that the plaintiff and defendant ſhould ſtand to the award of the arbitrators, if they made one, and if they made none, to the determination of the umpire. But if the defendant, before the 20th of December, ſhould ſhew no ſuch proof, it was, in that caſe, awarded, that the plaintiff ſhould not pay for the currants, but ſhould be free from any further claim on that account; and it was further awarded, that the defendant ſhould pay to the plaintiff 19l. 12s. before the firſt day of January

[1] Palmer. 110, 146.

after, if no award ſhould be made before that time for the currants.—This award was held to be altogether void, for that the firſt part was void, being partly a reſervation, and partly a delegation of authority; and if an award had been made, according to the power reſerved or delegated, it was not intended that the defendant ſhould pay to the plaintiff the 19l. 12s. and the latter clauſe depending on the firſt, which was void, muſt alſo be void.[2]

A DISTINCTION is alſo made between the reſervation of a further *miniſterial* act, and of a *judicial* one; the former, it is ſaid, may be reſerved, the latter cannot; all the judicial authority of the arbitrators determines with the time limitted for them to make their award; but they may reſerve a further *miniſterial* act to be done either by themſelves or by a ſtranger, at any ſubſequent point.—However well founded this diſtinction may be, it is not always very ſucceſsfully exemplified by the caſes in the books. It is ſaid, if one of the parties aſſert, that he has a receipt for a certain debt claimed by the other, the arbitrator may award, "that if he produce the receipt before ſuch a day, after the time limited for making the award, then he ſhall be diſcharged of that debt; but if he cannot produce it by that day, then he ſhall pay the money;" for that this is only the reſervation of a miniſterial act. But, with deference to the authority of the book, it is neither the reſervation of a miniſterial nor of a judicial act, but an award, of which the final determination depends on a future contingency, and therefore the

[2] Brown v. Dalton. M. 9 Car. B. R. Rol. Arb. H. 10.

queſtion, whether it be good or bad, depends on another principle, which requires, that all awards ſhould be final and certain.—On the ſame diſtinction it is endeavoured to ſupport the authority of a caſe, cited from the year books,[3] but which is not to be found there. This was the caſe of a ſubmiſſion of a diſpute concerning a horſe; one of the parties inſiſted, before the arbitrator, that the horſe was worth 20l. the other that he was only worth 10l. The arbitrator awarded, that if J. D. ſhould ſay that the horſe was worth 20l. then the one ſhould pay to the other 20l. if 10l. then only 10l. and this, it is ſaid, was held to be a good award, as being only the reſervation of a miniſterial act; had there been other ſubjects of diſpute, and the arbitrator, in order to ſatisfy his own mind about the amount of damages to be given, had referred to J. D. to ſet a value on the horſe, this might have been conſidered only as a miniſterial act; but as the caſe is here ſtated, the only queſtion referred to his deciſion appears to have been, to ſettle the value of the horſe, and by referring to the judgment of J. D. he delegated his whole authority, which he had not power to do.[4]

NEITHER have the courts been always unanimous in their opinion of what ſhould be conſidered as a judicial, and what as a miniſterial act.—An umpire ordered that the defendant ſhould deliver to the plaintiff certain goods particularly ſpecified; and that the plaintiff ſhould deliver to the defendant certain other goods alſo by name: but that if any of the goods, on either ſide

[3] 30 H. 6. tit. Arbit.

[4] Vid. for theſe two caſes, 2 Rol. Rep. 189, 214.

awarded to be delivered up, ſhould be loſt or miſlaid, then the party, on whoſe ſide the deficiency ſhould be found, ſhould pay to the other the value of them, according to the appraiſement of the umpire and the arbitrators. It was diſputed, whether this ſhould be conſidered as a judicial or a miniſteral act. Trevor, Chief Juſtice, and Blencow, Juſtice, were of opinion, that it was the former; Powell, Juſtice, that it was the latter.[5] If the valuation of the horſe, in the laſt caſe, could be conſidered as a miniſterial act, ſurely this appraiſement ought to have been ſo too.

A SUBMISSION was, of diſputes concerning certain land, and it was awarded, that one of the parties ſhould pay a certain ſum of money to the other for every acre, to be meaſured by an able meaſurer in the preſence of the arbitrators, at the rate of ſo many yards to the pole. This was held clearly to be only a miniſterial act, to aſcertain the quantity of the land.[6]

THE ſubmiſſion by the litigating parties, to the deciſion of an individual, ariſes from the confidence which they repoſe in his integrity and ſkill, and is merely perſonal to him; it is therefore inconſiſtent with the implied intention of the ſubmiſſion, that the arbitrators or umpire ſhould delegate any part of their authority to another, or refer to him the deciſion of any point on which they find any difficulty to decide themſelves. On this principle it is eſtabliſhed as a general rule, both in the civil and the Engliſh law, that a delegation of authority is void.[7]

Delegation of their Authority.

[5] Cockſon v. Ogle. 13 W. 3. C. B. L tw. 550.

[6] Hunter v. Benniſon. Hardr. 43.

[7] Puto vere non committi, ſi dicat *ad judicem de hoc eundum, vel ſe vel alium: in ſe vel in alium compromittendum.* Nam

Therefore, if inſtead of deciding the matters ſubmitted to him, the arbitrator direct that the parties ſhall ſtand to the award of a third perſon, this is void.[8] So, if he award, that the defendant ſhall account before ſuch auditors as the plaintiff ſhall aſſign, and that if he be found in arrears, he ſhall pay the ſum found, and that each ſhall then go quit againſt the other.[9] And the ſame rule prevails where the delegation is neceſſarily implied, as where it is expreſſed; and therefore if the arbitrators leave the matter incomplete, the defect cannot be ſuplied; as if they award, that one of the parties ſhall give a bond to the other without mentioning in what ſum, the award is nugatory, becauſe neither the plaintiff nor the defendant can determine the ſum.[1]

So, where it was awarded, as to part, that the defendant, at ſuch a time and place as the plaintiff ſhould appoint, ſhould make a public confeſſion of his offence for the battery of the plaintiff: this was held to be void, becauſe the arbitrator ought to have determined the time and place, and not to have left their appointment to another, more eſpecially to the plaintiff, who

et Julianus impune non pareri, ſi jubeat *ad alium arbitrum ire*, ne finis non ſit—ne propagentur arbitria, aut in alios interdum inimicos agentium tranſferantur, ſuâ ſententiâ finem controverſiæ imponere cum oportet: non autem finiri controverſiam, cum aut differatur arbitrium aut in alium tranſferatur;—idque delegari non poſſe niſi ad hoc compromiſſum ſit, ut arbiter ſtatueret, cujus arbitratu ſatiſdaretur. Ff. l. 4. t. 8. ſ. 32. n. 16. In compromiſſis arbitrium perſonæ inſertum, perſonam non egreditur. S. 45.

[8] M. 8 Ed. 4. 27 Ed. 3. 20 Brooke 44. b. Jenk. 129 H. 37 El. inter Lower et Lower Rol. Arb. B. 20 H. 11.

[9] 30 H. 6. Fhbt. 52. b. Rol. Arb. I. 9.

[1] Samon's caſe. Cro. El. 432. 560. 78.

thereby became judge in his own cauſe; for though in general, time and place are but circumſtances, yet in ſuch a ſatisfaction as this, they make the moſt conſiderable part.[2]

But where arbitrators award the ſubſtance of the thing, and leave only the form to be ſettled by another, or the amount of a ſum to be calculated, this is not ſuch a delegation of their authority as to vitiate the award; for the ſame diſtinction between a judicial and a miniſterial act prevails with reſpect to the delegation as the reſervation of authority.—Thus, an award, "that one ſhall pay 10l. to the other, and, for ſecurity of payment, ſhall be bound in an obligation, by the advice of counſel," is good, for it is incident to the award, that counſel ſhould make the payment ſure.[3] So, if it be awarded, that on payment of 10l. by the one, the other ſhall give a general releaſe, as fully and beneficially as counſel ſhall adviſe, this is good; for it gives no power to the counſel to do a judicial act; their authority is only miniſterial. The arbitrator has directed the extent of the releaſe, by ordering it to be general, and the counſel is only to ſee that it be ſo drawn as to have that effect.[4] So, if in order to decide the title to certain land between the parties, the arbitrators award, that an action ſhould be conceived by the advice of certain counſel; for this is not referring the matter to their judgment on the ſubſtance, but

[2] Glover v. Barrie. 10 W. 3. C. B. Lutw. 1597. 1 Salk. 71.

[3] 19 Ed. 4. 1 Rol. Arb. H. 5.

[4] Tr. 1650, Cater v. Startut on demurrer. Rol. Arb. H. 7. Style 217, 218.

on the form.[5] But a diſtinction in theſe caſes ſeems formerly to have been made between ſuch a reference to counſel, and to a ſtranger. When made to the latter, it was ſaid to be the delegation of a judicial act, and therefore void;[6] but this ſeems to be a diſtinction without any foundation.[7]

On this point there is ſome uncertainty in the Roman law; ſome holding, that a reference to another to ſettle the form which ſhould give effect to the ſubſtance of the award, was generally valid; while others held that it was void, unleſs it was made in conſequence of a power given for that purpoſe in the ſubmiſſion.[8]

That arbitrators, where they award the ſubſtance of the thing to be done, may refer it to another to ſettle the manner in which it ſhall be put in execution, is now fully ſettled by a determination of Lord Hardwicke's.

By the conſent of plaintiff and defendant in ſeveral cauſes, depending in Chancery, reſpecting partnerſhip tranſactions, an order was made, that all matters in difference between them, relating to their joint dealings, or otherwiſe, ſhould be referred to arbitration. The

[5] 8 Ed. 4. 11. a. Brooke 37.

[6] 19 Ed. 4. 1. Rol. Arb. H. 6. Emery v. Emery. Cro. El. 726.

[7] Jenk. 128.

[8] Quod ſi hoc modo dixerit, ut arbitrio Publii Mævii fundus traderetur, aut ſatiſdatio detur: puto parendum eſſe ſententiæ. Idem Pedius probat--finem controverſiæ imponere oportet; non autem finiri controverſiam cum arbitrium in alium transferatur, partemque ſententiæ eſſe, quemadmodum ſatiſdetur, quibus fidejuſſoribus; idque delegari non poſſe, niſi ad hoc compromiſſum ſit, ut arbiter ſtatueret, cujus arbitratu ſatiſdaretur. Ff. l. 4. t. 8. ſ. 32. n. 16.

arbitrators made an award, and the plaintiff filed a bill againſt the arbitrators and the defendant, to have an inſpection of all the accounts from which the arbitrators had framed their award, that the award might be ſet aſide; and that the defendant might account generally for all tranſactions during his partnerſhip with the plaintiff.—The defendant pleaded the reference by conſent, and that the arbitrators had, within the time limited, made their award, which he ſet forth, and which, among other things, contained the following orders: Having given, in a ſchedule to their award, an account of ſeveral debts and effects owing to the partnerſhip, to the amount of 5094l. 14s. 2d. they awarded, that theſe debts and ſecurities ſhould belong in moieties to the plaintiff and defendant, and, that they might be the better collected, they recommended to the parties to conſent, that an order ſhould be made by the court, for the appointment of a proper perſon, converſant in mercantile affairs, to collect in the ſame for their joint uſe; and, in caſe either of the parties ſhould refuſe their conſent, the arbitrators made it their humble requeſt to the court to order the ſame, as being the moſt probable means of preventing future litigations between the parties.

They awarded and declared that, excluſively of the above matters, there was then due, from the plaintiff to the defendant, the ſum of 9194l. 19s. 6d. on a fair balance, which they awarded to be paid by inſtalments of 2000l. at a time, with intereſt at 4l. per cent.

And laſtly they awarded that, on payment of the 9194l. 19s. 6d. by the plaintiff, his executors, &c. to the defendant, his executors, &c. they, the ſaid plaintiff, and defendant, their reſpective executors and admi-

niſtrators, ſhould mutually execute and deliver to each other reſpectively a good and ſufficient releaſe and diſcharge, by which the ſaid parties ſhould reſpectively releaſe to each other all matters in difference between them, relating to their joint dealings; and that the form of the releaſe ſhould be previouſly ſettled by one of the maſters of the court, in caſe the court ſhould be pleaſed to give directions for that purpoſe.

To the firſt part of this award, it was objected, that the recommendation of the arbitrators to the parties to conſent, that an order ſhould be made by the court for the appointment of a proper perſon to collect the debts due to the partnerſhip, was a deputation to a third perſon to do an act which ought to have been done by themſelves, and that therefore they had not properly exerciſed their own judgment. To the ſecond part it was objected, that the arbitrators ought to have ſettled the releaſe themſelves, and not to have left it to be done by a maſter under the order of the court.

With reſpect to the firſt objection, Lord Hardwicke ſaid, he had entertained great doubts; but as the juſtice of the determination was the material thing, and as the award anſwered the purpoſe of parties, in ſubmitting to a reference, if it was good to a common intent, he was now of opinion it was ſufficient; for that in caſes of this ſort, in mercantile affairs, which could not admit of certainty, it would be too nice to defeat awards on objections of this kind. It had been ſaid, that the recommendation to the parties by the arbitrators, to conſent that an order ſhould be made by the court for the appointment of a receiver, and in caſe of the parties refuſal, the requeſt to the court to make ſuch an order, was a delegation of their power. If it were

indeed a delegation of their power, the award was void for the whole; but it had been anſwered, that what the arbitrators had done in this reſpect was, at moſt, but ſurpluſage; yet his Lordſhip obſerved, if it affected the juſtice of the caſe, with reſpect to the things ſubmitted, it would not be merely ſurpluſage. But it ſeemed to him, that this recommendation was not compulſory on the parties, but left them at large; and if they did not approve of the ſcheme, it was ſurpluſage only, and not a delegation of their power.

The true queſtion was, whether the award, that the debts due to the partnerſhip, when received, ſhould be divided in moieties between the parties, was ſufficient? and he was of opinion it was, for the arbitrators had no controul over the debtors themſelves, who might, if they pleaſed, pay the whole to one of the partners.

To lay it down as a general rule, he ſaid, that arbitrators muſt particulary point out the method in which their award ſhould be carried into execution, would be too nice, and ſuch a rule would overturn a great number of awards; if, in ſuch a caſe as the preſent, one of the parties ſhould releaſe a debt due to the partnerſhip, that would be a breach of the award, and the other party could have no remedy but by action, or bill, to have the award carried into execution, and then no award could ever be effectual to finiſh diſputes between contending parties.

In the preſent caſe, he could think of no other method the arbitrators could have purſued: it had indeed been ſaid, that they might have directed the parties to give ſuch perſon, as they ſhould appoint, a letter of attorney to get in the debts; but this would not have been adviſable, becauſe if the perſon ſo de-

puted had proved insolvent, it would have been doubtful whether the arbitrators themselves would not have been liable.

As to the last objection, he said, the award had fully and completely described what the parties should do, with respect to giving releases, and then followed the reference to the master to settle the form. If the award had said, that the release should be settled by the court first, and then the arbitrators would consider whether they should order a release between the parties, this would have been very different, and he should have thought it a delegation of their power, and the award consequently void; but here they had awarded releases, and only left it to the court to give directions to a master to settle the form; and it would be very extraordinary, when he thought the arbitrators had done all that was necessary, and when there was no occasion for the court to interfere, yet, because they had said they left it to the court, therefore he must interpose merely for the sake of making that a bad award, which, without his interposition, would have been good.[9]

After the introduction of references at *nisi prius*, there could be no question but the arbitrator had a jurisdiction over the costs of the action, as well as over the subject of the action itself, unless it was provided by the form of the submission that the costs should abide the event, or that each party should pay his own costs; or unless there was some other restriction with respect to the costs: because unless there was some restriction, the costs accruing before the reference was

[9] Lingood v. Eade. 2 Atk. 501. (515).

within the ſubmiſſion; and in this caſe, if the arbitrator incorporate the coſts with the damages, the court cannot interfere; neither can they interfere when they are given ſeparately, unleſs they are exceſſive, and then only by conſidering their exceſs as an evidence of undue practice.[1]

It afterwards became a queſtion, however, whether the arbitrator, inſtead of aſcertaining the coſts himſelf, could refer it to the proper officer of the court to tax the coſts; and it was ſettled, on debate, that he might, the courts comparing awards to judgments at law, to which, though certainty be requiſite, yet the officers always tax the coſts; and therefore, where the arbitrator gives ſuch directions, this does not defeat the award.[2] Where the arbitrator awards coſts of ſuit to be taxed, without ſaying by whom, it muſt be underſtood that they are to be taxed by the proper officer of the court, that being the ſettled mode of taxing coſts by the law of the land.[3] If he award ſimply that one of the parties ſhall pay coſts, without ſpecifying the ſum, or ſaying "to be taxed," the court will ſupply it, by ordering them to be taxed by the proper officer.[4] But if he award coſts of the ſuit, and of the reference, the court will order only the coſts of ſuit to be taxed, becauſe the officer cannot judge of the coſts of the reference.[5]

[1] Shephard v. Brand. B. R. H. 54.

[2] D. per Ld. Hardwicke. 2 Atk. 519. (504). Winter v. Garlick. 1 Salk. 75. 6 Mod. 195. 2 Keb. 231. Nutt v. Long. B. R. H. 181.

[3] Barnes, 56. vid. 1 Sid. 358.

[4] Dudley v. Nettleford. Str. 737. Thomlinſon v. Arriſkin. Comyns. 330.

[5] Barnes, 58.

But the arbitrator cannot refer the ſettlement of coſts to any perſon who is not the proper officer of the court, becauſe the court have no controul over any other perſon. In an action on an arbitration bond, the plaintiff, in his replication, ſet forth an award, "which, among other things, ordered, that the defendant ſhould pay ſuch a ſum to the plaintiff as J. W. and J. G. ſhould ſettle for coſts, having regard to ſuch coſts as are uſually taxed by maſters in Chancery," and averred, that the ſaid J. W. and J. G. ſettled the ſum of ſo much to be due for coſts, in which he had regard to ſuch coſts as are uſually taxed by maſters in Chancery, and aſſigned a breach in the non-payment of that ſum. To this the defendant demurred, and the demurrer was held good; for though ſeveral caſes were mentioned, in which coſts were awarded, it was anſwered, that theſe were all of coſts to be taxed by the proper officer of the court, or coſts generally, which meant the ſame thing; that this was reaſonable enough, becauſe the reference to the proper officer made an end of the matter, as he was ſubject to the authority of the court, who, if he erred, could amend his errors ſummarily; but they had no controul over a ſtranger. And it having been argued, that this taxation was a miniſterial, not a judicial act, and that arbitrators might delegate a miniſterial act; it was anſwered, that this was not merely a miniſterial act, and appeared not to be ſo, from the terms in which the award was penned; for the referees were directed to have regard to ſuch coſts as the maſter would allow, which was an act of judgment: reference to an officer was merely miniſterial, to a ſtranger judicial.[6]

[6] Nutt v. Long. B. R. H. 181. Str. 1025.

NEITHER can the arbitrator award a ſum of money in certain, and alſo the coſts of ſuit depending in an inferior court, becauſe, ſays the book, there is no mode of aſcertaining them; in this caſe, therefore, he muſt neceſſarily aſcertain them himſelf.[7]

IF, in any point, the arbitrators order that the parties ſhall ſtand to the award already made on that ſubject by former arbitrators, this is not ſuch a delegation as to defeat the award; for it only expreſſes their approbation of what others have done, and has the ſame effect as if they had repeated the former award as from themſelves, in ſo many words.[8]

So, an award, "that one before made by another arbitrator ſhall ſtand in all other reſpects, except, that whereas in the former award one was to pay 10l. at Michaelmas, he ſhall have 'till Chriſtmas to pay it," is good; for this is the ſame thing as if, without referring to the former award, they had repeated it with this alteration.[9]

At what time they may make their Award.

WHEN by the ſubmiſſion a time is limited for making the award, it ſeems hardly neceſſary that it ſhould have been judicially decided that it might be made on the day of the ſubmiſſion, yet a deciſion to that purpoſe is gravely reported.[1] It has alſo been found neceſſary to declare judicially, that the arbitrators may make their award in the evening of the day preceding that before which it is limited to be made, provided they do it before midnight.[2]

7 6 Mod. 195. Salk. 75.
8 39 H. 6. 11. a. per Priſot.
9 Semb. ſed quære. Car. Rol. Arb. H. 12. Tr. 3 Jac. dubitatur.
1 Latch. 14.
2 Withers v. Drew. Cro. El. 676.

WHERE it is provided in the ſubmiſſion that the award ſhall be made *on* or *before* a particular day, and the time is afterwards enlarged by conſent *until* a ſubſequent day, the award may be made *on* the latter.

THUS where the proviſo was, "that the award ſhould be made *on* or *before* the firſt day of Michaelmas term," and the time was enlarged on motion by conſent "*'till* the firſt day of Hilary term;" the award was made *on* the firſt day of Hilary term, and an application being made to ſet it aſide, on the ground of its having been made out of time, the Lord Chancellor [3] ſaid he thought it impoſſible to impeach it on this foundation; that this was an enlargement of the time in *ſtatu quo*, and muſt, therefore, *include* the firſt day of Hilary term, which, it was manifeſtly meant, ſhould be *ſubſtituted* inſtead of the firſt day of Michaelmas term; and being ſatisfied with the award on the circumſtances of the caſe, he ordered it to ſtand.[4]

WHERE a queſtion ariſes as to the extent of the matters *actually* ſubmitted to the deciſion of the arbitrator, the latter may be admitted as a witneſs to prove what matters were or were not laid before him.[5]

[3] Thurlow.

[4] Knox v. Simmonds, 3 Brown. Ch. Rep. 358.

[5] Vid. Ravee v. Farmer, 4 Term Rep. 146.

CHAP. V.

The AWARD *or* UMPIRAGE.

EVERY award in writing, in order to be enforced by law, muſt be on a ſuitable ſtamp; and the Court of King's Bench has lately decided, that if it be under ſeal it muſt be on a *deed* ſtamp, the ſealing, as they held, conſtituting it a deed.[1] But if it ſhould happen to be on an *improper* ſtamp, the court will not on that account ſet it aſide, but leave the party in whoſe favour it is made at liberty to procure the proper ſtamp to it, by paying the penalty.[2]

IT has been laid down as a general rule, that the arbitrator is a judge, from whoſe ſentence there is no appeal, and that no other tribunal can inquire into the equity of his deciſion.[3] This is equally the general doctrine of the civil and the Engliſh law; but in both

[1] I do not find the caſe reported, nor do I recollect the name of it.

[2] Preſton v. Eaſtwood, 7 Term Rep. 95.

[3] Arbitrorum genera ſunt duo; unum ejuſmodi, ut ſive æquum ſit ſive iniquum, parere debeamus; quod obſervatur cum ex compromiſſo ad arbitratum itum eſt. Ff. l. 17. t. 2. ſ. 76, 77, ante page 73. —Qualem autem ſententiam dicat arbiter, ad Prætorem non pertinere, Labeo ait dummodo dicat quod ipſi videtur. Ff. l. 4. t. 8. ſ. 19.

it is guarded with particular reſtrictions, derived from the nature of the authority conferred on the arbitrators, and the implied engagement under which the contending parties bind themſelves by their ſubmiſſion.[4]— The chief of thoſe reſtrictions is that which requires that the award ſhould be conſiſtent with the terms of the ſubmiſſion, the whole authority of the arbitrators being derived from thence.[5]

The Award muſt be according to the Submiſſion.

THE principal diſtinction in the Roman law is that between what is called a full and what is called an incomplete ſubmiſſion. A full ſubmiſſion was that which comprehended all kinds of controverſy, and every ſubject of diſpute between the parties; an incomplete ſubmiſſion extended only to ſome particular matter; yet, if the meaning of the parties was to confine the authority of the arbitrator to one ſubject, though by inadvertency the ſubmiſſion was full, the intention of the parties prevailed over the ſtrict form of the ſubmiſſion, and they were not concluded, by a general award, from ſuing one another, on all thoſe cauſes of action which were not intended to be ſubmitted.[6] It

[4] Vid. ante page 4. Quæſitum eſt de ſententia dicenda? et dictum, non *quamlibet:* licet de quibuſdam variatum ſit. Ff. l. 4. t. 8. ſ. 32. n. 16.

[5] *De officio Arbitri* tractantibus ſciendum eſt, omnem tractatum ex ipſo compromiſſo ſumendum: nec enim aliud illi licebit, quam quod ibi, ut efficere poſſit, cautum eſt,— Non ergo quodlibet ſtatuere arbiter poterit, nec in re qualibet; niſi de quâ re compromiſſum eſt; et quatenus compromiſſum eſt. Ff. l. 4. t. 8. ſ. 32. n. 15.

[6] Plenum compromiſſum appellatur, quod *de rebus controverſiisve compoſitum eſt*: nam ad omnes controverſias pertinet. Sed ſi forte de unâ re ſit diſputatio, licet pleno compromiſſo actum ſit, tamen ex

was alſo a rule, that though the ſubmiſſion was full, yet it comprehended only thoſe diſputes which exiſted at the time of the ſubmiſſion, and that the arbitrator could not decide on any thing which had ſubſequently ariſen.[7]

THE ſame diſtinction between a full and a particular ſubmiſſion is alſo recognized in the Engliſh law; but that is far from being alone ſufficient to explain the great multiplicity of caſes that occur: it will therefore be neceſſary to compare the terms of the award with that of the ſubmiſſion under which it is made, arranging the caſes according to the particular branches of the general rule to which they immediately refer.

Muſt not extend to any Matter beyond the Submiſſion.

THE firſt branch of the general rule is, that the award muſt not extend to any matter not comprehended within the ſubmiſſion.

THUS, if the ſubmiſſion be confined to a *particular* ſubject of diſpute, while there are other things in controverſy between the parties, an award which extends to any of theſe other things is void, as far as it reſpects them.[8]

BY a ſubmiſſion of all *actions* perſonal, the arbitrators have no power to make an award of any thing in which the parties have only a *cauſe* of action. Thus, in caſe

cæteris cauſis actiones ſupereſſe: id enim venit in compromiſſum, de quo actum eſt ut veniret. Sed eſt tutius ſi quis de certa re compromiſſum facturus ſit, de ea ſola exprimi re in compromiſſo. Ff. l. 4. t. 8. ſ. 21. n. 6.

7 De his rebus et rationibus et controverſiis judicare arbiter poteſt, quæ ab initio fuiſſent inter eos, qui compromiſerunt, non quæ poſtea ſupervenerunt. Ff. l. 4. t. 8. ſ. 46.

8 Vid. 2 Mod. 309.

of ſuch a ſubmiſſion, an award "that one of the parties ſhall convey E, the ſervant of the other, to London," is void, unleſs it appear that an action was depending relative to this ſervant.[9]

But had the ſubmiſſion been of all actions and *complaints*, this would have comprehended *cauſes* of action; and the award, with reſpect to the conveyance of the ſervant, would have been within it.

If the ſubmiſſion be of all actions perſonal, ſuits and complaints, the word "perſonal" extends to ſuits and complaints, and conſequently an award of all actions real is beyond the ſubmiſſion; but if it be of all actions perſonal, *and* ſuits and complaints, the word perſonal does not extend to the latter part, and an award on ſuch a ſubmiſſion may comprehend actions real.

Yet, where the ſubmiſſion is only of things real, the award may order a ſum of money to be given in ſatisfaction. The ſubmiſſion was concerning the right and poſſeſſion of a manor; it was awarded, that one of the parties ſhould releaſe his right in the manor to the other, and that the other ſhould pay him twenty pounds: it was held, that though the ſubmiſſion was only of things real, yet the award of the twenty pounds was good.[2]

It ſeems alſo to have been the prevailing opinion in the ſame caſe, that where the ſubmiſſion is of things perſonal, yet the arbitrator might award ſomething in the realty in ſatisfaction; this may perhaps be well

[9] 36 H. 6. 11 b. Bro. Arb. pl. 27, 50.
[1] 9 Ed. 4. 44. a. Fhbt. 52. a.
Rol. Arb. D. 6. 7.
[2] Id. ibid.

founded, where the party to whom the thing in the realty is awarded in ſatisfaction is ordered to give up ſome perſonal demand, to which otherwiſe he appears to be intitled; for in ſuch a caſe the award will amount to the order merely of a bargain and ſale, but I doubt much whether it can be ſupported in the general terms in which it is here conceived. An award of *money* in ſatisfaction of any injury is good, becauſe money is the univerſal ſtandard by which damages are eſtimated and property valued: but it ſeems to be altogether unreaſonable to permit an arbitrator, to order, without reſtriction, the transfer of any property, or the performance of any particular act, unleſs that article of property, or that particular act, have an immediate connection with the ſubject of diſpute. Thus, where the ſubmiſſion relates merely to a treſpaſs, or to a claim of any ſpecific kind, it would be highly unreaſonable to leave it to the caprice of an arbitrator to order one of the parties to deliver to the other a particular horſe, or a particular article of dreſs, or to releaſe his right in a certain piece of land, which were ſeverally unconnected with the diſpute ſubmitted to him.[3]

THERE are, however, one or two caſes which ſeem to convey an idea that, in modern times, an award of ſomething elſe than money, in ſatisfaction of a treſpaſs, would be conſidered as valid.

To an action of treſpaſs, the defendant pleaded a ſubmiſſion by himſelf and the plaintiff to the award of J. S. who ordered that the defendant ſhould provide a

[3] Vid. 9 Ed. 4. 44. Rol. Arb. B. 11. Dict. cont. per Moyle.

couple of fowls, at his mansion-house in Old Bedlam, to be eaten by the plaintiff and his friends, on Wednesday or Thursday in a certain week, in satisfaction of a trespass; he averred that he had, on Thursday in the week appointed, provided two fowls, but that the plaintiff and his friends had not come to eat them.—No objection was made to this award, because it ordered something to be done which had no relation to the subject of the submission; but it was objected, that being an award of a *collateral* thing, it could not be a good bar without execution; the word "collateral" being here used in contradistinction to the payment of money; and that therefore the defendant ought to have given notice to the plaintiff on which of the days, and at what hour he would provide the fowls. But the court thinking the matter of too ludicrous a nature to deserve a solemn decision gave no judgment, but recommended that it should be compromised.[4]

In another case it is said, that, by the better opinion, an award, "that the defendant should make a submission before the mayor of a town, for an injury done to the plaintiff," is good; but this was not the point directly in question; for the arbitrator had awarded, that the defendant should make this submission at any time and place, at the discretion of the plaintiff, which the court held to be clearly bad, because it made the plaintiff judge of the satisfaction to be given to himself; time and place in such a case making a principal circumstance.[5]

[4] Purflow v. Baily. 6. Mod. 221. 2 Ld. Raym. 1039. 1 Salk. 76.
[5] 1 Sid. 12.

NOTWITHSTANDING the concluſion which might be drawn from theſe caſes, it is conceived, that an award of any thing, not connected with the ſubject of diſpute, is not binding on the parties.

IF two ſubmit to the award of a third perſon, all *demands* between them, without more; the word "demand" implies all matters between them, concerning the lands of both parties, which are the ſubject of variance.[6]

IF the ſubmiſſion be, "of all cauſes of action, ſuits, debts, reckonings, accounts, ſums of money, claims, and demands;" an award "to releaſe all bonds, ſpecialties, judgments, executions, and extents," is within the ſubmiſſion; for as all debts are ſubmitted, the arbitrators have power to make their award concerning the debts themſelves, and of courſe to award a releaſe of every thing by which they are ſecured.[7]

WHERE the ſubmiſſion is "of all debts, treſpaſſes, and injuries," an award "to releaſe all actions, debts, duties, and demands," does not exceed the ſubmiſſion; for the word "injuries" is ſufficiently comprehenſive to imply all "demands."[8]

IF the ſubmiſſion be, "of the right and title of a manor, and other lands and tenements, and of all manner of actions and demands," an award, "that one of the parties ſhall deliver to the other a deed of annuity, by which forty ſhillings a year were granted to the wife of the former, to be taken out of the manor,"

[6] Keilway 99. vid. 1. Ld. Raym. 115 acc.

[7] Roberts v. Marriot, 2 Saund. 190. [8] 3 Bulſtr. 312.

is binding on the huſband, becauſe, it is ſaid, he is intitled to it in right of his wife.[9]

If the ſubmiſſion be, "of all ſuits and actions depending between A and B," the arbitrator cannot make an award of an action which B and his wife have depending againſt A, becauſe that is out of the ſubmiſſion, the action between B and his wife, and A, not being an action depending between A and B.[1]

If the ſubmiſſion be "of controverſies between the plaintiff and defendant, for divers ſums of money laid out for the defendant's wife, at her requeſt, while ſhe was ſole," an award, "that the defendant ſhall pay to the plaintiff a ſpecific ſum, for *all* ſums of money laid out by the plaintiff for the wife of the defendant while ſhe was ſole," is ſaid to be void, as being beyond the ſubmiſſion; that being confined to all ſums laid out at her requeſt, and the award being general of *all* ſums laid out for her, of which part might have been without her requeſt. This is reported to have been adjudged on a writ of error, and the judgment of the court below reverſed.[2] But, it may well be doubted, whether, at this day, it would not be preſumed in favour of the award, that the whole had been laid out at her requeſt.

The rule, "that an award of any thing beyond the ſubmiſſion is void," is not ſo ſtrictly interpreted as to extend to every thing *literally* beyond it; if the award be of any thing depending on the principal, it is good.[3]

[9] 21 H. 6. 19. Br. 45 a. Pl. 22. ſed quære, et vid. page 47.

[1] H. 38 El. B. R. Brockas v. Savage. Rol. Arb. D. 4.

[2] Waters v. Bridges. Cro. Jac. 639, 640.

[3] 8 H. 6. 18. b. Rol. Arb. B. 2. C. 4. 5. 6.

As if the ſubmiſſion be of all treſpaſſes, and in addition to the award of ſatisfaction for the treſpaſſes, the arbitrator order the parties to put their ſeals to the award, this is good, for it is only an appendage to the principal.

So, if the ſubmiſſion be of all treſpaſſes, and the award be, "that one ſhall pay to the other 10l. and that he ſhall enter into a bond to him for that ſum:" this is good, becauſe it only renders the award more effectual.

On this principle, it would ſeem that, 'if the ſubmiſſion be of all actions perſonal, ſuits, and complaints, and the award, "reciting that the defendant had committed ſeveral treſpaſſes on the plaintiff, and that the plaintiff was ſeiſed of a certain houſe in his demeſne as of fee," order that the defendant ſhall releaſe to the plaintiff all his right in that houſe, and deliver the deed of releaſe in ſatisfaction of the treſpaſſes; this is a good award, for though the ſubmiſſion, in this caſe, be of actions perſonal only, and the award of a thing connected with the realty; yet there ſeems to be a natural connection between a releaſe of a man's right to a houſe, and treſpaſſes committed by him with reſpect to it. The Juſtices, however, are not reported to have been unanimous in this opinion;[4] and Rolle, in abridging the caſe, gives it as decided the other way, with the exception of Moyle.[5]

The ſubmiſſion was concerning a term of years, and every thing depending on it; the award included rent to become due at Michaelmas next after the date of

[4] 9 Ed. 4 44. [5] Rol. Arb. B. 13.

the award; this was held to be beyond the ſubmiſſion, becauſe the rent might be extinguiſhed by ſurrender, eviction, or otherwiſe, before Michaelmas.[6] The ſame thing was held at a much later period, where the award, made on the 23d of June, ordered ſo much rent to be paid, which, by the award itſelf, appeared not to be due till the 24th of June.[7]

A and B ſubmitted to the award of J. S. a ſuit depending between them *in ejectione firmæ*. J. S. on that ſubmiſſion, made an award relative to the land for which the action was brought; in an action on the caſe for not performing this award, after a verdict for the plaintiff, it was adjudged, in arreſt of judgment, that the award was beyond the ſubmiſſion.[8]

THERE was a diſpute between a parſon and one of his pariſhioners, whether the tythes ſhould be paid in kind or not; and they, reciting the ſubject of the diſpute, ſubmitted to the award of J. S. concerning all matters, as well ſpiritual as temporal, from the beginning of the world to the day of the date of the ſubmiſſion. The arbitrator awarded, that the parſon ſhould have 7l. for the tythes due before the ſubmiſſion, and that the pariſhioner ſhould pay 4l. annually for the tythes which ſhould afterwards become due. This was held to be a good award for the future tythes; becauſe the ſubmiſſion comprehended not only a diſpute concerning the tythes then due, but a queſtion concerning a future right.[9]

[6] Inter Gray et Wicker. Rol. Arb. B. 3.

[7] Barnardiſton v. Foulyer. 10 Mod. 204.

[8] Taylor v. Waltam. P. 10. Car. B. R.

[9] Beckingham v. Hunter. H. 42. El. B. R. Rol. Arb. D. 8.

If two partners refer all matters in difference between them, the arbitrator may diſſolve the partnerſhip. At a trial at *niſi prius* a juror was withdrawn, and all matters in difference between the plaintiff and defendant, who were partners, were referred in the common form; and after the rule of reference was drawn up, the plaintiff openly declared, he would not have it underſtood that the arbitrator ſhould have a power to diſſolve the partnerſhip. The arbitrator did order the partnerſhip to be diſſolved. The plaintiff applied to the court to have the award ſet aſide on this account, alleging, that the arbitrator had exceeded his authority. The court held that, under ſuch a general reference, the arbitrator had clearly a right to diſſolve the partnerſhip; and added, that if a difference between a maſter and his apprentice was referred, the arbitrator had a power to order the indentures to be delivered up. With reſpect to the plaintiff's declaration, that he would not have it underſtood that the partnerſhip ſhould be diſſolved, Lord Mansfield obſerved, this was evidence out of his own mouth, that the diſſolution of partnerſhip was then a matter of diſpute.[1]

Where the ſubmiſſion is by reference at *niſi prius*, the order in which the words are placed in the rule of reference gives riſe to a material diſtinction with reſpect to the power of the arbitrator——If the reference be "of all matters in diſpute in the cauſe between the parties," the power of the arbitrator is confined ſolely to the matters in diſpute in that ſuit.—If it be "of all

[1] Green v. Waring. 1. Bl. Rep. 475.

matters in difference between the parties in the ſuit," his power is not confined to the ſubject of that particular cauſe, but extends to every matter in diſpute between them, though there be croſs demands, and though the defendant has not pleaded his demand againſt the plaintiff, by way of ſet-off; and a proviſo, that the coſts ſhall abide the event, makes no difference.[2]

An award "that both ſhall pay the reckoning contracted at the houſe where the award was made, is ſaid to be void, becauſe it extends to a time beyond the ſubmiſſion;[3] ſuch an award indeed ſeems perfectly nugatory, becauſe the landlord of the houſe may recover againſt them for the reckoning: but inſtead of being conſidered as void, becauſe it extends beyond the ſubmiſſion, it would be more correct to conſider it as an award, that, to a certain extent, the expences of the arbitration ſhould be equally defrayed by the parties.

On the ſame principle, "of being beyond the ſubmiſſion," an objection has been made to an award, "that land, the ſubject of diſpute, ſhould be meaſured at the expence of both parties;"[4] though, inſtead of an award relative to ſome ſubject not within the ſubmiſſion, it is rather to be conſidered as an order for the performance of a future act, which is clearly within the power of the arbitrator.

It appears too, that though the arbitrator order a claim of one party againſt the other, which has accrued ſince the ſubmiſſion and before the award, to be given

[2] Vid. 2. Bl. Rep. 1118. 2 Term Rep. 644, 5. 3 Term Rep. 636.

[3] Hall v. Maſſey. Rol. Arb. K. 14.

[4] Hardres 45.

up in satisfaction of the balance of claims submitted to him; this should not be considered as an usurpation of a jurisdiction over something not within his authority, but as an award to do a specific future act, for the conclusion of the differences between them. This seems to have been the principle which prevailed in a case, where two submitted to the award of J. S. concerning all matters between them, *till* the submission, and each assumed to the other to perform the award. J. S. reciting that one of them was bound to the other in an obligation made *since* the submission, and *before* the award, ordered the obligee to deliver up the obligation to the other, in full satisfaction of all matters between them: this was adjudged a good award.[5] Rolle, however, doubts of the propriety of this decision, observing, that though this was in satisfaction of all matters *within* the submission, yet the obligation being itself *out* of the submission, and a thing in action between the parties, it would seem that it is void.

An opinion long prevailed, that under a submission in the common form an arbitrator had no power with respect to the costs of the arbitration, because they were something which had arisen since the time of the submission.[6] The only way, therefore, by which he could secure any recompence for his trouble, was to keep the award in his own hands 'till he was paid for it. This, however, might be subject to this incon-

[5] Nicklas v. Thomas, adjudged good. T. 15 Jac. B. R. Rol. Arb. B. 10. Reporter, quære ceo.

[6] Vid. Bushfield v. Bushfield. Cro. Jac. 577, 578. Capel v. Allen, Hil. 22 Car. B. R. Al. 10. Rol. Arb. H 13. Berry v. Perry, Bridgeman 90, 91.

venience, that if the parties would not pay for it, and there was a proviſo, that it ſhould be delivered within a certain time, an objection might be made to the performance for want of delivery according to that proviſo: it became, therefore, a matter of prudence in thoſe, who might be propoſed as arbitrators, to refuſe the office, unleſs a clauſe were inſerted in the ſubmiſſion, that the coſts of the reference ſhould be according to their diſcretion. The judges, however, did once go the length of ſaying, that where it was part of the condition in the ſubmiſſion that the award ſhould be in writing, payment for the writings was intended.[7] And it is now determined, that the power of awarding coſts of the arbitration is neceſſarily incident to the authority conferred on the arbitrator of determining the cauſe; and that the reaſon why, in references of this ſort, a proviſion is frequently inſerted, that the coſts ſhall abide the event of the award, is, that the arbitrator may not have it in his power to withhold coſts from the party who is in the right; and that therefore ſuch a proviſion is to be conſidered as the reſtriction of a power which the arbitrator would otherwiſe neceſſarily have.[8]

[7] Pinkney v. Bullock. 2 Keb. 832. vid. 10 Mod. 201.

[8] 2 Term Rep. 645.

N. B. In an opinion which I have lately ſeen from a very reſpectable authority, it is ſtill inſiſted, "that the arbitrator has no power over the coſts of the *arbitration*;" and it is ſuggeſted "that the rule here laid down is not warranted by the caſe cited in ſupport of it:" "becauſe," ſays that authority, "the reference in that caſe having been by *rule* of *court*, the coſts in queſtion muſt have been the coſts of the *action*, not the coſts of the *arbitration*:"—It is true the report (2 T. R.

When a cauſe is referred at *niſi prius*, and it is inſerted in the order, that the coſts ſhall abide the *event*, which is the uſual form, the *event* is taken to mean the *legal event*, and therefore the party in whoſe favour the award is made will not be entitled to any more coſts than he would have been had the trial gone on, and he had had a verdict in his favour.

A cause, in which the plaintiffs were executors, was referred at *niſi prius*, with the uſual proviſo with reſpect to the coſts abiding the event. The arbitrator awarded, that there was nothing due from the defendant to the plaintiffs; in conſequence of which the maſter taxed the defendant his coſts. An application being made to reſtrain the defendant from proceeding to enforce the payment of theſe, on the ground that the plaintiffs were executors, and therefore not liable to pay coſts, the court held the meaning of the rule to be that which

645) ſtates the award to have been made in a *cauſe* referred to arbitration by *rule* of *court*; and it is not diſtinctly ſtated, whether the coſts, to the award of which the objection was made, were the coſts in the cauſe, or the coſts of the arbitration; the reaſons, however, for ſuppoſing them to have been the *latter*, are ſtrong: In the firſt place, the power of the arbitrator over the *former*, when there is no *expreſs* reſtriction, has been long undiſputed. Vid. ante p. 134 et ſeq. and in the next place, the authority (1 Rol. Abr. 254) cited in ſupport of the objection to the power of the arbitrator over the coſts, refers to the coſts of the *arbitration only*, and could refer to no other, as there is not a caſe, to be found in the books, of a reference by rule of niſi prius, till ſome time after the date of that authority:—In fact, I was preſent in court when the caſe in 2 T. R. 645 was agitated, and from my own recollection, I can take upon myſelf to ſay, the coſts of the *reference* only, were in queſtion.

is ſtated above; and that, as it was clear, that if a verdict had been given againſt the plaintiffs, or they had been nonſuited at the trial, they would not have been liable to pay coſts, they were conſequently not liable to this order.[9]

On a ſimilar reference the arbitrators found, that the plaintiff's original demand was under 40s. awarding that the defendant ſhould pay the plaintiff only 37s.—An application being made to the court to have it referred to the maſter to tax the defendant his coſts of the action, it was contended on his behalf that the plaintiff was not intitled to coſts any more than he would have been if, on a trial, he had recovered under 40s. but that on a ſuggeſtion to be entered, by leave of the court, the defendant would be intitled to coſts.—The court were of this opinion, and made the rule abſolute.[1]

The plaintiff brought an action of treſpaſs againſt the defendants, for pulling down the plaintiff's gates and aſſaulting him. The defendants juſtified to all the counts, except one, under different rights of way, and pleaded not guilty to the whole: the cauſe was referred at *niſi prius*, the rule of reference reſtricting the coſts of the action to abide the *event*: The arbitrator awarded a right of way to the defendants different from any of thoſe under which they juſtified, and gave 5s. damages to the plaintiff for the aſſault, as having

[9] Highnam et al. v. Haſſel. H. 14. G. 3. cited 3. Term Rep. 139.

[1] Butler v. Grubb. H. 23. G. 3. cited 3 Term Rep. 139. This muſt have been a caſe where the demand aroſe within the juriſdiction of a court of conſcience.

been committed when the defendants were attempting to exercife a right of way negatived by the arbitrator. It was held, on the authority of the two preceding cafes, that the plaintiff could recover no more coſts than damages; and further, that the arbitrator's award was not equivalent to a judge's certificate under the 22d and 23d Car. 2. c. 9.[2]

As it is the profeſſed purpoſe of parties ſubmitting their diſputes to arbitration to have them finally ſettled, ſo there is no method more effectual to anſwer that purpoſe than the award of mutual releaſes, after the execution of other parts of the award; there are, accordingly, very few of the cafes reported in the ancient books which do not, among other things, include a releaſe: but as the arbitrator could not always be aware of every nice objection to his award, it is very ſeldom that the period to which the releaſe ſhall extend is confined to the date of the ſubmiſſion. It is ſometimes ordered to the date of the award, ſometimes to a period long ſubſequent, and poſterior to the time appointed for the execution of all the other parts, and ſometimes generally without any limitation of the time to which it is to operate. In all theſe cafes it has been conſtantly objected, that, by awarding ſuch a releaſe, the arbitrator has exceeded his authority: the objection has as conſtantly been ſuſtained, ſo far as to determine the award of the releaſe to be void for any thing ariſing ſubſequently to the ſubmiſſion. But many cafes have gone further, and the award has been frequently conſidered as altogether void, on account of ſo trivial an

[2] Swinglehurſt v. Altham et al. 3 Term Rep. 138.

inadvertency in the award of the releaſe. The hiſtory of theſe caſes is confuſed and complicated, and involves a part of the ſubject, which will make a diſtinct article very conſiderable in itſelf.[3]

THE next branch of the general rule is, that the award muſt not extend to any one who is a ſtranger to the ſubmiſſion.

THUS it has been held, that where the ſubmiſſion is between two, and it is ordered by the award that one of them ſhall convey certain land to the other and his wife, this is void as to the wife, becauſe ſhe is a ſtranger to the ſubmiſſion.[4]

So, if it be awarded that a third perſon be ready to ſeal and deliver 15 bonds for the payment of a certain ſum to one of the parties, and that he ſhall do his endeavour that no advantage be taken of a forfeiture committed by that party, all this is void.[5]

So, if two ſubmit to the arbitration of certain perſons concerning the title of certain lands, and the arbitrators award, that all controverſies touching the land ſhall ceaſe, and that one of the parties, his wife and ſon his heir apparent, by his procurement, ſhall make to the other ſuch aſſurance of the land as the other ſhall require, this is void; becauſe the wife and ſon are ſtrangers to the ſubmiſſion.[6]

So, it is ſaid, that if the condition of a ſubmiſſion bond be to ſtand to the award of A and B, who award

[3] Vid. poſt, "Where an award ſhall be good in part though void in part," and, "how awards ſhall be conſtrued."

[4] Samon's caſe. 5 Co. 77. b. 78. a. Rol. Arb. B. 7.

[5] 10 Co. 131. a. b. Rol. Arb. B. 5. vid. 3 Leon. 62. Mo. 359. pl. 489.

[6] Rol. Arb. N. 9.

that one of the parties ſhall pay 20s. to a third perſon: this, ſays Coke, is a void award, and the bond of no force, notwithſtanding an opinion to the contrary, which he ſays is ill reported.[7]

So, where it appeared that the plaintiff, in the action then before the court, had formerly brought another action in the King's Bench againſt the preſent defendant and one J. P. and that the plaintiff and this J. P. had ſubmitted all manner of treſpaſs and actions between them two, and all other treſpaſſes between the plaintiff and the preſent defendant; and the arbitrators awarded, that as well for the treſpaſs done by the defendant as by J. P. there ſhould be paid to the plaintiff 100s. which J. P. had paid. This was held to be a void award, becauſe the defendant was not a party to the ſubmiſſion.

WHERE the ſubmiſſion was between three on one ſide, and one on the other, of all actions and demands between them, it was ſaid by three juſtices in the Exchequer Chamber, that the arbitrators had an authority to make an award of all joint matters between the three and the one, and alſo of all matters ſeverally between the one and any one of the three; and that therefore if he awarded that any one of the three ſhould pay ſo much to the ſingle party on the other ſide, and that the other two ſhould go quit; or that the ſingle party ſhould pay ſo much to any one of the other three, the award in theſe ſeveral caſes was good.[8] And Brooke, in abridging the caſe, ſays this is good

[7] 10. Co. 131. b. Rol. Arb. B. 6. E. 5. vid. 22 H. 6. 46. b. and Brooke ſays *quod mirum*, ſpeaking of the opinion to the contrary.

[8] 2 R. 3. 18.

law; but he denies that what follows is good law, viz. that the arbitrator has an authority to decide on any matter between any two of the other three.[9]

It is in general laid down, that the award of payment of money to a ſtranger is void:[1] but this muſt be underſtood to hold only when ſuch payment can be of no benefit to the other party; for an award that one of the parties ſhall pay ſo much to a creditor of the other in diſcharge of a debt due by the other to that creditor, is unqueſtionably good.[2]

So, an award to pay money to W. the plaintiff's ſolicitor, if it appear from the nature of the caſe that the payment is for the plaintiff's benefit.[3]

So, where it was awarded that the defendant ſhould pay a ſum of money for the plaintiff's benefit, to ſuch perſon as the plaintiff ſhould appoint to receive it, it was ſaid in argument, and aſſented to by the court, that it would hardly be contended that ſuch an award was not good.[4]

So, if at my requeſt, and that of W. N. two others are bound in 20l. and, on a diſpute ariſing between W. N. and me, on this queſtion, among other matters, "which of us ſhall pay the 20l." we ſubmit all matters in controverſy, and the arbitrator award that I ſhall pay to the obligee the half, with intereſt, and W. N. the other half; this is a good award, though the payment of the money be awarded to a perſon who is a

[9] Br. Arb. pl. 44.

[1] Godbolt. 12, 13.

[2] R. acc. 1 Lord Raym. 123. Dodderidge ſemb. P. 16 Jac. B. R. Buckhurſt and Mayo's caſe. Rol. Arb. E. 5.

[3] 1 Lord Raym. 123. M. 8. W. 3. Bedam v. Clerkſon.

[4] Dale v. Mottram. 2 Barnard. 291. 6 G. 2.

ſtranger to the ſubmiſſion, becauſe it appears to be an advantage to both parties.[5]

If the award be, that the one ſhall acquit the other of a bond, in which they are both bound to a third perſon for the payment of a ſum of money, this is good; for though he cannot compel the third perſon, who is a ſtranger, to deliver up the bond, or to make a releaſe by the common law, yet, if the bond be not forfeited, he may pay the principal ſum to the obligee at the day, and this will acquit the other. If the bond be forfeited, yet he may pay the penalty, which will alſo acquit the other; or, on ſatisfaction given, he may compel the obligee to deliver up the bond in a court of equity, or to give a releaſe.[6] So now, ſince the ſtatute for the amendment of the law, on an action brought for the penalty after forfeiture, he may pay the principal, intereſt, and coſts, which will alſo acquit the other party.

It having been awarded, that the plaintiff and defendant, who were brothers, ſhould pay a certain ſum yearly for the uſe of their mother; this was held a good award by Powell J. becauſe he thought it muſt be preſumed to be for their benefit, or rather becauſe it really appeared to be ſo, as it was for the uſe of their mother; and by Holt C. J. becauſe he was of opinion, that a general award of the payment of money to a ſtranger was good, becauſe it was to be preſumed that the parties ſubmitting were bound as truſtees, or were by ſome means liable, and that the payment ſhould be intended for their benefit, unleſs the contrary appeared.[7]

[5] Gray v. Gray. P. 16 Jac. B. R. Rol. Arb. E. 6. F. 8.

[6] Barſey v. Clipſham. Rol. Arb. E. 11. S. C. Cro. Car. 541. vid. Becket v. Taylor. 1 Mod. 9. S. P. 2 Keb. 546. S. C.

[7] Bird v. Bird. 1 Salk. 74.

And, in general, a diſtinction is taken between the caſe of an act awarded to be done by a ſtranger, and that of an act awarded to be done to the ſtranger, by a party to the ſubmiſſion: in the latter caſe the award is ſaid to be good; and if the ſtranger will not accept the money awarded to be paid to him, the party's obligation is ſaved.[8]

If the perſons comprehended in the award were in contemplation of the ſubmiſſion, though they were not directly parties to it, yet the award is good; as if it be awarded that all ſuits ſhall ceaſe between the parties, or any others in their behalf.[9] So, if the ſubmiſſion be by two, concerning a matter which aroſe between one of them and the wife of the other when ſhe was ſole, an award "that the other ſhall pay to the married man and his wife 10l." is good, becauſe it was on her account that the diſpute aroſe.[1]

A dispute ariſing between A and B on one ſide, and C, D, and E on the other; C, in conſideration of ſixpence given to him by A and B, ſubmitted the matter for himſelf and D and E, and aſſumed to ſtand to the award: A and B ſubmitted for themſelves on the other ſide. The arbitrator awarded that C, on behalf of himſelf and the other two, ſhould pay a certain ſum to A and B in ſatisfaction of the controverſy: this was held to be a good award, and C adjudged to perform it, though it concerned two ſtrangers to the ſubmiſſion.[2]

[8] Norwich v. Norwich. 3 Leon. 62.

[9] Onyons v. Cheeſe. 10 W. 3. Lutw. 530.

[1] March, 78.

[2] Bullock v. Dalbie and Gatwood, adjudged H. 14 Jac. and on a writ of error judgment affirmed. Rol. Arb. B. 18. vid. 22 E. 4. 25. 1 Barnardiſton. B. R. 85. 1 Keb, 790, 865.

A BOND was given by the defendant Clemence to Lynch and Templeman, of which the condition was, that Clemence, the obligor, ſhould perform the award of arbitrators indifferently named, as well on the part and behalf of Clemence as of Lynch, without naming Templeman, "to arbitrate and determine all matters in controverſy between the ſaid parties *or either of them.*" The award, "reciting that there were ſeveral differences between the plaintiffs Lynch and Templeman on the one part, and the defendant Clemence on the other, and that they had all ſubmitted by ſeveral bonds; reciting alſo, that the defendant was bound to Elizabeth Templeman, now the wife of the plaintiff Lynch: that the bond was in truſt for the plaintiff Templeman, and that 117l. was due on that bond," ordered that the defendant ſhould pay to the plaintiff Templeman 83l. in part ſatisfaction of the 117l. and for ſatisfaction of the reſidue ſhould aſſign to the ſame Templeman a certain debt of 34l. due to Clemence by one Henry Beeſley of London, and ſhould execute and deliver to the ſame Templeman ſufficient authority to ſue for and recover the ſaid debt, with covenants to be inſerted in that authority; that he ſhould not revoke it, nor receive the money from Beeſley, but that he ſhould aid and aſſiſt Templeman to recover it; that he ſhould alſo make an affidavit in writing before a maſter in Chancery, that the ſum of 34l. before mentioned, was really and juſtly due to him from Beeſley; and that in caſe Clemence ſhould fail to execute ſuch authority, and take ſuch oath, he ſhould, within the ſpace of two months from the date of the award, pay to Templeman the further ſum of 34l. And that the plaintiff Tem-

pleman, on performance, ſhould deliver to the defendant the bond in which he was bound to Elizabeth Templeman, and that the plaintiff Lynch ſhould execute a general releaſe to the defendant.

The objection on which the defendant principally reſted his defence was, that Templeman not having been named in the condition of the ſubmiſſion bond, he was a ſtranger to the ſubmiſſion, and that therefore the award of payment to him was void; but it was anſwered, that he was ſo far from being a mere ſtranger, that he was in fact the perſon principally in contemplation of the ſubmiſſion; he was party to the bond, and the ſubmiſſion was of a thing, in which his intereſt was concerned. The wife of Lynch, before her marriage, was truſtee for Templeman, and by the marriage the huſband became the truſtee; when, therefore, Templeman joined with Lynch in taking the ſubmiſſion bond, it was manifeſt he had agreed that the matters in controverſy relative to the bond, taken by him in the name of Elizabeth Templeman, ſhould be determined by the arbitrators, which amounted to a ſubmiſſion to their award. The arbitrators had, by their award, affirmed, that Templeman, as well as Lynch and Clemence, had ſubmitted to them; the court would preſume that it was ſo, and the parties to the ſubmiſſion bond were eſtopped to ſay the contrary: it was not abſolutely neceſſary that the ſubmiſſion ſhould appear by expreſs words in the condition of the bond on which the ſuit was founded; it might appear by the bond made by Templeman to the defendant, for the performance of the award: but in the preſent caſe, without having recourſe to extrinſic circumſtances, the condition

itſelf implied that Templeman was a party to it, and the omiſſion of his name was evidently the miſtake of the perſon who drew the conditon, for it was to arbitrate *between the ſaid parties, or either of them*, where the latter words, "or either of them," would be abſurd and inſignificant, if there were not two perſons on one ſide. As to the award itſelf, that was good, for theſe reaſons: the money payable on the bond to Elizabeth Templeman, in equity, belonged to Templeman the plaintiff, and, by the conſent of his truſtee, it was to be paid to him, which was in effect the ſame thing as if it had been awarded to be paid to Lynch; for had it been ſo, it muſt at laſt have been paid by Lynch to Templeman. Tender to Templeman, and refuſal by him of the money awarded, would have been a good plea to an action of debt on the bond given to Elizabeth Templeman. By the payment to the plaintiff Templeman, the defendant's bond would be diſcharged as well as if the money had been paid to Lynch, and Lynch would alſo be diſcharged of his truſt, which was for his benefit; ſo that each of the parties would have a ſuitable benefit by this award.[3]

THE condition of a ſubmiſſion bond recited, that a replevin was depending between Baily, one of the parties to the ſubmiſſion, and one Webb, who made conuſance, as bailiff to Iſaac Shelf, the other party, and Margaret his wife, and then ſtated, that the plaintiff Shelf, and the defendant Baily, were to ſtand to the award of arbitrators, on proviſo, that the award

[3] Lynch v. Clemence. 11 W. 3. Lutw. 571.

were made concerning the premiſes, by a certain day. The award recited that Baily had brought a replevin, for taking his cattle, againſt Webb, to which Webb had made conuſance, as bailiff to Shelf and Margaret his wife, and, after ſtating the proceedings in that action, awarded, "of and upon the premiſes, and of all matters in difference between the parties;" that all proceedings in the replevin ſhould ceaſe; that Baily ſhould pay 7l. 10s. for the rent in arrear to Shelf, and 10l. coſts; and that Shelf ſhould give him a general releaſe. In avoidance of this award, it was argued, that Webb was a ſtranger to the ſubmiſſion, and that by it the action between Baily and him was to ceaſe; that ſo much was to be paid to Shelf, who was to give a releaſe, which would not diſcharge Baily from the claim of Webb, who was intitled to coſts, if the plaintiff in replevin did not proceed: it was anſwered, that *Shelf* was the party concerned in intereſt, and that a perſon might ſubmit to an award for another.—And the court expreſſed the inclination of their opinion to be, that if one ſubmitted on the behalf of another, his bond was forfeited if the ſtranger did not perform his part of the award; but that it did not appear here that Shelf undertook for Webb, or ſubmitted on his behalf.[a] However, as in this caſe, Shelf was the principal in the avowry, and Webb only an agent, the award appears to be concluſive againſt Webb, and might have been ſet up as a defence to any claim of coſts by him againſt Baily.

[a] Shelf v. Baily in C. B. 8 Ann. Comyns Rep. 183.

It has been ſeen, that a man is bound by an award to which he ſubmits for another;[5] and that if an attorney, without the expreſs authority of the principal, enter into a bond to a third perſon, under a condition to be void on performance of the award by the principal, otherwiſe to be in full force; this ſhall bind the attorney and not the principal.[6] It has alſo been ſaid, that if a man authorize another on his behalf to refer a diſpute between the principal and another, an award made in conſequence of ſuch a ſubmiſſion is binding on the principal alone.[7] But, by a modern caſe,[8] it appears, that the latter aſſertion is true only when the agent does not bind himſelf for the performance of the principal; or if he does, not only the principal who authorized him but the agent himſelf is bound by the award.

The bond was given by one George Fitzgerald, the defendant, who was authorized by John Fitzgerald to ſubmit all matters between the latter and Cayhill, the plaintiff. The condition reciting, that there were differences between John Fitzgerald and the plaintiff, concerning a certain debt, due from him to the plaintiff, on a bond for 800l. purported to be that, if the ſaid George Fitzgerald, the obligor, for and on the behalf of the ſaid John Fitzgerald, ſhould perform ſuch award as arbitrators ſhould make, on or before a certain day, between the plaintiff and John Fitzgerald, then the bond ſhould be void. The arbitrators awarded, that George

[5] Ante, page 42. [6] Ante, page 45. [7] Page 42.

[8] Cayhill v. Fitzgerald. B. R. 17 G. 2. 1743. 1 Wilſ. 28, 58.

F. the defendant, ſhould pay 298l. 9s. 6d. that the plaintiff ſhould receive it in full of all demands, and that they ſhould execute releaſes.

Among other objections to the award, this was taken, that it was not made between the parties to the ſubmiſſion; for that, inſtead of ordering G. F. the defendant, to pay, it ought to have ordered J. F. who was the real party to the ſubmiſſion. The court ſeemed at firſt to think the award was bad, but afterwards Lee, C. J. delivered the opinion of the court in favour of the award: at firſt he ſaid, that on reading Carthew's report of the caſe of Bacon and Dubarry,[9] he had been inclined to think the award was bad; but that having looked into Lord Raymond's report of the ſame caſe, and alſo ſeen a manuſcript report of it, he was now clearly of opinion that the award was good, and that the preſent caſe was not to be diſtinguiſhed from that; for that it appeared by the pleadings in that caſe,[1] that had the award been general as in the preſent, and not "to the uſe of either of them," which confined it to the attorney, it would have been good to bind the principal. In the preſent, it appeared on the record, that the award was made "of and concerning the premiſes," in the condition of the bond, for it was expreſsly averred to be ſo in the replication.

Where the ſtranger is only an inſtrument to the performance of the award, no objection ſhall be allowed on that account: as if it be, that one of the parties ſhall ſurrender his copyhold into the hands of

[9] Ante page 45. [1] In 2 Salk.

two tenants of the manor, who ſhall preſent the ſurrender; this is good, though it be awarded, that the ſurrender ſhall be made to ſtrangers, who cannot be compelled to accept, becauſe they are only to be uſed as inſtruments.[2]

For the ſame reaſon it is a good award, that one of the parties ſhall make a deed of feoffment, with a letter of attorney to J. S. to make livery.[3] Or that the defendant ſhall pay as the plaintiff and his attorney by a bill and oath ſhall make appear, for the attorney is only an inſtrument to aſcertain the ſum.[4]

As an award of a thing, out of the ſubmiſſion, cannot be enforced by an action at law, ſo neither ſhall a man by ſuch an award be precluded from claiming his right in equity. This appears clearly from the caſe of Warren and Warren, plaintiffs, and Green, Hurtnall, and others, defendants. Mary Warren, the mother of the defendants, being poſſeſſed of the reſidue of a term for 99 years, in certain houſes and grounds in Briſtol, ſettled them on Hurtnall, one of the defendants, and others, in truſt for herſelf, and afterwards to the uſe of the plaintiff John Warren, her ſon: ſhe afterwards intermarried with the defendant Thomas Green, and then Hurtnall, contrary to his truſt, delivered up the ſettlement, and the original leaſe, to Green; Mary was likewiſe ſeiſed in fee of a moiety of other lands, and died ſo ſeiſed; and after her death, Green continued in poſſeſſion of the lands and houſes; ſome differences ariſing between

[2] Coote v. Pooley. Rol. Arb. E. 7.

[3] Rol. Arb. E. 8.

[4] Rous v. Lun. 1 Keb. 569.

him and John, one of the plaintiffs, concerning the ſum of 8l. and other trifling matters, they were ſubmitted to the arbitration of Hurtnall, both parties entering into bonds for that purpoſe: Hurtnall awarded, that all ſuits between them ſhould ceaſe, and that before the end of Trinity term following Warren ſhould ſufficiently convey and aſſure to Green, his heirs and aſſigns, all his right and title to the moiety of the ſaid lands, and ſhould procure his wife to join with him in a fine before the end of the ſaid term, in order to perfect the conveyance; and ſhould ſufficiently grant, convey, ſurrender, and aſſign to Green, all his right to the houſes in Briſtol; and that, 'till ſuch conveyance made, Green ſhould continue in poſſeſſion, and ſhould pay to Warren ſome ſmall ſums, amounting to 200l. whereas the premiſes were worth more than 1000l. and that they ſhould ſeal mutual releaſes to one another.

THE plaintiff Warren exhibited his bill to have a re-conveyance of the premiſes in Briſtol, and an account of the profits ſince the death of his mother, and to have the award ſet aſide, as comprehending ſubjects not within the ſubmiſſion.

THE court decreed, that Hurtnall and the other defendants, the truſtees, ſhould re-convey the premiſes; that Green ſhould account for the profits, and that the bonds of ſubmiſſion ſhould be brought before the maſter and cancelled.[5]

[5] John and Richard Warren v. Green, Hurtnall, et al. Ca. Temp. Finch 141. This *ſeems* to be the effence of the decree, for the report is not accurate.

NEITHER ſhall an award affect the rights of perſons not parties to the ſubmiſſion. Thomas Brown, on the day before his marriage with Mary his intended wife, entered into a bond to truſtees for Mary, in the penalty of 10,000l. conditioned, that if Mary ſhould ſurvive him, he would leave her 6000l. to be paid at three payments within 18 months after his death, but that if he ſhould purchaſe lands to a certain value, and aſſign the ſame, together with ſome other property, to her, then the bond ſhould be void. After the marriage, the truſtees delivered the bond to Mary, who locked it up in her cabinet; but the huſband, or ſome one by his order, opened the cabinet, and took away the bond and cancelled it; and he never performed the condition with reſpect to the purchaſe of the land. Brown had ſeveral ſuits with the truſtees, which were referred to arbitration; general releaſes were awarded between Brown and the truſtees, but the bond was not concerned in the diſputes, nor was any recompence made or intended to be made to the wife by the award in ſatisfaction of the bond.

A BILL being filed by the widow againſt the executors of Brown, and theſe, with other circumſtances, appearing in the cauſe, the court conſidering the award, and the releaſes given in conſequence of it, to have no relation to the bond, decreed, that the widow ſhould have the ſame ſatisfaction, and the ſame benefit out of her huſband's eſtate, as if the bond had not been cancelled, and the award had never exiſted.[6]

[6] Mary Brown, widow, v. Will. Savage et al. executors of her huſband. Ca. Temp. Finch 184. et vid. Id. 180, 441.

THE adherence to the rule, "that the award ſhould not go beyond the ſubmiſſion," has not been ſo literally ſtrict, as to overturn the award merely becauſe the words might ſeem too comprehenſive; but if it might reaſonably be preſumed that nothing was in reality awarded beyond the ſubmiſſion, it has in general been ſupported.

THUS, antiently, "where the ſubmiſſion was of all matters between the parties at the time of the ſubmiſſion, and it was awarded that one of them ſhould releaſe to the other all demands to a day ſubſequent," it was held that this was void, becauſe a demand might have accrued ſince the day of the ſubmiſſion, which the arbitrator had no authority to order to be releaſed.[7] Yet, if in the ſubmiſſion there was a clauſe running thus, "ſo that the award be made concerning the premiſes," or ſomething equivalent, and if the award was made with reference to that clauſe, this ſhould controul the conſtruction of the award, and confine the operation of the awarded releaſe to differences exiſting at the time of the ſubmiſſion.[8]

So, where the ſubmiſſion is of a *particular* difference, when there are other matters in controverſy, though an award of a general releaſe would have been void; yet the burthen of ſhewing the exiſtence of theſe was thrown on the party objecting to the award on that account.[9]

[7] Moor v. Bedel. Gouldſb. 91, 92, cited 10 Co. 131. 2. Jenk. 264. Rol. Arb. B. 4.

[8] Vanlore v. Tribb. Rol. Arb. 21. Vid. 6 Mod. 232.

[9] 2 Mod. 309. Vid. Rous v. Nun. 1 Sid. 154. Alablaſter v. Clifford. Rol. Arb. B. 23. Vid. Hob. 190. Goſſe v. Browne.

THE ſubmiſſion was, "of all ſuits and controverſies between the parties concerning the tythes of corn and hay in a certain pariſh. The arbitrator awarded, that the defendant ſhould pay to the plaintiff 40l. before a certain day, in conſideration of which the latter ſhould permit all ſuits and controverſies depending between the parties to ceaſe, and that they ſhould be no further proſecuted. The plaintiff having ſet forth this award, averred, that there were not any other ſuits depending between them for the tythes of the pariſh. The defendant rejoined, that there were ſuits depending then between them, concerning a parcel of land in the ſame pariſh, but no controverſy concerning the tythe. When the caſe firſt came before the court, they thought the award bad, as extending to ſubjects beyond the ſubmiſſion; on a further hearing, however, the plaintiff had judgment, and a writ of error being brought in the Exchequer chamber, the judgment was affirmed, that court being of opinion, that the order "that all ſuits ſhould ceaſe," ſhould be confined to ſuits relating to the tythes, and void only for the reſidue.[1]

Muſt not be of parcel only of the things ſubmitted.

ANOTHER branch of the general rule, "that the award muſt be according to the ſubmiſſion," is, "that it muſt comprehend every thing ſubmitted, and muſt not be of parcel only.[2] The purpoſe of the parties in ſubmitting is, to have a final determination of every matter comprehended within their ſubmiſſion: that purpoſe is not obtained when the award only comprehends a part.

[1] Ingram v. Webb. 1 Rol. Rep. 362. 2 Rol. Rep. 192. Cro. Jac. 663.

[2] 19 H. 6. 6. Fhbt. Abr. 51. a. 39 H. 6. 11. b. ſemb. cont. Brooke Arb. 29.

This, however, must be understood with a considerable degree of limitation; for though the words of the submission be more comprehensive than those of the award, yet if it do not appear that any thing else was in dispute between the parties, beside what is comprehended in the award, the award will be good. As if the submission be of all actions real and personal; and the award be only of actions personal; it shall be presumed that no actions real were depending between the parties.[3]

So, it will be sufficient if the thing awarded necessarily includes the other things mentioned in the submission. As, where the submission was of the *right*, *title*, and *possession* of 20 acres of land, and the arbitrators awarded that one of the parties should enter into 10 acres, and have them to him and his heirs, and the other should have the other 10 acres for term of his life; this deciding apparently only the possession, yet in substance comprehending the right and title, is a good award.[4]

And where by a reference to something which the arbitrators suppose done, but which is in fact not done, it turns out, that of one particular point they have made no award, this shall not render the whole award void.

As where they awarded, that on one thing submitted to them the parties should perform the award made by former arbitrators, who had in fact made no award.[5]

[3] Vid. 8 Co. 98. 19 H. 6. 6. b. Rol. Arb. L. 5.

[4] 10 H. 6. 6. Fitzh. Abr. 51. a. Brooke 44, 45. Rol. Arb. 51. a.

[5] 39 H. 6. 9. b. Brooke Arb. 29.

So alſo, if the ſubmiſſion be of all the premiſes, or of any parcel of them, in this caſe the arbitrator may make an award of parcel only.[6]

If the ſubmiſſion be of all matters between the parties, and the award be made of all except a bond, and of this the award be that it ſhall ſtand, the award is good for the whole; for the arbitrator is not bound to diſcharge the bond without cauſe, and it ſhall be preſumed that there was no cauſe.[7]

The condition of an arbitration bond was with a proviſo that it ſhould be made concerning the dilapidations of the parſonage of S. being and remaining in decay and ruin by the default and after the death of A. B. clerk, whoſe executor, one of the parties, was late parſon there; and alſo of and upon all and ſingular actions, ſuits, quarrels, debates, and ſtrifes, had, moved or depending in variance between the parties.

The award was, that the defendant, the executor, before a certain day, ſhould repair the dilapidations at his own coſts; but, in the award, the arbitrator proteſted that he would not meddle with any other actions, &c. beſides. It was objected, that by this proteſtation the arbitrator had diſabled himſelf to judge between the parties; for that this differed from the caſe "of a ſimple ſubmiſſion, in words which, in their natural meaning, might extend to *two* things, and an award of *one* of them;" for there, in favour of the award, it

[6] 39 H. 6. 11. b. Rol. Arb. L. 6.

[7] H. 14 Jac. Berrie v. Perrin, at Serjeant's Inn, judgment affirmed on a writ of error. Cro. Jac. 400. Bridgeman, 91. Rol. Arb. M. 2. S. P. reſolved in Sallows v. Girling. Cro. Jac. 277.

was to be presumed that no other matter was laid before the arbitrator but that on which he had decided; but here it appeared, by the express protestation of the arbitrator himself, that there were other matters in dispute beside the dilapidations, and he had not awarded according to the submission by refusing to take cognizance of these. In the report of this case in Dyer, it does not appear whether the objection was considered as well founded, as it was not averred that any other matter was in reality in dispute beside the dilapidations, nor is any judgment there reported to have been given.[8]

But in another report of the same case judgment is said to have been given for the defendant, the award being void.[9] And on another occasion it was held clearly by the court, that if arbitrators award for one one thing, and say that they will not meddle with the rest, all is void, because they have not pursued their authority.[1]

With respect to the award being void or not, when it is made only of part of the subjects comprehended within the submission, there is a distinction arising from the form of the submission itself, which runs through all the books.[2]

The submission is sometimes general of all matters in difference between the parties, without specification of any particular subject of dispute. Sometimes it specifically enumerates the particulars.

[8] Dyer, 216, 217.
[9] Benl. 107.
[1] Dict. Barnes v. Greenwell. Cro. El. 858.
[2] Vid. Cro. Jac. 200, 354. Hob. 49. 4 Leon. 49. 2 Saund. 292. 2 Lev. 3. 2 Keb. 759. 3 Lev. 413. Cro. Car. 383. 2 Vent. 242, 243. Salk. 75. pl. 16. Lutw. 552.

Both forms are ſometimes without any particular clauſe providing for the arbitrators deciding on the whole; and ſometimes, to each, ſuch a conditional clauſe is added, which, from the firſt words of it, when all legal inſtruments were in Latin, is called the clauſe of *It quod*: the words running thus: "So that the award be made '*of and upon the premiſes*,' before ſuch a partieular day." But it is not abſolutely neceſſary, that, to produce its proper effect, this clauſe ſhould exactly run in theſe words: "of and upon the premiſes" may be ſupplied by other words equivalent; "ſo as the *ſame* award be made and delivered by a particular day" admit of a ſimilar conſtruction, the "ſame" having a reference to every thing before mentioned.[3]

A proviso, that the award be made on or before a certain day, implies a proviſo that it be made of the premiſes, though that be not expreſſed, and therefore all the qualities neceſſary to conſtitute a good award, where the proviſo is full, are equally neceſſary in the other caſe.[4]

And where a proviſion is made for the appointment of an umpire, in caſe of a want of deciſion by the arbitrators, it is ſufficient that the clauſe of *ita quod* be inſerted with reſpect to the arbitrators, though it be not repeated with reſpect to the umpire; for the refence to the umpire is only an addition of time, and not the conſtitution of a diſtinct power.[5]

[3] Cro. El. 838. pl. 14. vid. Al. 52.
[4] Lee v. Elkin. 13 W. 3. Lutw. 202.
[5] 1 Keb. 791, 865. 1 Lev. 140.

WHERE the ſubmiſſion is of certain things ſpecifically named, with this proviſional clauſe, the arbitrator ought to make his award of all, otherwiſe it will be void.[6]

BUT where the ſubmiſſion is general of all matters in difference between the parties, though there ſhould happen to be many ſubjects of controverſy between them, if only one be ſignified to the arbitrator, he may make his award of that: he is, in the language of Lord Coke, in the place of a judge, and his office is to determine according to what is alleged and proved. It is the buſineſs of the parties grieved, who know their own particular grievances, to ſignify their cauſes of controverſy to the arbitrator; for he is a ſtranger, and cannot know any thing of their diſputes but what is laid before him. If any other principle prevailed, many awards might be avoided, ſays the ſame author; for one might conceal a treſpaſs committed, or other ſecret cauſe of action, which he had againſt the other, and ſo avoid the award, which would counteract the very principle on which theſe domeſtic judgments are recognized by the law.[7]

AND if, in the caſe of ſuch a general ſubmiſſion, an award concerning one thing only be made, it ſhall be preſumed till the contrary be ſhewn, that nothing elſe was referred to the arbitrator.[8]

[6] 8 Co. 98. Baſpole's caſe. S. P. Hammond v. Hatch. Goldſb. 125. pl. 14. 19 H. 6. 6. Fhbt. Abr. 51. a. Rol. Arb. L. 9.

[7] 8 Co. 98. b. cited Hob. 49. Rol. Arb. l. 7. 8. Brownl. 63. 2 pt. 309.

[8] Vid. all theſe points adjudged. Middleton v. Weeks. Cro. Jac. 200. Ormlade v. Coke. Cro. Jac. 355.

PENDING an action of treſpaſs, the parties referred the matter to arbitration. The ſubmiſſion was, in general terms, of *all* actions, controverſies, and ſuits between them: The award was in theſe words:—"Whereas there has been a ſuit at law, between the parties, that has run to a great expence on both ſides; and it being left to me to make an end of it, I determine that they ſhall each of them pay his own charges at law; and that the defendant pay the plaintiff five ſhillings for his making the firſt breach in the law." The defendant, by conſent of the plaintiff and leave of the court, pleaded this award, in bar of the action; one objection made to it was, that the ſubmiſſion purported to be of ſeveral matters, and the award was of one; but the court held unanimouſly, that as it appeared, that this particular ſuit was depending between the parties, and the arbitrator had decided on it, and the parties had not deſired to be heard on any more than this one; there was no probable preſumption that any other ſubſiſted between them.[9]

AND notwithſtanding the proviſional clauſe inſerted in a general ſubmiſſion, it ſhall not be preſumed, that any other difference appeared between the parties than thoſe included in the award, unleſs it be ſhewn by the party objecting to it on that account.—Thus, where the ſubmiſſion was of all matters depending to the 29th of January, "ſo that, &c." and the arbitrators reciting that ſeveral matters were depending on the 29th of January, awarded, "of and concerning the premiſes," of all matters to the 28th of January; the award was held

[9] Vid. the Cobler's Award. 1 Bur. 274 et ſeq.

good, becauſe it did not appear that any matter was depending on the 29th which was not depending before the 28th, and becauſe, without ſpecial matter ſhewn, it ſhould be intended a good award, with the averment, that it was made "of and upon the premiſes."[1]

THE ſame determination has been given in many other ſimilar caſes,[2] and in one it was ſaid by the court, that there was no occaſion for an averment, that theſe were all the matters depending at the time of the ſubmiſſion; "now depending" could not be, unleſs they had been in ſuit before the 29th; becauſe "a ſuit cannot be ſaid to be begun and depending all on the ſame day."—I cannot, however, ſubſcribe to the accuracy of this obſervation, nor can it at all apply to any other caſe, where the diſtance of time between that mentioned in the award, and the date of the ſubmiſſion, is more than one day.

THOUGH the proviſional clauſe be inſerted in a general ſubmiſſion, yet it will be no objection to the award, that the arbitrator had notice of a demand of a certain ſum by one party againſt the other, and that he made no award of that, if in other reſpects the award be good. Thus, where the award was, that the defendant ſhould pay to the plaintiff ſeveral particular ſums, on ſo many diſtinct accounts, and that on the payment of ſuch ſums, they ſhould give to each other general releaſes; the defendant pleaded, that the plaintiff was indebted to him for fees and diſburſements

[1] T. 7 Car. B. R. Ward v. Unwin. Rol. Arb. B. 24. Cro. Car. 216.

[2] Buſsfield v. Buſsfield. Cro. Jac. 577. Ley v. Paynes. H. 15 Jac. et eod. term. Maye v. Samuel. Rol. Arb. M. 5. Hob S. C. 258.

as an attorney in the ſum of 4l. that before the award made, he gave notice of this demand to the arbitrator, and offered to make it appear to him, and prayed that he would allow him that in the award; but that the arbitrator made his award as ſet forth by the plaintiff, without any allowance made, or conſideration had of the ſaid 4l. notwithſtanding the notice; but it was held, that this was no objection to the award, becauſe the arbitrator was not bound to make the allowance, as he might conſider it as not a juſt claim; he was the proper judge whether it ought to be allowed or not, and he had given his judgment by ordering general releaſes.[3]

Where the reference is general "of all matters in difference between the parties," yet if one of them omit to aſſert any particular claim, and the arbitrator of courſe make his award without conſidering that demand, the party is not bound by the award from afterwards enforcing the claim omitted by a ſuit in the ordinary courts.

In an action of covenant the defendant, among other things, pleaded that in a former term an action was brought againſt him by the plaintiff for ſome other matter, on which "all matters in difference between them" had been referred to arbitration; that the arbitrator had ordered ſeveral ſums to be paid to the plaintiff by the defendant, and that the parties ſhould give each other general releaſes; and that the defendant had paid the money, and that general releaſes were given; the plaintiff replied, that the matters which were the ſubject of the preſent action were not

[3] Birks v. Trippet. 1 Saund. 32, 33.

before the arbitrator: the defendant demurred; and after argument Lord Mansfield said the only question was, whether a submission of all matters "in difference" was a submission of matters "*not* in difference;" and judgment was given for the plaintiff.[4]

In a subsequent action for money had and received by the defendant to the use of the plaintiff for eighteen bags of red Dutch clover, the defendant pleaded, among other things, an award; the plaintiff replied that the subject of the present action was not included in the matters referred: issue being joined on this, a trial was had before Lord Kenyon; the plaintiff called one of the arbitrators to prove that this matter had never been laid before them, and that consequently they had not taken it into their consideration, in forming their award; objection was taken to this evidence on behalf of the defendant, on the ground that the submission included "all matters in difference;" his Lordship thought he was bound by the terms of the reference to reject the witness; and non-suited the plaintiff: an application being made to the court to set aside the non-suit, Mr. Justice Buller referred to the case immediately preceding as having decided the point; a new trial was had; the witness was admitted, and the plaintiff had a verdict: a motion was made to have this verdict set aside and a new trial granted, on the ground that the reference being of "all matters in difference," the award was conclusive on the parties as to all causes of action subsisting between them previously to the sub-

[3] Golightly v. Jellicoe. Hil. 9 G. 3. B. R. 4 Term Rep. 147 in the Notes.

miſſion. The court held there was no colour for the motion, for that the plaintiff might undoubtedly ſhew that the ſubject of the preſent action was not a matter in difference between him and the defendant at the time of the ſubmiſſion, nor was referred by them to the arbitrators.[5]

These deciſions are in perfect conformity with the rule of the civil law.[6]

An award of one particular thing, for the ending of a hundred matters in difference, is ſufficient: as, where the ſubmiſſion was of all matters in controverſy, and the award, taking notice of ſeveral matters, ordered the defendant to pay to the plaintiff four pounds, for arrearages of rent, and towards the repair of the houſe; this was held ſufficient.[7]

In the caſe of a ſubmiſſion of ſpecific ſubjects of difference, if no condition be annexed that the award ſhall be made "of and concerning the premiſes," it is ſaid the arbitrator may make his award of any of them, without conſidering the others.[8] This, however, appears to be a hard meaſure of juſtice, unleſs it be accompanied with the qualification allowed in the caſe

[5] Ravee v. Farmer. 4 Term Rep. 146.

[6] De rebus controverſiiſque omnibus compromiſſum in arbitrum a Lucio Titio et Mœvio Sempronio factum eſt, ſed errore quædam ſpecies in petitionem a Lucio Titio deductæ non ſunt, nec arbiter de his quicquam pronunciavit: quæſitum eſt an ſpecies omiſſæ peti poſſint? Reſpondi, peti poſſe nec pœnam ex compromiſſo committi; quod ſi maligne hoc fecit, petere quidem poteſt, ſed pœnæ ſubjugabitur.—Ff. l. 4. t. 8. f. 43.

[7] Hopper v. Hacker. 1 Keb. 738. 1 Lev. 132, 133.

[8] 8 Co. 98. a. M. 5 Jac. Middleton v. Weeks. Rol. Arb. L. 2. 3. Dict. pr. Maynard. 2 Vern. 100.

of a general ſubmiſſion, that the party may notwithſtanding the award bring his action for the ſubject omitted. And indeed there is a caſe reported, in modern times, which, as far as a deciſion at *niſi prius*, reported by one whoſe authority is not the moſt reſpected in Weſtminſter Hall, can be conſidered as an authority, directly contradicts the general principle here laid down.[9] This was an action of debt, on a bond conditioned for the performance of an award. At the trial, the Chief Juſtice is reported to have ſaid, that the arbitrators were bound to make their award on all matters between the parties which had been laid before them, though there was no proviſional clauſe of "*ita quod*." And the arbitrators having overlooked ſome matters that had been laid before them in the preſent caſe, a verdict was given for the defendant.

As it is of ſeveral particular things, ſays Lord Coke,[1] ſo it is of ſeveral particular perſons, and therefore, if two on one ſide and one on the other ſubmit, the arbitrator may make an award between one of the two of the one part, and the other of the other part, and it will be good.[2]

THEREFORE where the ſubmiſſion was by two plaintiffs on one ſide, and defendant and his wife of the other, of all matters and controverſies between them, "or any of them;" the award was held good, though nothing was awarded concerning the defendant's

[9] King v. Hammerton. 2 Geo. 2. 1 Barnard. K.B. 316.

[1] 8 Co. 98. a.

[2] Vid. 2 R. 3. 18. Brooke 44, cited Plowd. 289. 1 Keb. 885, contra. 1 Lev. 140. Bean v. Newbury. 16 Car. 2. B. R.

wife, on account of the words, "between them, or any of them."[3]

So, if A and B on one ſide, and C on the other, ſubmit to the award of J. S. of all matters between them; J. S. may make an award of any matter between A alone and C, for the ſubmiſſion ſhall be taken diſtributively, and perhaps there was no matter between B and C.[4]

A SUBMISSION of all matters between the parties, when there are more than one on one ſide, is the ſame as a ſubmiſſion of all matters between the parties, or either of them; and therefore, on ſuch a ſubmiſſion, an award of a ſum to be paid by one of the two to the ſingle party is good; though it was objected, that the ſubmiſſion muſt be underſtood of joint demands, and that therefore an award of a ſeparate debt was not within it.[5]

BUT if, in ſuch a caſe, it appear in the ſubmiſſion, that there were differences between the perſon on one ſide, and all the parties on the other, and the ſubmiſſion be with the proviſional clauſe, the award muſt comprehend all the parties, becauſe the ſubmiſſion is under a condition that it ſhall do ſo.[6]

THIS diſtinction, "with reſpect to the ſubmiſſion being conditional or not," is ſaid not to hold in the caſe of a reference by a rule by conſent of parties in a court of equity; for there, it is ſaid, unleſs the award comprehend all matters referred, it will be ſet aſide, as not being a determination purſuant to the terms of refe-

[3] Hardres 399.

[4] Arnold v. Pole. Rol. Arb. D. 5. Carter v. Carter. 1 Vern. 259.

[5] Althelſtone v. Moone et Willis. Comyns 547.

[6] Harris v. Paynter. Rol. Arb. O. 8. cited Lutw. 1628

rence.[7] Perhaps ſomething like a reaſon may be given for this apparent difference in the doctrine held on the two different ſides of the hall.—And perhaps the difference is more in appearance than in reality.—In the conditions of ſubmiſſion bonds, though there may in fact be but one ſubject of diſpute between the parties, yet a great variety of general and comprehenſive words is frequently inſerted, which would, if in fact there were ever ſo many ſubjects referred, include them all; but the inſertion of which does not imply the exiſtence of more than one. The courts of law, therefore, do wiſely in impoſing, on the party objecting to the award for this cauſe, the burthen of ſhewing that in fact a greater number of things were laid before the arbitrator than he has determined: but when a reference is by rule of a court of equity, a greater preciſeneſs is probably obſerved in the deſcription of the ſubjects referred, and, by omitting to decide on any one in particular, the arbitrator does not fulfil the intention of the court, which is to have as final a determination by his award as would have been made by a decree.

Or if the rule be drawn up in general terms, it cannot be leſs neceſſary in a court of equity than in a court of law, for the party objecting to the award, becauſe it is leſs comprehenſive than it ought to have been, to ſhew accurately that ſomething was in reality in diſpute which is not comprehended in the award.

Muſt not be of any Thing againſt Law.

If an award be of any thing which is againſt law, it is void, and the parties not bound to perform it.[8] As by the Roman law no penalty was incurred by non per-

[7] Hide v. Petit. 1 Ca. Ch. 186. Colwel v. Child. Id. 87.

[8] 19 E. 4. 1. Rol. Arb. G.

formance of any thing awarded which was diſhonourable.[9]

And it was once held, that an award of a recompence for an injury, for which no damages are recoverable at law, was void: thus an award, "that the defendant ſhould pay the coſts of a ſuit, inſtituted againſt him for words," was held to be void, if the words were not actionable; and for that reaſon it was adjudged, that the words ought to appear in the award, that the court might determine whether they were actionable or not.[1]

But this has ſince been denied to be law, and it has been held, that the plaintiff is not bound to ſhew that there was cauſe of action, that being left to the arbitrators to determine who have power to award damages, though, in point of law, there was no cauſe of action, becauſe the parties have made the arbitrators their judges.[2]

Muſt not be of a Thing impoſſible.

An award of a thing which is not phyſically or morally in the power of the party to perform, is void; as that he ſhall deliver up a deed which is in the cuſtody or power of a perſon over whom he has no controul;[3] that he ſhall procure a ſtranger to be bound with him for the payment of a ſum of money; for he cannot compel a ſtranger to be bound for him: or that he ſhall procure the juſtices of the Common Pleas to ſit, in order that

[9] Non debent autem obtemperare litigatores, ſi arbiter aliquid non honeſtum jufſerit. Ff. l. 4. t. 8. ſ. 21. n. 7.

[1] Vid. 1 Sid. 12.

[2] Hanſon v. Liverſedge. 2 W. and Mary. 2 Vent. 243.

[3] 12 Mod. 585.

he may levy a fine;[4] or that he ſhall procure the lord of a manor to grant a copyhold, or a ſtranger to make a releaſe or confirmation of an eſtate;[5] or to pay a ſum of money at a day which was paſt at the time of the award;[6] but in this caſe he ought to pay the money, the payment being the eſſence of the award, and not the payment on a particular day: that he ſhall enter into an obligation to the other *immediately* after the award; for ſome time is neceſſary.[7] Yet perhaps at the preſent day "immediately" would be conſtrued "within a reaſonable time." An award, however, that the one party ſhall infeoff the other in an acre of land, and *immediately* after deliver up the title deeds; or enter into a bond, and immediately after pay the money, would be good, becauſe neither of them is impoſſible.[8]

But an award, that the defendant ſhall be bound with ſureties, ſuch as the plaintiff ſhall approve, is void; for it may be impoſſible to force the approbation of the plaintiff.[9]

So, we are told, an award is void which orders the party to do ſomething which has been already done, or which, if it were done, would not be effectual to anſwer the purpoſe intended: as if it be awarded, that A ſhall releaſe to B the ſurety of the peace which he has againſt him in the King's Bench, when, in fact, before that, B has purchaſed a ſuperſedeas out of Chancery, directed to the juſtices to diſcharge the ſureties in the King's

[4] 19 Ed. 41. 1. Rol. Arb. F. 2. 3. 4.
[5] 28 H. 6. Mo. 3. pl. 3.
[6] 8 Ed. 4. 21. Rol. B. 17.
[7] 18 Ed. 4. 1. Rol. Arb. E. II. 1.
[8] 18 Ed. 4. 21. Rol. Arb. E. II. 2.
[9] 3 Mod. 272, 273.

Bench, becauſe he had found ſureties in Chancery, and the juſtices have accordingly diſcharged them.—Or if it be awarded, that he ſhall releaſe his ſuit againſt B, when in fact he had no ſuit againſt him; or that he ſhall releaſe all his right in a certain manor, when in fact there is no ſuch manor, or he has no right in it.[1]

And in general, in this reſpect, a diſtinction is made between the caſe of a bond, and that of an award; for if a man bind himſelf to do a thing which it is not in his power to do, it is reckoned his own folly, and he forfeits his bond by non performance: but the duty of an arbitrator is to judge reaſonably and impartially between the parties, and he departs from that principle, when he orders any thing which it is not phyſically or morally in the power of the parties to do.[2]

But it is no objection to the award, that it is difficult for the party to perform it, from the accidental narrowneſs of his circumſtances; as if it be to pay 20l. when he is not worth a groat, or to give 20 tons of wine when he has not one.[3]

And, if the party's doing that which is awarded will have weight with the court to give effect to it, he ought to do it; as in the caſe of releaſing the other from ſureties of the peace, where he is bound to keep the peace towards the releaſor and all the king's ſubjects; though, by his releaſe, he cannot diſcharge the party ſo bound, becauſe every ſubject has an intereſt in the recognizance:[4] yet he ought to releaſe, becauſe his

[1] 21 Ed. 4. 38. 39. Br. Arb. 40.

[2] 19 Ed. 4. 1. Rol. Arb. F. 2. 3.

[3] Id. ibid. cont. 18 Ed. 4. 1 Rol. Arb. E. II. 2. F. 2.

[4] 21 Ed. 4. 40, 41.

releaſe ſhewn to the court will be an inducement to them to diſcharge the recognizance.[5]

In the caſe, too, of an award that one of the parties ſhall procure a ſtranger to do a thing, a diſtinction is taken between the caſe, where he has no power over the ſtranger to compel him, and that where he has power, either by the common law, or by bill in equity. In the former caſe the award is void, for ſo much as concerns the ſtranger. In the latter it is good; as if a ſtranger to the ſubmiſſion be ſeiſed to the uſe of one of the parties, and the arbitrator award, that the latter ſhall cauſe the feoffee to uſes to give a releaſe to the other who is in poſſeſſion; this is good, becauſe the *ceſtuy que uſe* has ſuch intereſt and power over the feoffee, that by ſubpœna out of Chancery he can compel him to releaſe.[6]

So, if it be awarded that one ſhall pay a ſum of money to the other, and that in conſideration of that he ſhall acquit him of a bond in which they are both bound to a third perſon; here, though a third perſon be in ſome meaſure to concur, yet it is held, that the award is good; for if the penalty of the bond be not incurred, he may diſcharge the principal ſum at the day; if the penalty be forfeited, he may pay, and compel the obligee in equity to deliver up the bond.[7] The ſame obſervation applies to an award that one of the parties ſhall diſcharge the other of his undertaking

[5] 2 Hawk. Leach. 257. Quæ. et vid. as to the releaſe of ſureties of the peace, Jenk. 136.

[6] 17 Ed. 4. 5. b. Rol. Arb. F. 1.

[7] Darſey v. Clipſham. March. 18. 1 Rol. Arb. page 248. n. 11. vid. ante page.

to pay a debt to a third perſon.[8] On the ſame principle, it is ſaid, that, admitting no objection will hold to an award of a diſcontinuance, or of a nonſuit, on account of its not being final, ſuch an award is good; though there muſt be an act of the court, for it is in the power of the party, ſays Rolle, to make default, or to deny the action.[9]

Muſt be reaſonable. As an award muſt not be of a thing impoſſible, ſo neither muſt it be of a thing unreaſonable. Therefore an award, that the one party ſhall ſerve the other for any period of time, is void; for it is unreaſonable, as being contrary to the firſt principles of civil liberty.[1] On the ſame principle, an award is void which orders the party to do a thing, in the performance of which he may ſubject himſelf to an action from another: thus, in the times of ancient nicety, an award was conſidered as void, which ordered the party to pay money "in" the houſe of a ſtranger, becauſe he could not enter the houſe of a ſtranger without committing a treſpaſs. But, that he ſhould pay the money "at" or "near" the houſe, was held good, becauſe he might go to the houſe without entering it and committing a treſpaſs:[2] unleſs the owner of the houſe has land adjoining to it, ſo that the party cannot come to the houſe without treſpaſſing on the land, for then the award was conſidered as void.[3] But

[8] Becket v. Taylor. 1 Mod. 9.

[9] Rol. Arb. F. 5. 6.

[1] 9 E. 4. 44 Rol. Arb. B. 12.

[2] Rol. Arb. E. 2. where many caſes are cited. Linſey v. Aſhton. 2 Bulſt. 39. Anon. 1 Keb. 92. Rol. Arb. F. 10. 1 Rol. Rep. 6.

[3] Taverner v. Skingley. Rol. Arb. E. 3.

even in thoſe times, if the houſe *at* which the payment was to be made was a common inn, the award was conſidered more favourably.[4] And now an award to pay *at* or *in* the houſe receives the ſame conſtruction, and is taken to imply a licence to go to the houſe;[5] eſpecially, if it be in the houſe of the arbitrator himſelf, for there a licence ſhall be preſumed.[6] Or at leaſt the party may pay at the door of the houſe, if he cannot obtain permiſſion of the maſter to pay it in the houſe.[7] It is on the principle of being unreaſonable, that an award, "that one of the parties ſhall pay only part of a debt due," has been conſidered as void, if it appeared on the face of the award that more was really due.[8] But where it does not appear by the award that a larger ſum is really due, but that it is only in demand, an award of a leſs ſum is good. And if the ſubmiſſion be of all matters in difference, though the arbitrator do not directly take notice of any other matter but the demand of the larger ſum, it ſhall be preſumed, in ſupport of the award, that the arbitrator ſaw, upon the whole, that nothing more was due than he has given. Thus, where to debt on bond for performance of an award, the defendant pleaded "no award made;" and the plaintiff in reply ſet forth an award, in which the arbitrators took notice of 72l. being in controverſy for rent due, and awarded 50l. in full ſatisfaction and general releaſes to be given; but it did not appear by

[4] S. C. Cro. Car. 226.

[5] Alley v. Cox. 27 Car. 2. 3 Keb. 479.

[6] Freem. 205.

[7] Holland v. Helwis. 3 Lev. 153.

[8] Cont. 45 Ed. 3. 16. where it is by ſimple contract. Br. 44. b. acc. Rol. Arb. J. 4.

the award that any other matter had been in controverſy, though the ſubmiſſion was general. The court were of opinion that the award was good; and further remarked, that it was ſingular the objection ſhould come from the defendant, in whoſe favour the award was; for by his objection he inſiſted on paying 72l. inſtead of 50l. The ſtrength of the objection, however, muſt have been, that the award for a leſs ſum was void, becauſe payment of the leſs ſum in purſuance of it, if the award was not good, would not be a bar to the plaintiff in another action for the original debt.[9]

On the ſame principle, of being unjuſt and unreaſonable, it has been held, that, where the queſtion in diſpute was the taking away of the plaintiff's goods, an award, "that he ſhould have part of them returned, and that the defendant ſhould retain the reſt," is void.[1] But if it had appeared that there was a diſpute about the property of the goods, an award "that the plaintiff ſhould have part, and the defendant ſhould retain the reſt," might have been ſuſtained; for then it muſt have been underſtood, that the arbitrator adjudged the property of ſo much as he ordered to be retained, to have been in the defendant.

Muſt be advantageous.

An award muſt not be of a thing which is merely nugatory, without any advantage to the parties; therefore an award that one of them ſhall go to Rome, or to St. Paul's, is void, for it can be of no ſervice to the other.[2] So if a man and

[9] Godfrey v. Godfrey. 2 Mod. 304.

[1] Cont. M. 45 E. 3. 16. Br. 44. b. Acc. Rol. Arb. J. 5.

[2] 9 Ed. 4. 44. Rol Arb. J. 11.

woman ſubmit to arbitration, and it be awarded that they ſhall intermarry, this is not binding; for one reaſon, among others, that it cannot be preſumed to be advantageous to them.[3] So it is not a good award that one ſhall give a releaſe to the other of land in ſatisfaction of an action, if he to whom the releaſe is to be made has nothing in the land at the time, for that can be of no ſervice to him. But, in ſuch a caſe, if he to whom the releaſe is to be made be ſeiſed of the land, ſuch an award will be good, though he who is to give the releaſe has no right in it; for it is an advantage to have ſuch a releaſe, to bar the releaſor if he ſhould afterwards pretend to have title to the land. So, if before ſubmiſſion, one of the parties had executed a releaſe made in favour of the other, but had retained it in his own hands, and then, on ſubmiſſion of all matters, the arbitrator had awarded that he ſhould deliver up all the evidences concerning the land, in ſatisfaction of a certain action; if he had not delivered the releaſe, this would have been a breach of the award; the award is good, though it be only to give the party his own evidences, it being an advantage to him to have them without an action.[4]

MUTUAL releaſes are advantageous, and therefore an award of them is good; and the condition of a bond to ſtand to an award will be broken, by not giving them, though there be no other means of compelling performance than by an action on the bond.[5]

[3] Id. ibid. et Rol. Arb. J. 10.

[4] Vid. all theſe points adjudged, 9 E. 4. 44. a. b. Rol. Arb. J. 10, 11, 12, 13, 15.

[5] Id. ibid. et vid. Freem. 52.

But the courts formerly went further than merely to require that an award ſhould be advantageous; they required that it ſhould give ſomething which appeared expreſſly to be a recompence to the plaintiff againſt whom it was pleaded. On this principle, it is held in many places,[6] that an award that each party ſhall be quit againſt the other of the treſpaſſes committed on one another, becauſe theſe treſpaſſes were equal, is not a bar to an action by one of them for the original treſpaſſes, becauſe, ſay the books, one muſt have a recompence. In other places,[7] however, ſuch an award is held to be good, as indeed there ſeems no rational objection to it. On the principle of a recompence being neceſſary, an award "that the plaintiff ſhall have his goods again, which had been taken by the defendant," it is ſaid, is not good, becauſe it gives no ſatisfaction for the taking and detention;[8] but, that if it be added that they ſhall be carried to ſuch a place at the expence of the defendant, this is a ſatisfaction: it is, however, no more a recompence for the taking and detention, than the award without the addition of this clauſe.

Even in thoſe times it was allowed, that an award, that "whereas each is indebted to the other in 40s. the one ſhall go quit againſt the other is good, becauſe it is a ſufficient ſatisfaction.[9]

[6] 43 Ed. 3. 28. b. 29. a. Brooke, 44. b. Rol. Arb. J. 1. 21 H. 6. 22 H. 6. 39 a. 9 Ed. 4. 44. Fhbt. 51. b.

[7] 10 H. 6. 14. Br. 43. 19 Ed. 4. 8. Br. 38. Rol. Arb. J. 7.

[8] 12 H. 7. 14, 15. Vid. 45 Ed. 3. 16. Rol. Arb. J. 3. Br. 32.

[9] 19 H. 6. 37. b. Rol. Arb. J. 6.

If on a submission of a trespass, it is said, the arbitrator award, that if the defendant will swear that he is not guilty, he shall go quit, and he accordingly swear, this is not a good award, and cannot be pleaded to an action of trespass, because, says the book,[1] nothing is awarded to be paid; or rather, says Rolle,[2] it cannot be intended to be the same trespass of which he waged his law.

Must be certain. As the intention of parties in submitting their disputes to arbitration, is to have something ascertained which was uncertain before, it is a general rule that the award ought to be so plainly expressed, that there may be no uncertainty in what manner the parties are to put it in execution, but that they may certainly know what it is they are ordered to do. It is to no purpose, says the civil law,[3] that the arbitrator should pronounce an uncertain award; and the English law has, in this respect, adopted the same language.[4] Therefore an award, "that one of the parties shall pay the other for certain task work and days work, without mentioning the sum," is void.[5]

The plaintiff and defendant having certain disputes concerning a piece of land, submitted them to arbitration. The arbitrator awarded, amongst other things,

[1] 46 Ed. 3. 17. Fhbt. 52. b. Brooke, 44. b. vid. Rol. Arb. 1. 2.

[2] Rol. Arb. X. 7.

[3] Pomponius ait, inutiliter arbitrum incertam sententiam dicere; utputa, *quantum ei debeo reddo*, divisioni vestræ stari placet. pro ea parte, quam creditoribus tuis solvisti, accipe. Ff. l. 4. t. 8. s. 21. n. 3.

[4] 10 Ed. 3. 18. 5 Co. 77. b. 78. a.

[5] Pope v. Brett. 2 Saund. 292, 293.

that the defendant ſhould enter into a bond to the plaintiff, that the plaintiff and his wife ſhould enjoy the land; this was held to be void, becauſe the arbitrator had fixed no certain ſum for the penalty of the bond; and there was no means by which the ſum could be aſcertained; for it was held, that this did not reſemble the caſe of a covenant by the party himſelf, to enter into a bond for the enjoyment of land, in which, if no ſum be expreſſed in the covenant, it is implied that the penalty ſhall be equal to the amount of the land.[6]

Two ſubmitted all matters in controverſy between them, and it was awarded that the one ſhould pay to J. S. the one half, and the other the other half of a certain debt due to J. S. by two ſtrangers, who were bound to J. S. at the requeſt of the two ſubmittants; though the ſum in which the two ſtrangers were bound was averred in the plea in which this award was pleaded, yet two juſtices againſt one [7] held the award was bad, for uncertainty in not having mentioned the ſum. But one [8] of the two thought that this might have been aided, by an averment that the two ſtrangers were bound to J. S. in no other obligation but this.[9]

THE ſubmiſſion was "of all controverſies concerning the right, title, and poſſeſſion of 200 acres of land, called *Kelſtorne Linge*; it was awarded, that in the

[6] Samon's caſe. 5 Co. 77, 78. Rol. Arb. Q. 1. 4. Cro. El. 432. pl. 40. Mo. 359. pl. 489.

[7] Doderidge and Houghton, Montague e contra.

[8] Houghton.

[9] Gray v. Gray. Rol. Arb. Q. 2. 3. Cro. Jac. 525. Godb. 275.

waſte lands of the vill of Kelſtorne, the one ſhould have the brakes growing there during his life, paying to the other 2s. per annum, but in the award no name was given to the land where the brakes grew; and for this reaſon the award was held to be void for uncertainty, nor would the court admit the aid of an averment, that the land where the brakes grew "was the ſaid land called Kelſtorne Linge in the ſubmiſſion, and no other nor diverſe:" becauſe they ſaid they could not expound the intent of the arbitrators.[1]

THE condition of a bond being to perform the award of J. S. made between A. and B. of all controverſies and demands between them, it was awarded, "of and concerning the premiſes," that A. ſhould permit B. to enjoy certain leaſes of certain lands then in his poſſeſſion, which were the lands of W. S. and then the inheritance of A.—B. paying the rents, and performing the covenants in the leaſes, and that B. ſhould pay the *arrears* of rent due to A. after his purchaſe: notwithſtanding an averment that there were two ſhillings of the arrears of rent then due, the award, as to the payment of the arrears, was held void for uncertainty, becauſe it did not appear by the award, at *what* time after the purchaſe, the rent became due; for that B. the leſſee, could not know at what time A. the plaintiff, purchaſed the reverſion of W. S. nor had he any means of knowing it, unleſs A. or W. S. would inform him, which he could not compel them to do.[2]

PERHAPS, in the three laſt caſes, the courts appear to have been abundantly nice; the ſame obſervation

[1] D. 8 El. 242. 52. per curiam. Rol. Arb. Q. 5.

[2] Maſſey v. Aubrey, after verdict for the plaintiff. Rol. Arb. Q. 9.

does not apply in an equal degree to ſome of thoſe which follow.

To an action on the caſe for the value of a quantity of malt, the defendant pleaded a ſubmiſſion to arbitration, and an award that he ſhould pay to the plaintiff ſo much for each quarter as a quarter of malt was then *ſold* for; the award was held to be void for uncertainty, becauſe it was not mentioned in what place the price was to be taken, and perhaps in one market it might be ſold for a greater price than in another.[3]

An award, "that the defendant ſhall deliver certain goods particularly named, and three boxes, and *ſeveral* books, without naming the books," is liable to the ſame objection of uncertainty: the books ſhould have been particularly deſcribed, unleſs it had been ſaid that the books were within the boxes, by which they would have been ſufficiently aſcertained.[4] So, an award, 'that one of the parties ſhall deliver up to the other a certain writing obligatory, or a certain bill obligatory which he had before," is altogether uncertain, for it does not ſay of what ſum, nor of what penalty the bond is, nor of whom it was obtained.[5]

The ſame thing has been ſaid of an award "that one of the parties ſhould give ſecurity for the payment of a ſum of money," either in one groſs ſum, or at different ſpecific times, or annually for life; becauſe, it is ſaid, he cannot tell what kind of ſecurity is meant, whether by bond or otherwiſe.[6]

[3] Hurſt v. Bambridge. Rol. Arb. Q. 7.

[4] Cockſon v. Ogle. 13 W. 3. Lutw. 550.

[5] Bedam v. Clerkſon. 1 Ld. Raym. 124.

[6] Duport v. Wildgooſe. 2 Bulſtr. 260. Thynne v. Rigby. Cro. Jac. 314. Tipping v Smith. 2 Str. 1024.

It was awarded, that "one party ſhould pay a certain ſum to the other, by different payments at ſeveral days, the laſt of which payments ſhould be two years after the award, and that on the laſt payment, the payee ſhould give a releaſe of all actions to the day of the *date* of the *releaſe*; it was much debated, whether the objection of uncertainty ſhould prevail againſt this award. The judges who argued in favour of the exception, and who compoſed the majority,[7] argued in this way: It is uncertain what the date of the releaſe was intended to be; if it be on the day of the laſt payment, the award of the releaſe itſelf is void, becauſe many cauſes of action may have accrued ſince the time of the ſubmiſſion; and if it muſt be left to the election of the party himſelf to give ſuch a releaſe as will be good, that is, with a date at the day of the ſubmiſſion, he may elect to give it any other date, as before the ſubmiſſion, which would not be ſufficient.—The judge who argued in favour of the award,[8] ſaid, it muſt be taken to be ſuch a releaſe as would be good, if expreſſly awarded, and then it muſt be antedated to the time of the ſubmiſſion, and the antedate could deceive nobody.[9] In ſuch a caſe, the judgment of a court would, at this day, probably coincide with the latter opinion.

If that, to which the objection of uncertainty is made, can be aſcertained either by the context of the award, or from the nature of the thing awarded, or by a manifeſt reference to ſomething connected with it, the objection will not prevail.

7 Coke et Doderidge.

8 Houghton.

9 Lumley v. Hutton. 1 Rol. Rep. 271.

On a ſubmiſſion by bond, "the condition of which recited ſeveral differences between the plaintiff and the defendant concerning a piece of ground ſituated ſouth of the plaintiff's houſe, adjoining to the river Thames, and uſed as a wharf, and the erection of ſeveral piles of boards and ſcaffolds on it, of which the plaintiff complained as being a nuiſance to his houſe;" an award was made, adjudging that the defendant *ſhould enjoy* the piece of ground as a wharf, and that the ſcaffolds *ſhould* be pulled down and removed. An action being brought on the bond, and on the plea of "no award," this being ſet forth by the plaintiff, and a breach aſſigned in the defendant's not having pulled down the piles of boards and ſcaffolds, the defendant demurred to it as wanting certainty, becauſe it did not order by *whom* they ſhould be pulled down; and it was argued, that it did not appear on the face of the award that the land belonged to the defendant, ſo that he could go upon it to pull down the nuiſance without being a treſpaſſor; for it was only ordered, that he ſhould uſe the ground as a wharf, which rather imported that it was before diſputed whether it was his property or not; and the award, that he ſhould uſe it as a wharf, did not decide it to be his now: it only gave him a liberty of wharfage: and if it were admitted to be his ground, yet the plaintiff might abate it if it were a nuiſance; every nuiſance being abateable by him to whom it is one; and if it were in fact no nuiſance, yet the arbitrators, by awarding that the plaintiff ſhould pull it down, might have enabled him to do it without being a treſpaſſor; and it being left indefinite, whether the plaintiff or defendant ſhould pull it down, the award was void for uncertainty. If any one be ready to exclaim that this

mode of reaſoning is too technical and puerile to have ſeriouſly attracted the attention of a court, let him treat it with more reſpect when he is told, that it is the reaſoning of Lord Chief Juſtice Holt.—It received, however, this anſwer from the other three judges,[1] that the ground muſt neceſſarily be conſidered as belonging to the defendant; for it could not be ſuppoſed that the arbitrators would have awarded that he ſhould uſe it as a wharf, if they had not conſidered it to have been his ground, and by declaring the erection of the deals and ſcaffolding to be a nuiſance, and ordering it to be pulled down, they could only mean that it ſhould be pulled down by him on whoſe ground it was erected. The caſe was the ſame as if a debtor or a creditor ſubmitted to an award, and the arbitrators ſhould award that the debt ſhould be paid, or that it ſhould be releaſed; where it was manifeſt that it muſt be paid by the debtor, or releaſed by the creditor. And it was compared to a caſe which had occurred in the reign of Edward the fourth;[2] where the condition of an obligation was, that the great bell of Milden Hall ſhould be carried to the houſe of the obligee in N, at the coſts of the men of M, and there weighed and melted down; and the obligee ſhould make of it a tenor, &c. though it was not ſaid who ſhould weigh the bell, yet it was adjudged that the obligee, who was a brazier, ſhould weigh it, becauſe it belonged to his occupation to do it. A writ of error, however, was brought on the judgment,

[1] Powell, Powis, and Gould.

[2] 9 Ed. 4. 3. b. Arnote v. Breame. 6 Mod. 244. But more fully reported in 2 Ld. Raym. 1076.

which was in favour of the plaintiff, in the Exchequer Chamber, but before argument the parties agreed.

It was held, in the ſame caſe, that where there was no date to the award, it ſhould be taken as dated from the day of the delivery, and that if any thing was ordered to be done at a certain time after the date, that time ſhould be reckoned from the delivery, which might be aſcertained by averment; and, in this caſe, where the ſcaffolding was ordered to be removed within fifty-eight days from the date of the award, which in truth had no date expreſſed, it was held that the time ſhould be reckoned from the 9th of October, that being the day on which it was averred in the replication to have been delivered to the parties.

An award, 'that one of the parties ſhall acquit the other of a bond of 200l. or "thereabout," in which they were bound to B, for payment of 105l. or "thereabout," is ſufficiently certain; for being of a bond given to a particular perſon, and with a penalty, and for the payment of a ſum nearly aſcertained, it ſhall not be preſumed that there are any more than one which will anſwer the deſcription in all theſe reſpects.[3]

An award, "that the one ſhall ſeal and deliver a demiſe to the other, *or* his aſſigns," is certain enough; it ſhall be underſtood, "to himſelf."[4]

An award, "that the plaintiff ſhall pay the defendant a certain ſum on a particular day, and that then the defendant ſhall re-aſſign the land mortgaged to him by the plaintiff," is ſufficiently certain, though it do not

[3] Barſey v. Clipſham on demurrer. Rol. Arb. Q. 3.

[4] 1 Keb. 335.

ſay for what term the reaſſignment ſhall be, whether for years, for life, or in fee; it ſhall be underſtood to be for the whole intereſt mortgaged.[5]

WHERE the ſubmiſſion was of all controverſies, reſpecting a voyage, and it was awarded that, one ſhould pay his part of the expences of the voyage, and allow, on account, his proportion of the loſs which ſhould happen to the ſhip during the voyage; this was held good, becauſe the expences and the loſs might be aſcertained by calculation.[6]

"To pay the charges of a ſuit" is ſufficient; for theſe may be aſcertained by the attorney's bill.[7] So, "that the one ſhall pay to the other all ſuch moneys as he had expended about the proſecution of a ſuit;" for that may be aſcertained by ſhewing what was in fact laid out.[8] So, "that the defendant ſhall pay as the plaintiff and his attorney, by a bill and oath ſhall make appear.[9]

So it might be ſuppoſed, an award between executors, "that the one ſhould pay the teſtator's charges, debts, &c. in the Spiritual Court, as far as his aſſets went," would be good, becauſe both the charges and the aſſets might be aſcertained.[1]

So, it might be ſuppoſed, "an award of a ſum, provided the party to whom it is awarded make affidavit of it before a magiſtrate," might be ſupported; but an

[5] Roſſe v. Hodges. 1 Lord Raym. 234.

[6] Beale v. Beale on demurrer. Rol. Arb. H. 24.

[7] Cro. Car. 383.

[8] Hanſon v. Liverſedge. 2 W. and M. 2 Vent. 242.

[9] Rous v. Lun. 1 Keb. 569. et vid. acc. Linfield v. Ferne. 3 Lev. 18 et ante p. 135.

[1] Semb. cont. Meſſenger v. Freeman. 3 Keb. 508.

award that he ſhall make ſuch an affidavit as the other party ſhall require, is bad for the uncertainty of what affidavit he will require.[2]

It is no objection to an award, that it is conditional, as that one of the parties ſhall enjoy a houſe for three years and a half, and ſhall pay his rent every half year; and that if he fail in payment, the award for the enjoyment of the houſe ſhall be void.[3] So that he ſhall pay the other 10l. on condition that each ſhall acquit the other; for it ſhall be taken as a poſitive injunction that they *ſhall* acquit one another.[4]

So it may be made with a penalty, to attach on the non-performance of a preceding part; as to pay 12l. on two ſeveral days, and on default of payment the firſt day, to pay the whole 12l. immediately after.[5]

And, where it is left to a ſubſequent event to aſcertain preciſely the thing awarded, it will be ſufficient if that event muſt neceſſarily happen; as if the ſubmiſſion be with reſpect to a way leading to a houſe, and the award be, that the one ſhall give a bond of 300l. to the other, payable at three years' end; and in caſe the way be taken away, then that he ſhall pay leſs by a certain ſum, and if not, a certain ſum more.[6]

An award in the alternative, that the party ſhall do one thing or another, is not ſubject to the objection for uncertainty; for, when he has done one of the things, he has performed the award; as if the award be, that

[2] Backwell v. Knipe. 3 Keb. 293.

[3] Furſer and Bond v. Prowd. Cro. Jac. 423.

[4] Linfield v. Ferne. 3 Lev. 18.

[5] Kockill v. Wetherel. 2 Keb. 838.

[6] Collet v. Powell. 2 Keb. 670.

he ſhall deliver up to the other party a certain deed, or pay him 50l. this is ſufficiently certain; and ſuch an award in the alternative ſeems to be the beſt mode of compelling a party to exert himſelf to procure the performance of what is not ſtrictly within his own power; as in the caſe before mentioned, if the deed were in the cuſtody or poſſeſſion of another over whom he had no controul, the award would be void, if it ſimply ordered that he ſhould deliver up the deed, becauſe it might not be in his power to obtain it from the perſon, in whoſe poſſeſſion it was: but the alternative of delivering the deed, or paying 50l. will be a motive for him to uſe his endeavour to have the deed delivered up; and if he cannot, the 50l. will be ſome ſort of recompence to the other for the want of it: perhaps, in juſtice, the other is intitled to have the deed, and it is withheld from him in conſequence of ſome miſconduct of the firſt; it is therefore but juſtice, that, if he cannot have the deed itſelf, he ſhould have a penalty equivalent to the damage he may ſuſtain by the loſs of it.[7]

Lord Chief Juſtice Coke is ſaid to have applauded the wiſdom of Chief Baron Manwood, in adopting this expedient of an alternative award, to enforce the performance of ſomething, for which, had it been awarded ſimply, the award, according to ſome rules of conſtruction, would have been void.

No objection can be taken to an award for want of certainty, becauſe it appoints no time or place for the payment of a ſum of money, though it be in the power

[7] Vid. Lee v. Elkins. 12 Mod. 585, 586. Lutw. 545.

of the arbitrator to appoint a time for payment, or for doing any collateral act; because the award shall have a reasonable construction; the party shall have a reasonable time to pay the money; a demand within a reasonable time shall be sufficient to entitle the opposite party to recover: and the place is perfectly immaterial.[8] In this respect the English law exactly corresponds with the civil.[9]

When Uncertainty may be helped by an Averment in pleading.

An averment, in some cases, may be admitted to support an award which has an appearance of being uncertain.[1] Thus, wherever, from the nature of the thing, the award may be ascertained by a reference to something else, there an averment will help it; as if it be, "to pay the money expended in a certain suit," an averment "that so much was expended," will support it.[2]

So, where the description of a matter in dispute, is not exactly the same in the award as it is in the submission, an averment in pleading "that the thing so differently described, is the same thing," will be sufficient to support the award: thus, where the submission

[8] 2 Brownl. 311. 1 Keb. 92. et vid. Philips v. Knightly. Str. 903. 1 Barnard. 84. 151. 463.

[9] Solutioni diem posse statuere arbitrum puto: et ita et Trebatius videtur sentire. Ff. l. 4. t. 8. s. 21. n. 2. Intra quantum autem temporis, nisi detur quod arbiter jusserit, committatur stipulatio, videndum est. Et, si quidem dies adjectus non sit, Celsus scribit, inesse quoddam modicum tempus: quod ubi præterierit, pœna statim peti potest et tamen si dederit ante acceptum judicium, agi ex stipulatu non poterit. n. 12.

[1] Dict. per Gould. J. 1 Lord Raym. 612.

[2] Vide ante page 202.

was concerning an enclosure between *Barton* Down and *North* Down, and the award purported to be an enclosure, between the *defendant's* down and the down of *I. S.* it seems to have been admitted, an averment "that the enclosure mentioned in the award, was the same with that mentioned in the submission," would have supported the award: but for want of such an averment, the plaintiff failed in his action.[3]

But if there be no means by which the thing, uncertainly awarded, can be reasonably ascertained, no averment of the party will make it good.—Thus, if it be awarded "that the one party shall pay to the other so much money as shall in conscience be due," such an award cannot be supported by an averment, "that any particular sum is due in conscience." It was the express business of the arbitrator to ascertain the sum.[4]

So, an award, "that the defendant shall pay the plaintiff for certain task work, and days work, without fixing a value," cannot be aided by an averment, "that the work was worth so much and no more.[5]

Where it does not appear from the award itself, that it was made "of and upon the premises," an averment in pleading, "that it was," it is said, will not help it: as where money was awarded to be paid by one party to the other, but it was not said, on what account, nor was it professed to be made "of and upon the premises:" the allegation of the party that it was so made, was held not sufficient to support the award.

[3] Withers v. Drew. Cro. El. 676. pl. 5.

[4] Watson v. Watson. Sty. 28. T. 3. Car. B. R.

[5] Pope v. Brett. 2 Saund. 292.

in this part.[6] Yet it ſeems difficult to conceive a reaſon, why it ſhould not have been preſumed to have been made "of and upon the premiſes," rather than otherwiſe.—However, it is laid down in the more ancient reports, as a thing not to be diſputed, that, where the award is not referred by the arbitrators to the ſubject in ſubmiſſion, or is not any generality comprehending it, the averment of the party that it is all one, cannot expound the intent of the arbitrators.[7] As if the ſubmiſſion be of a manor, and an award be made of an acre, and it does not appear by the award itſelf, that this is parcel of the manor; it cannot be made good by an averment that it is.[8]

So, where it was awarded, that the defendant ſhould pay to the plaintiff 3l. 10s. but it was not ſaid for what; Hobart held that this implied nothing, nor could it be helped by averment. Yet in the ſame place he ſays, that, if an action were brought for the treſpaſs, no doubt this award might be pleaded with an averment. But why an award ſhould be pleaded in bar of an action for the cauſe, on the ſubmiſſion of which the award was made, though that award cannot be enforced, ſeems to require ſome explanation. However, Hobart adds, "that there was no judgment given in this caſe; for though he himſelf was, and continued at the time when he reported the caſe, to be clearly decided, and the reſt concurred, yet there was ſome

[6] Bacon v. Dubarry. 1 Ld. Raym. 346. 12 Mod. 129.

[7] Dyer 242. b. pl. 52. M. 7 and 8 Eliz.

[8] Per Co. Ch. J. conceſſum per Doderidge, but Houghton doubted: but Coke ſaid this is Dyer's caſe.

varying afterwards, and so it hung, and he thinks it was compounded, for he heard no more of it."[9]

Must be final. As the principal object which parties have in view, when they submit to arbitration, is to prevent any future litigation on the subject of the submission, no rule is better founded than that which requires that an award should be final.[1]

It is on this principle that it has been uniformly held, that an award that each party shall be nonsuited in the action which he has brought against the other, is not good, because a nonsuit does not bar them from bringing a new action.[2] An award ought to have four qualities, says Newton; it ought to be a final determination; the parties ought to be bound by it for ever; it ought to inflict a penalty on him who does not perform it; and it ought to be such, that performance may be compelled by the law: an award of a nonsuit, continues he, is deficient in all these respects: it is not final, and the party is not perpetually bound by it, because he may bring another action; and he cannot be compelled by the law to be nonsuited.—What is meant by the requisition "that the award should inflict a penalty on him who will not perform it," does not appear very intelligible; it cannot be supposed that it is meant, that every award should be in the alternative, "do this, or suffer a forfeiture on failure of performance," for very few awards are so penned: neither can it be supposed, that it is intended that the thing itself

[9] Hob. 49, 50. Nichols v. Grunnion.

[1] Non differendarum litium causâ, sed tollendarum ad arbitrum itur. Ff. l. 4. t. 8. s. 37.

[2] 19 H. 6. 36. Fhbt. 51. a. b. Brooke. 45. a.

which is awarded, ſhould contain any myſtic virtue, which ſhould deter the party from diſobedience. The laſt requiſite clearly refers to that diſtinction which was antiently taken between an award for money, and an award of any thing "collateral;" the word "collateral" being technically uſed to contradiſtinguiſh money from every thing elſe: for in thoſe times, an award for any "collateral" thing could not be enforced, unleſs there was a bond for performance; if, however, there was a bond for performance, the party might forfeit the penalty of his bond by not being nonſuited as well as by not doing any other ſpecific thing. Another objection is indeed made to an award of a nonſuit, "that the party cannot be nonſuited without a judgment, and that, therefore, the nonſuit is in part the act of the court. But this objection would extend to the award of every act, to the accompliſhment of which the concurrence of the court, or of a third perſon, is neceſſary; yet, in the very ſame place where this objection is taken to the award of a nonſuit, it is laid down that an award "that one of the parties ſhall levy a fine" is good, though a fine cannot be levied without the act of the court.[3] The only well-founded objection, therefore, that can apply peculiarly to the award of a nonſuit, is this, that it is not final, becauſe it does not bar the party from bringing another action. Had the queſtion, indeed, remained yet undecided, it might have been ſaid, in analogy to the conſtruction put on other caſes, that he, who ſuffered a nonſuit, but afterwards brought another action, nominally performed the award, but

[3] 5 H. 7. 22. Fhbt. 52. b.

in ſubſtance was guilty of a breach: however, the word "nonſuit" ſeems to be ſo peculiarly appropriated to expreſs one particular idea, that its meaning cannot be ſo far extended, as to imply a breach of ſuch an award, in bringing another action: for "that an award of a nonſuit is not final," has been uniformly held from the time of the year books, to the preſent day.[4]

It was formerly doubted, whether an award "of a diſcontinuance of an action," was not equally liable to the objection of not being final, as that of a nonſuit, becauſe the party is not bound by a diſcontinuance from bringing another action.[5] It was ſoon, however, diſtinguiſhed from the caſe of the nonſuit, by obſerving that the diſcontinuance was altogether the act of the party, namely, the making default and not proſecuting his action; how little this diſtinction affects the queſtion, may be conceived, by what has been obſerved a little above.—However, Rolle tells us that, "if it be awarded, that each ſhall diſcontinue the actions which he has againſt the other," this is good: but his opinion ſeems not to be founded on the principle of ſuch an award being final; for he immediately adds: "but it is otherwiſe, when one is ordered to diſcontinue, and the other to give a releaſe, *becauſe then the parties have not an equal advantage.*"[6] But in another place, it is mentioned as a thing decided, "that an award to continue or diſcontinue a ſuit" is good, becauſe it is in the

4 Vid. the places before cited, and Rol. Arb. T. 15. 16. 17. F. 9. 7. 6 Mod. 232. 1 Barnard. K. B. 463.

5 Vid. the places above cited.

6 Dict. 1 Rol. Rep. 362. cites 19 H. 6. 36.

power of the party to do it or not:[7] and now it ſeems to be taken for granted, that no objection can be taken to ſuch an award.[8]

An award, "that the party ſhall enter a *retraxit* in a ſuit which he has depending, is clearly final, becauſe, after a retraxit, the plaintiff cannot bring another action for the ſame cauſe.[9]

An award, "that all ſuits ſhall ceaſe," is final: it ſhall be taken as if it had been ſaid that all ſuits ſhall ceaſe for ever; no new ſuit can be brought, while thoſe ordered to ceaſe are depending, becauſe they may be pleaded in abatement to the others, nor can theſe be proſecuted becauſe of the award; that operates as a releaſe, and conſequently extinguiſhes the right; for if a man releaſe his action, and have no other remedy for his right but the action, that diſcharges the right; in the ſame manner determining the ſuit, determines the right of the thing, becauſe he has no other remedy but by ſuit, and therefore the award is final.[1]

So, an award, "that a bill in Chancery ſhall be diſmiſſed," is final: it ſhall be taken to mean, "that the ſuit ſhall ceaſe for ever;" that alone being a ſubſtantial diſmiſſion.[2]

So, "that what is awarded on one ſide, ſhall be in full of all debts and demands on the other," will aid

[7] Per G. Croke, in the caſe of Gray. Godbolt. 276.

[8] Vid. 1 Barnardiſton. 463.

[9] 5 H. 7. 22. Fhbt. 52. b. Brooke Arb. 31. Rol. Arb. F. 7.

[1] Squire v. Greville. 6 Mod. 33. 2 Ld. Raym. 961, 964. 1 Salk. 74. vid. Tipping v. Smith. 2 Str. 1024, which ſeems contra.

[2] Knight v. Burton. 6 Mod. 232. 1 Salk. 75.

the award, ſo far as what is awarded on the other is not completely final; for the word "demands" extends to every thing which the one has a right to demand or exact from the other at the time of the ſubmiſſion.[3]

An award, "that the plaintiff in an action ſhall not proſecute nor proceed in the ſame term," is good.[4] But it is ſaid that an award "that each party ſhall bear his own expences in ſuits depending between them," though not liable to the objection of not being mutual, is bad for want of being final, without the addition "that the ſuits ſhall ceaſe."[5] Now, however, it is apprehended, it would be preſumed, that it was the intent of the arbitrators that the ſuits ſhould ceaſe. And this opinion is ſupported by the judgment in the following caſe. To an action of treſpaſs, and falſe impriſonment, the defendant pleaded an award which run in theſe words, "Whereas there has been a ſuit at law between the parties, that has run to a great expence on both ſides; and it being left to me to make an end of it, I determine that they ſhall each of them pay their own charges at law; and that the defendant pay the plaintiff five ſhillings, for his making the firſt breach in the law." The court were unanimouſly of opinion, that this was a fair and reaſonable award, and that it muſt neceſſarily be preſumed the ſuits were to ceaſe, and the five ſhillings to be paid by the defendant, to be taken as a diſcharge.[6]

[3] Knight v. Burton. 6 Mod. 232. 1 Salk. 75.

[4] Gray v. Gray. Cro. Jac. 525.

[5] Farmer v. Durant. 2 Keb. 351.

[6] 1 Bur. 274. Hawkins v. Colclough, vid. ante page 177.

By the civil law, if the arbitrator declared "that the one party owed nothing to the other," though he did not prohibit the latter to ſue, yet, if he did, notwithſtanding, ſue, he forfeited the penalty of his ſubmiſſion.[7] And with us, at this day, if there have been ſuits depending between the parties before the ſubmiſſion, though the arbitrator take no notice of the coſts, yet if he award mutual releaſes, it ſhall be preſumed that he meant each ſhould pay his own coſts.[8] And without ſuch releaſes the ſame preſumption would very probably be made if there were no other objection to the award.

With reſpect to a bond which the one party had againſt the other, it was awarded, "that the obligee ſhould not proſecute, nor cauſe to be proſecuted, any ſuit againſt the obligor on the ſaid bond;" this was held to be ſufficiently final; it was objected, indeed, that the award did not extinguiſh the duty, by merely ordering that he ſhould not ſue; it was however anſwered that this ſhould be taken according to the *effect* of the words, which was to extinguiſh the duty.[9]

If the award be as final as the nature of the thing will admit, that is ſufficient. Marſhall, at the inſtigation of Knightly, brought a qui tam action againſt Philipps, on behalf of himſelf and the poor of a pariſh: Philipps, for himſelf, and Knightly, on behalf of Marſhall, ſubmitted, by bond, all matters in difference

[7] Si Arbiter pronunciaſſet, "Nihil videri Titium debere Scio;" tametſi Seium non vetuiſſet petere, tamen, ſi quid petiiſſet, videri contra arbitri ſententiam feciſſe. Ff. l. 4. t. 8. ſ. 21. n. 1.

[8] Dict. per Buller J. Hil. 1791.

[9] Milwood v. Stokes. Rol. Arb. O. 7.

between the parties, to arbitration. It was awarded, that Knightly ſhould execute a *covenant* to indemnify Philipps againſt all coſts, damages, and expences which might happen by means of any further proceedings in the qui tam action: an action on the ſubmiſſion bond being brought, and after "no award" pleaded by the defendant, this award being ſet forth in the replication, one objection was taken to it, as not being final, not putting an end to the ſuit, but only giving a new action of covenant; it was indeed allowed, by the judge,[1] who ſupported this objection, that if a bond had been awarded to the plaintiff, to indemnify him in the ſuit depending, that would have been good; for there the arbitrators would have aſcertained the penalty, as the conſequence of his not performing the award: and though, by executing this bond, he had ſatisfied the arbitration bond, and the plaintiff's remedy was of courſe gone upon that, yet there ſubſiſted as effectual a remedy on the bond awarded to be executed, as there was upon the other. But, in the preſent caſe, by the execution of the deed of covenant, the plaintiff's remedy on the arbitration bond was gone, and there was only a remedy on the covenant left in its ſtead, which was a ſatisfaction in damages to be aſcertained by a jury.—But the other judges thought that the award was ſufficiently final, and that at any rate, it was not competent to the defendant to make this objection; the arbitrators had in this caſe done every thing they poſſibly could do to render their award final; they could not have awarded that Marſhall ſhould diſ-

[1] Page J.

continue the ſuit, which he had brought on behalf of himſelf and the poor of the pariſh, for that would have been to diveſt an intereſt out of the poor which was veſted in them by the commencement of the action: and there was no difference between the award to execute a bond or to execute a covenant, the remedy was by action in both caſes.[2]

If the award be of a thing to be done at a future day, it is final, if it muſt then be abſolutely done, as if it be to pay money at three ſeveral days to come.[3] So, to give a note or a bond, for the payment of money at a future day.[4] But if it depend on a condition whether it muſt be executed or not, then it is not final; as if it be, that money ſhall be refunded if it appear afterwards that the party was not intitled to retain it.[5]

It was awarded, "that if one of the parties ſhould, within four months after the date of the award, make out, that two tons of freight were diſcharged by him at 16l. per ton; and that if the other, within ten days, ſhould make oath that he received the two tons of freight at 10l. per ton, and not more, then that the firſt ſhall pay him 12l. more than was awarded to him in the former part of the award, being the difference on two tons at 16l. and 10l. per ton." The inclination of the court

[2] Philipps v. Knightly. Str. 903. 1 Barnard. 84, 151, 387, 457, 463. Fitzg. 54, 168, 270, but in the latter book, it ſeems the *qui tam* had been brought by the plaintiff in the preſent action, and that it was he who was awarded to convenant to indemnify, in return for which the defendant in the preſent action was to pay him a ſum of money.

[3] Per Dodderidge. Palm. 110.

[4] Booth v. Garnett. 2 Str. 1082.

[5] Palm. 110.

ſeemed to be to conſider this award as void, becauſe it was not final at the time of making it.[6]

THE ſame opinion was held where it was awarded that the one ſhould pay ſo much money to the other, and the latter ſhould give him a releaſe, provided that if the firſt ſhould be diſcharged of any arrears due to ſoldiers by an act of indemnity, then the award ſhould be void.[7] So, an award "that, if the plaintiff, on account, prove certain articles againſt the defendant, then he ſhall pay ſo much money as the plaintiff was damnified therefore," is not final.[8]

So, alſo, "that if the defendant make out, upon oath before a judge, any diſburſements made out on account of the plaintiff, then the plaintiff ſhall pay them; but in caſe the defendant do not prove theſe matters within a certain time limited, then the parties ſhall give general releaſes;"[9] this is not final.

WHERE the firſt part of an award is final, and a proviſo is afterwards added, giving a power to either of the parties to render it void, by an act to be done within a limited time *after* that appointed for the performance of that which makes it final, the proviſo is repugnant to the former, and will be rejected.—Thus, if it be awarded, "that each of the parties ſhall, within four days after the award, releaſe to the other, all actions, ſuits, and demands, before the date of the ſubmiſſion bond, with a proviſo, that if either of the parties ſhall be diſcontented with the award, or any

[6] Dighton v. Whiting. 6 W. 3. Lutw. 51.

[7] Kinge v. Fines. 1 Sid. 59.

[8] Selby v. Ruſſel. Comb. 456.

[9] Id. ibid.

part of it, then, if within twenty days after the day for making the releaſes, the party thinking himſelf aggrieved ſhall pay 10s. to the other, the award ſhall be void, and either of them be at liberty againſt the other as before the award:" this proviſo being repugnant to that which was to be *executed* before, ſhall be rejected, and the former part of it ſhall be valid; for every award ought to be reaſonable and indifferent between the parties, and one part of it not repugnant to the other; but here it would be contrary to theſe principles to conſider the award as totally void, and to ſet the parties at liberty, the one againſt the other, when they had made mutual releaſes; or to permit the one, when the other had releaſed, to diſſolve the award, by means of the proviſo.—And it would be abſurd to conſider the ſubmiſſion-bond as forfeited, as it muſt be, by not making the releaſe within the four days, and afterwards to conſider it as becoming not forfeited, by the diſſolution of the award, in conſequence of the proviſo.[1]

But where the proviſo is not merely repugnant to the other part of the award, but ſo connected with it, that, on the conſtruction of the whole, the award is not final, there the whole award is void.—As if in the laſt caſe the proviſo had been, "that either of the parties might render the award void, by paying the 10s. within the four days limited for the making of the releaſes;" for here the award is not final, it being left to the parties to determine whether it ſhall be ſo or not.—So, if the proviſo had been, "that within twenty

[1] Dict. arg. by the court in Sherry v. Richardſon. Poph. 15, 16.

days after the *award* made, it might be defeated on the payment of 10s." for here the 10s. might have been paid within the four days as well as at any ſubſequent time within the twenty, and the party not bound to make the releaſes, becauſe, before the expiration of the time within which they were to be made, that would have been done which the arbitrator intended ſhould render the award void; and therefore the award not being final at the time when it was made cannot be ſupported.[2]

The Award muſt be mutual. THE laſt rule to be obſerved in the conſtitution of an award is, that it ſhall be mutual; that it ſhall not give an advantage to one party, without an equivalent to the other. This rule ſeems to have ariſen from an idea of juſtice miſapplied: underſtood in the general ſenſe which the words of it convey, it ſuppoſes, that it is impoſſible for two parties, who ſubmit to arbitration, not to have committed mutual injuries; and that it is equally impoſſible for a man to make a groundleſs complaint againſt his neighbour: ſome of the ancient caſes ſhew, that the judges adopted the rule to this extent.

IF two ſubmit themſelves to an award of all treſpaſſes, and the arbitrators award, "that the one ſhall make amends to the other, but award nothing that he ſhall do to him again," this, ſay the judges, is a void award; for all is for the one party, and nothing for the other.—Here they ſuppoſe it impoſſible for the injuries not to have been mutual.

IF it be awarded, it is ſaid, "that one ſhall go quit of all actions had by the other againſt him, and nothing

[2] Dict. arg. by the court in Sherry v. Richardſon. Poph. 15, 16.

be ſaid of the actions which the other has againſt him," this is void. If the defendant plead, 'that the plaintiff and he ſubmitted all complaints between them to arbitrators, who awarded, "that the defendant ſhould go quit of all actions and complaints had by the plaintiff againſt him, without ſaying any thing of the actions and complaints which the defendant had againſt him," the plea is bad,' becauſe, adds the court, the one ſhould be diſcharged of all actions, and the other would receive nothing in ſatisfaction: here they would not preſume that the defendant had no action or complaint againſt the plaintiff, nor that the complaint of the latter againſt the former was, in the opinion of the arbitrator, without foundation.

They do, however, admit, that if it be expreſſed by the award, that the injuries were mutual, and equal, and that therefore nothing is given on either ſide, this will be good.—Thus, if the award recite that the plaintiff had committed a treſpaſs againſt the defendant, and that the defendant had committed a treſpaſs againſt the plaintiff, and for that reaſon order, "that the one ſhall be quit againſt the other, and the other againſt him:" this they ſay is a good award, becauſe it is mutual.[3]

The principal requiſite, however, to form that mutuality, about which ſo much is ſaid in all the caſes uſually claſſed under this rule, is nothing more than that the thing awarded to be done, ſhould be a final diſcharge of all future claim by the party in whoſe favour the award is made, againſt the other for the

[3] 7 H. 6. 41. 21 H. 6. 9. 22 H. 6. 39. Br. Arbit. pl. 23 cites ſame caſe.

cauſe ſubmitted; and therefore the preſent rule amounts to nothing more than a different form of expreſſion of the caſe, which requires that an award ſhould be final. Thus, in the ſame places where it is required that an award ſhould be mutual, it is held, that an award, "that one party ſhall pay to the other a certain ſum of money, *in conſideration of a debt long due*," is good: and the reaſon given is, that the party paying the money ſhall be diſcharged of the debt, which is a ſufficient reciprocity to ſupport the award.[4]

THE moſt frequent complaint againſt awards for the want of mutality is that when ſomething is awarded on one ſide, there is no releaſe awarded to the other in return; for it is uniformly held that a releaſe would render the award mutual; but the releaſe muſt operate to the benefit of the principal in the ſubmiſſion, and not be confined to his attorney, who ſubmits for him; at leaſt this is the concluſion to be drawn from a caſe, the authority of which has not yet been overruled. An attorney, on behalf of his client, ſubmitted by bond to perform an award: it was awarded that the attorney ſhould pay to the other party 345l. and that the attorney and the other party ſhould give mutual releaſes, namely, that the other party ſhould ſign a releaſe to the uſe of the "attorney," and the attorney to the other party: this was held to be an award only on one ſide: the attorney, it was ſaid, ſubmitted on behalf of his client, and nothing was awarded to his client, the releaſe not being expreſsly awarded to the uſe of the latter, but to that of the attorney: and then the award

[4] 8 Co. 98. a. Rol. Arb. K. 5.

being only that the attorney ſhould pay the money, without ſaying on what account, it is not good without the releaſes; but it was admitted, that if the releaſe had been to the uſe of the client inſtead of the attorney, the award would have been mutual, and therefore good.[5] The place of the releaſe, however, may frequently be ſupplied, by words from which it muſt reaſonably be concluded that the arbitrator meant the party, againſt whom the award is made, ſhould be diſcharged on performance of it. Thus, in the caſe preceding, it was admitted in argument, that if the money had been awarded to be paid by the attorney, "in ſatisfaction of all accounts," or "for all money due" from the client; or if the award had purported to be made, "of and upon the premiſes;" the award would, in any of theſe caſes, have been good without the releaſes, becauſe then the payment of the money would of itſelf have been a good diſcharge to the client.

So, it has been admitted that an award "that all ſuits ſhould ceaſe" was equivalent to an award of a releaſe.[6]

So, that all "controverſies" ſhall ceaſe, and that the one ſhall pay 10d. to the other, although the other have nothing given to him; for perhaps, ſay the books, he had committed the greater treſpaſs.[7]

An award was made "of and upon the premiſes," that one ſhould pay to the other 10l. at a certain day, and that the parties aforeſaid ſhould continue in love and friendſhip as formerly; it was held to be an award on

[5] Bacon v. Dubarry. Comb. 439. 1 Ld. Raym. 246.

[6] Strangford v. Green. 2 Mod. 228.

[7] Cole's caſe 8 Jac. Rol. Arb. K. 10. S. P. Harris v. Knipe. 13 and 14 Car. 2. 1 Lev. 53.

both ſides, and that it ſhould be intended in ſatisfaction of all matters between the parties, more eſpecially as it was ſaid, that the parties ſhould be friends as formerly.[8]

If two ſubmit all matters between them, and the award be made "of and upon the premiſes, in manner and form following," that is to ſay, that the one ſhall pay 40l. to the other; it is ſaid, this is a good award on both ſides, for being made concerning the premiſes it cannot be intended to have been made but in ſatisfaction of all matters within the ſubmiſſion, and cannot be taken to have been for any other cauſe.[9] But about the ſame time, it is ſaid, that, where an award was made "of and upon the premiſes, in manner and form following," namely, that the one ſhall depart from his houſe, and remove his hay, and pay to the other 3l. this was an award only on one ſide, becauſe it was not made of the premiſes *generally*, but *in manner and form following*.[1] Yet this is exactly in the ſame terms as the introduction of the award in the caſe immediately preceding.

As an award "that money ſhall be paid in ſatisfaction" is good, ſo other words may ſometimes have the ſame effect; thus, it is a good award "that the one ſhall pay 10l. to the other *for* a treſpaſs;" the word "for" implies that it is to be in ſatisfaction of the treſ-

[8] Raymond v. Popley, and on the ſame award Popley v. Popley in the ſame term. T. 8 Car. on demurrer in debt on the bond, and a breach aſſigned in non-payment.—Rol. Arb. K. 12. vid. etiam Id. O. 1. 2.

[9] Mawe v. Samuel. 1 Roll. Rep. 1. 2. Rol. Arb. F. 6.

[1] M. 13 Jac. Nichols v. Grunwin. Rol. Arb. K. 11. Brownl. 58. S. C. Hob. 49. in which laſt place it is ſaid that no judgment was given.

paſs.[2] Or "to pay ſo much for arrears of rent;" for that ſhall be taken "in ſatisfaction of all arrears, and the party diſcharged by payment."[3] So, "for having made the firſt breach in the law," implies that the ſum awarded ſhall be taken in ſatisfaction.[4] Yet, where the ſubmiſſion was of all ſuits depending between the plaintiff and defendant in the Spiritual Court "for tythes;" and it was awarded, that the defendant ſhould pay 40s. to the plaintiff "for the tythes" on ſuch a day; it was held, that this award was not mutual, becauſe nothing was awarded for the advantage of the defendant, as that he ſhould be free of ſuits, or ſomething equivalent: it may be obſerved, however, that the award, being of 40s. "for the tythes," it muſt neceſſarily be implied, that the 40s. were intended to be in ſatisfaction.[5]

An award recited that there had been conſiderable dealings between the plaintiff and the defendant, that the plaintiff had paid to the defendant all his demands, and that 40l. were due to the plaintiff, and then ordered that the defendant ſhould pay to the plaintiff the 40l. It was held, that the recital of the dealings between the parties, and of the payment by the plaintiff of all that was due on his part, implied that the payment of the 40l. by the defendant was intended to be in full ſatisfaction of the debt.[6]

[2] Ormlade v. Coke. Cro. Jac. 354. S. P. Hob. 49. Freem. 205. 266.

[3] Hopper v. Hackett. 1 Lev. 132.

[4] 1 Bur. 277. ante p. 177. 212.

[5] Colſton v. Harris.

[6] Elliott v. Cheval. Lutw. 541.

It was awarded that the defendant ſhould pay to the plaintiffs 15l. on or before a certain day, which the arbitrators adjudged to them for the coſts and damages they had ſuſtained by reaſon of a ſuit commenced againſt them without cauſe by the defendant, and that all ſuits and differences ſhould ceaſe which were between the parties before the date of the ſubmiſſion bond: it was objected that the award was not mutual, becauſe it was no benefit to the defendant to ſtay his own ſuit and pay 15l. coſts; but the objection was conſidered to be without foundation; as indeed nothing but the groſſeſt miſconception of the real meaning of the rule, which requires awards to be mutual, could have given *riſe* to ſuch an objection.[7]

In the more ancient reports, however, the rule ſeems to have been ſo underſtood, that either the thing which was awarded muſt of itſelf imply a diſcharge to the party againſt whom the award was made, or ſome poſitive terms muſt have been added which ſhewed the arbitrator's intention that a diſcharge ſhould be the conſequence;[8] for otherwiſe, it was thought, it could not be known for what cauſe the thing awarded was to be done, and therefore nothing could be preſumed to be diſcharged by it.

If it had been awarded that the obligor, in a ſingle[9] bond, ſhould pay the debt, if it was not added that he ſhould thereupon be diſcharged, the award was held not binding for want of mutuality, becauſe the payment

[7] Watmough v. Holgate. 2 Vent. 221. 222. S.P. Comb. 212.

[8] May v. Samuel. Rol. Arb. F. 3. Kirby v. Pigot. 25 Car. 2. 3 Keb. 140.

[9] It may not be altogether uſeleſs to obſerve here, that a *ſingle* bond means a bond without a penalty.

of the money due by a ſingle bond could not be pleaded to an action on the bond, without a releaſe.[1] But this reaſon, ſince the ſtatute for the amendment of the law,[2] has no longer any weight.

If it appeared, however, by the general tenor of the award, that the thing awarded to be done on one ſide was intended as a recompence for injuries ſuſtained by the other, that was conſidered as rendering the award ſufficiently mutual, without any words of diſcharge.

An award 'reciting the ſubmiſſion to have been of all differences between the parties: reciting alſo, that theſe differences being underſtood by the arbitrators, who were ſatisfied that certain allegations, made in a bill exhibited by the plaintiff in the Star-chamber againſt the defendant, were for the moſt part known to the latter to be true, namely, "That the defendant had taken of the plaintiff 40s. for a ſuperſedeas to reverſe an outlawry againſt the plaintiff, but had not reverſed it; that he had taken of the plaintiff 20s. more as a fee pretended to be due to him on an execution for 26l. ſued againſt the plaintiff; neither the defendant, who was then under-ſheriff of Dorſet, nor any one for him, having ever enforced the execution; that the plaintiff had been impriſoned, by means of the defendant, by one J. S. who had arreſted him without any warrant directed to him, and that the plaintiff had been compelled by J. S. to pay 20s. for this unjuſt arreſt, before he was permitted to go at large:" reciting further, that the plaintiff was an honeſt man and of good reputation, and a tradeſman, having a wife and ſix children,

[1] Hob. 49. Brownl. 58. [2] 4 Ann. c. 16. ſ. 12.

and that by reaſon of the circumſtances before recited he had ſuſtained great damage, ſcandal, and diſcredit:' ordered the defendant to pay to the plaintiff 500l. by different payments, on certain ſpecific days.—It was objected to this award, that it was not mutual, becauſe the 500l. were not awarded to be paid in ſatisfaction of the wrongs recited, nor in conſideration of them, nor for them, nor were there any words which implied a diſcharge to the defendant: but the court held the award good, and that the payment of the 500l. muſt neceſſarily be intended to be as a ſatisfaction for the wrongs.[3]

And it may, now, be ſafely laid down, that it is not neceſſary that the award itſelf ſhould expreſs that a ſum awarded to be paid, or an act to be done in favour of one of the parties ſhall be in ſatisfaction; or that it ſhould contain any equivalent terms: a diſcharge to the other muſt neceſſarily be preſumed from the payment of the ſum or the performance of the act.—Thus, the defendant having pleaded to an action of treſpaſs, that the plaintiff and he had ſubmitted the treſpaſs aforeſaid to arbitrators, who had awarded that the defendant ſhould pay to the plaintiff 7l. on a certain day, and alſo two-thirds of ſuch coſts as he had been put to in and about the ſuit, the ſubmiſſion having been after an imparlance: this was held to be good, though no releaſes were awarded, nor any words of ſatisfaction were uſed.[4]

[3] 16 Car. B. R. Burbidge v. Raymond in a writ of error on a judgment in C. B. where it had been adjudged a void award on demurrer. But B. R. affirmed the judgment for a clear defect in the manner of pleading, though they thought the award good.—Rol. Arb. K. 17.

[4] Tomlinſon v. Ariſkin. Comyns 328.

It ſeems indeed a little extraordinary that the plaintiff, in whoſe favour the award was made, ſhould have objected to it, for ſo ſingular a reaſon as that the money to be paid to him by the defendant was not awarded to be in ſatisfaction or diſcharge of any thing, and that nothing was awarded to be done *to* the defendant or for his benefit: the objection can be reconciled to common ſenſe on no other principle than a ſuppoſition that had the plaintiff ſued on the award the defendant might have objected to it for the reaſons now aſſigned by the plaintiff.

To an action on a bond, conditioned for the performance of an award, the defendant pleaded that no award was made: the plaintiff in his replication ſet forth an award, "that the defendant ſhould pay to the plaintiff 12l. on a particular day, and take away his mare and colt from the plaintiff's within a week:" this was held to be a mutual award, becauſe it ſhould be preſumed, that the poſſeſſion which by the award the plaintiff appeared to have of the mare and colt was legal, as by diſtreſs for damage feaſant, by bailment, or other means by which the plaintiff might have juſtified the detention.[5]

These two caſes ſeem fully to juſtify the obſervation which immediately precedes them. The firſt is indeed the caſe of a parol award, and it does not appear whether the ſecond was by parol or in writing: the condition of the bond enabled the arbitrator to make his award in either way, and the replication only ſtates that he made and publiſhed his award within the time

[5] Cooper v. Hirſt. Lutw. 539.

limitted, but does not allege in what manner: there ſeems, however, to be no good reaſon for making any diſtinction, in this reſpect, between an award by parol and one in writing.

All the preceding rules apply only to particular parts of an award; but there are many caſes in which, though the award, in particular parts, be void, becauſe theſe are not conformable to ſome one or other of theſe rules, yet it is good for the remainder. And there are alſo a great many caſes in which the circumſtances of its being void for part renders it void for the whole: but in order to conſider this part of the ſubject with advantage, it ſeems proper to collect what is to be found in the books with reſpect to the conſtruction of awards.

How awards ſhall be conſtrued.

In former times, the courts conſidered awards, with reſpect to their conſtruction, in a very different manner from that in which they conſidered deeds and wills: the latter, they held, ought to be conſtrued according to the intent of the parties, and the meaning of the words to be collected from the whole of the inſtrument put together; but an award they conſidered to be in the nature of a judgment, which ought to be plain and correct, and that therefore there ought to be no neceſſity to collect the meaning of the arbitrators; for that ſuch a collection would not be their judgment, but the conjecture of another of what they had intended to decide.[6]

The adherence of the courts to this rule was in many inſtances ſo rigorous and ſtrict, that the power

[6] Brownl. 92. Yelv. 98.

of referring diſputes to arbitration, inſtead of being a benefit to the parties, often well merited that reflection which a learned judge once made with reſpect to references at *niſi prius*, that he never knew any good to ariſe from them.

In thoſe times, even a miſtake in the recital of a day mentioned in the former part of an award, was thought ſufficient to render the award void, though it would otherwiſe have been good. Thus where, on a ſubmiſſion of the title of copyhold land, the arbitrator, after awarding the payment of a ſmall ſum of money by one of the parties, on the "twenty" firſt day of May, ordered the other to releaſe to him on the aforeſaid firſt day, omitting the word "twenty," all his right to the copyhold land, and that three years after he ſhould make further aſſurance: the award was held to be void, on account of the omiſſion of the word "twenty," becauſe there being no ſuch day before mentioned as the firſt of May, there was no day from which the three years could be calculated, and conſequently no further aſſurance could be made.[7] The court thought they were not at liberty either to ſupply the word "twenty," which would have given effect to the intention of the arbitrator, or to reject the word "aforeſaid," which, though a little deviating from his meaning, would have made the award completely certain.

Towards the end of the reign of James the firſt however, the judges laid down more liberal rules to be

7 Markham v. Jennings. Rol. Arb. K. 15. Q. 6. Cro. Jac. 149 Yelv. 97. 98.

obſerved in the conſtruction of awards; holding, that they ſhould be interpreted, as deeds, according to the intention of the arbitrators; that they ſhould be conſidered, with the ſame favour as the "arbitrium boni viri," in the civil law: that therefore they ſhould not be taken ſtrictly, but liberally, according to the intent of the parties ſubmitting, and according to the power given to the arbitrators: that "all actions" mentioned in the award ſhould be taken to mean "all actions over which the arbitrators have power by the ſubmiſſion;" and that if there were any contradiction in the words of an award, ſo that the one part could not ſtand conſiſtently with the other, the firſt part ſhould ſtand, and the latter be rejected: but that if the latter were only an explanation of the former, both parts ſhould ſtand.[8]

So, it was held, that if an award were made generally in ſatisfaction of all controverſies, without any limitation, this ſhould be conſtrued to extend only to ſuch controverſies as are within the ſubmiſſion.[9]

If, by manifeſt implication, that appear, which, if poſitively expreſſed, would render the award good, that is ſufficient to ſupport it.

The ſubmiſſion was of all controverſies between the parties, and it was awarded, "that the one ſhould pay to the other 10l. on a particular day, and that the other, on the receipt of the 10l. ſhould give to the firſt a general releaſe." It was objected, that if he to whom the 10l. were to be paid refuſed to receive it, he

[8] Dict. per Doderidge. Palm. 108. 3 Bulſtr. 66, 67.

[9] Brown's caſe, cited Hutton, 9.

was not bound to give the releaſe, and the award, for that reaſon, was only on one ſide, and therefore void: but the objection was overruled, and the award held to be good; becauſe, when it is awarded that the one ſhall pay 10l. to the other, it is, by neceſſary implication, awarded that the other ſhall receive it: in the ſame manner as if it had been awarded that the payment ſhould be in ſatisfaction of all controverſies between them, in which caſe it muſt have been implied that the other ſhould receive it in ſatisfaction: in the preſent times it will appear ſtrange that there ſhould have been any neceſſity for the judgment of a court in this caſe, but in the reign of Charles the firſt, the matter was ſo far from being clear, that the unſucceſsful party not being ſatisfied with the judgment of the court below, appealed to parliament in a writ of error, where the judgment was confirmed by the opinion of all the judges.[1]

An award "that the one ſhall keep and enjoy the goods in diſpute, "paying" ſo much money to the other," muſt be conſtrued in the ſame manner as if it had been expreſſed imperatively, "that he ſhould pay."[2]

It was awarded "that the defendant ſhould pay 10l. to the plaintiff, and fetch away his mare and colt;" it was objected, that it was not awarded that the plaintiff ſhould deliver the mare and colt: it was adjudged, that that muſt neceſſarily be implied.[3]

[1] M. 22 Car. B. R. Linnen v. Williamſon. Rol. Arb. K. 16. cited 6 Mod. 35. 2 Ld. Raym. 965.

[2] Stiles v. Triſte. 1 Sid. 54.

[3] Hooper v. Hirſt. Lutw. 539, cited 1 Ld. Raym. 612.

So, it might reaſonably be ſuppoſed, that, where the award was, "that the plaintiff, for work done, ſhould "accept" a bill of ſale from the defendant, of the eighth part of a ſhip," there could have been no harm in implying that the defendant ſhould "give" the bill of ſale: in common language, a man cannot *accept* a thing, which it is not in his option to have, and it could not be in his option to have it, unleſs the other was bound to *give* it.[4]

On the ſame principle, it would ſeem that an award, "that the plaintiffs ſhould pay 30l. to the defendant, and that they ſhould receive their goods left by the defendant in the hands of a third perſon for their uſe," were good, and that the defendant ſhould be bound to procure the delivery of the goods.[5]

It was awarded "that the defendant ſhould enjoy a houſe of which the plaintiff was leſſee for years, during the term, paying to the plaintiff 20s. yearly:" this was conſtrued not to be merely a condition annexed to the award of the defendant's enjoyment of the houſe, but it was conſidered to be a part of the award itſelf, that being evidently the intention of the arbitrators: and it was held, that an action of debt on the bond, would lie for the non-payment of the 20s.[6]

The ſubmiſſion was of certain controverſies reſpecting a wine licence, and the arrears of rent iſſuing out of certain land; the award was in ſuch terms as theſe, "that whereas it appeared to the arbitrators that 15l.

[4] Dis aliter viſum. Clapcott v. Davy. 1 Ld. Raym. 612.

[5] But ſemb. contr. Dighton v Whiting. Lutw. 51.

Parſons v. Parſons. Cro. El. 211. S. P. M. 18 and 19 El. inter Treſſam et Robins.

remained due to the plaintiff, they ordered that the defendant ſhould pay him 7l. 10s. in ſatisfaction of ſo much of the 15l. and ſhould aſſign to him the wine licence:" it was held, in the firſt place, that though it was not expreſſed on what account the defendant was indebted to the plaintiff, it ſhould be preſumed to be for no other cauſe than for the rent; and ſecondly, though it was not ſaid that the wine licence ſhould be aſſigned in ſatisfaction of the reſidue of the 15l. the better opinion was that it ſhould be ſo preſumed.[7]

WHERE the words of an award have any ambiguity in them, they are always to be conſtrued in ſuch a manner as to give effect to the award.—Thus, if money be awarded to be paid "in full of all demands;" theſe words ſhall be conſtrued to mean "in full of all demands up to the time of the ſubmiſſion only, not to the time of the award, or to the time of payment.[8]

ON a ſubmiſſion by the parſon and part of his pariſhioners on behalf of themſelves and the reſt, with reſpect to tythes, it was awarded, that each of the pariſhioners ſhould give the parſon notice, when he intended to ſhear his ſheep; in anſwer to an objection that the award was unreaſonable, becauſe the pariſhioner muſt follow the parſon wherever he might be, in order to give him notice, it was held, that the award muſt be conſtrued to mean that the notice ſhould be given at the parſonage-houſe.[9]

IT was awarded that the defendant ſhould pay to the plaintiff ſo much money on the firſt of April, and ſo much on the firſt of May; and that the parties ſhould

[7] Al. 51. [8] Per Powell J. 6 Mod. 35. [9] Lutt. 30.

pay 1l. 5s. each to the arbitrators for their trouble; and that "on payment of the money aforesaid" on the first of May, they should give mutual releases: here the words "on payment of the money aforesaid," coming after the award of the money to the arbitrators, it was contended they should be referred to the whole, as well to the money to be paid to the arbitrators as to that to be paid to the plaintiff by the defendant; and, according to the opinion which then prevailed, the award being void as to the former, because performance of it could not be compelled, and the releases not being awarded to be given till performance, it was insisted the award was void for want of mutuality: but the court held that these words, "the money aforesaid," should be referred only to those sums with respect to which the award was good, and not to the money awarded to be paid to the arbitrator.[1]

An award, reciting that so much money had been disbursed by one party, as was *alleged*, ordered that money to be paid by the other: in favour of the award, the court held that this should be understood as alleged, and not controverted or disproved: and that it should not be supposed that the arbitrators did not inquire into the matter, or that they awarded payment from the mere allegation of the disbursement.[2]

It was awarded, that the defendant should pay to the plaintiff 8l. on the 14th of April, "and that he should deliver to the plaintiff a certain writing obligatory, or a certain bill obligatory, which he had be-

[1] Abrahat v. Brandon. 10 Mod. 201.
[2] Knight v. Burton. 6 Mod. 232.

fore," and that *then* the one ſhould make to the other general releaſes. In favour of the award, the court held, that the word *then* ſhould be referred to the 14th of April, and not to the delivery of the bond to the plaintiff, that the objection to the uncertainty of the intervening phraſe might not excuſe the payment of the money.[3]

A MISRECITAL of the ſubmiſſion ſhall not avoid the award: thus, where it appeared by ſpecial verdict that the ſubmiſſion bond of the plaintiff was dated on the 22d of February, and that of the defendant on the 9th of March; but the award recited the latter to have been on the ſame day with the former; this was held not to be material.[4] So where the ſubmiſſion was dated on the 10th of February, and the award recited as of the 7th.[5]

NOR is it any objection that money is awarded to be paid at a place by name with the addition of the word "aforeſaid," though the place has not been mentioned before; the word "aforeſaid," in ſuch a caſe, is to be rejected as ſurpluſage.[6]

IF the ſubmiſſion be "ſo that the award be made on or before a particular day, or that the arbitrators ſhall chooſe an umpire," and the umpire ſo choſen make an award, reciting that the parties had bound themſelves to ſtand to his award; though compared to the words of the ſubmiſſion, this be not literally true, yet an

[3] Raym. 123.
[4] Al. 85. 87.
[5] Toll v. Dawſon. 1 Vent. 184.
[6] Lambard v. Kingsford. Lutw. 558.

objection on that account will not be allowed, becauſe it is but recital.[7]

WHERE the ſubmiſſion contains the clauſe of "ita quod," and the award is made with reference to that clauſe, this ſhall controul the conſtruction of the award in ſuch a manner as to ſupport it, though the words in their natural ſignification be more comprehenſive than the ſubmiſſion, and it ſhall be intended that nothing was in controverſy but what was comprehended in the ſubmiſſion, unleſs the contrary be ſhewn: and on the contrary, if the words of the award be not ſo comprehenſive as thoſe of the ſubmiſſion, yet, unleſs the contrary be alſo ſhewn, it ſhall not be intended that any thing more was in controverſy than what is comprehended in the award.[8]

THE ſubmiſſion was by bond conditioned to ſtand to the award of J. S. ſo that it were made "of and upon the premiſes;" the award referring to that clauſe, ordered that one of the parties ſhould pay to the other 10l. two months after the award, and that on ſuch payment each ſhould make to the other a general releaſe up to the time of the payment, though the releaſe comprehended a time beyond the ſubmiſſion, and though it was objected that the bond or promiſe of ſubmiſſion would be releaſed: this was held to be a good award, for by the payment of the money the ſubmiſſion was at an end, and every thing depending on it; and, on account of the clauſe of "ita quod,"

[7] Adams v. Adams. 2 Mod. 169.

[8] 6 Mod. 232.

the releaſe ſhould be taken to extend only to the things ſubmitted.[9]

On a ſimilar ſubmiſſion, it was awarded that the one party ſhould pay to the other 10l. in ſatisfaction of all actions, ſuits, and accounts which he might have againſt him for any matter to the time of the award made, and that all ſuits then depending, or which afterwards ſhould be depending between them, for any matter, from the beginning of the world to the time of the award made, ſhould ceaſe; this was held good, though it comprehended a time beyond the ſubmiſſion, becauſe it muſt be preſumed, without being ſhewn, that nothing had ariſen between the time of the ſubmiſſion and the award.[1]

The ſubmiſſion was of all actions perſonal, "ſo that the award were made of and upon the premiſes," before Eaſter: the award, made before Eaſter, and profeſſing to be made "of and upon the premiſes," ordered that the one ſhould pay to the other 20l. at Midſummer next enſuing, and that *then* the other ſhould releaſe to him all actions perſonal, in ſatisfaction of all matters perſonal between them; this being made "of and upon the premiſes," it was held, that it muſt be intended that the releaſe was to be of actions only till the time of the ſubmiſſion, and not till Midſummer.[2]

[9] Dubitatur M. 14 Car. B. R. Atnoke v. Orwell, moved in arreſt of judgment and the *Poſtea* ſtay ſur cco. Rol. Arb. O. 4. Vid. acc. 2 Mod. 170.

[1] 23 Car. B. R. Lerwyn v. Hills on demurrer. Rol. Arb. O. 5. S. C. Al. 26. there called Gurman v. Hill.

[2] 5 Jac. Goſſe v. Brown. Rol. Arb. M. 1. Hob. 258. S. C. cited Mo. 885. pl. 1242.

So, where an award was made "of and upon the premiſes," that all actions and controverſies between the parties ſhould ceaſe; it was held that, though the latter words, in ſtrict grammatical propriety, applied to all matters and controverſies at the time when they were uſed, that is, at the time of the award, yet the words, "of and upon the premiſes," ſhould controul the meaning, and refer it only to controverſies at the time of the ſubmiſſion.[3]

THERE is no doubt but that at preſent, without the help of this controuling clauſe, the ſame conſtruction would prevail in all caſes ſimilar to the preceding; even in thoſe times of nicety, it was held that an award of a ſum of money *now* in controverſy, was good, for that it ſhould be underſtood to have been in controverſy at the time of the ſubmiſſion as well as at the time of the award.[4]

MUCH difficulty, it has been obſerved, occurs in all the more ancient reports, on the conſtruction that ought to be put on the award of a releaſe: that which was naturally adopted as the moſt probable mode of putting an end to litigation, between the contending parties, has, in almoſt numberleſs inſtances, been the great obſtacle to the accompliſhment of that purpoſe.—It has not been without an obſtinate ſtruggle, that an award of a "general" releaſe, unaccompanied with any words from which an unfavourable conſtruction might, with any ſhew of reaſon, be put

[3] Cro. El. 861. Goodman v. Fountain.
[4] Baſpole v. Freeman. Cro. Jac. 285.

upon it, has been admitted to be good; though ſo early as the reign of Charles the ſecond a diſtinction was made between the award of a "general releaſe," without additional words, and of a "general releaſe to the time of the award;"[5] yet, ſo late as the ſeventeenth of George the third, an objection was ſeriouſly taken to an award becauſe it ordered a "general releaſe." On a reference at *niſi prius* of all matters in queſtion *in the cauſe*, the arbitrators had at firſt ordered the parties to give general mutual releaſes; but afterwards obſerving that the reference was not of *all matters between the parties*, they thought they had exceeded their authority, and therefore they made another award, in every other reſpect the ſame as the former, but inſtead of *general* releaſes, ordered ſpecial releaſes of matters in difference in that cauſe. An application was made to the court to have both awards ſet aſide, the firſt becauſe of the general releaſes, and the ſecond, becauſe it was made after the arbitrators had executed their authority. The court however held that the firſt award might be ſupported, either by conſtruing the releaſe to be ſo far good as it fell within the authority of the arbitrators, or if it muſt be ſuppoſed to be one intire thing, by rejecting it altogether.[6]

THE leading caſe on this ſubject is that of Vanlore and Tribb, as given in Rolle's Abridgment:[7] the ſubmiſſion was made on the firſt of May, of all contro-

5 Vaſque v. Daniel. 25 Car. 2. 3 Keb. 253.

6 Pickering v. Watſon. 2 Bl. Rep. 1117. M. 17 G. 3. C. B.

7 Rol. Arb. N. 1. vid. Mawe v. Samuel. 2 Rol. Rep. 2, the ſame doctrine. Kynaſton v. Jones. Rol. Arb. N. 2.

verſies between the parties: the award was made on the fourth of May, and ordered that one ſhould give a general releaſe to the time of the award: this was held to be altogether void, becauſe, comprehending a time out of the ſubmiſſion, and extending to controverſies that might have ariſen between the firſt and the fourth of May, it was void as to theſe, and being an intire thing it muſt be conſidered as void in the whole.

But the principal reaſon given by the court for this determination was, that by this releaſe, the bond or aſſumpſit, by which the oppoſite party was bound to perform the award, would be releaſed. And this reaſon has been adopted in ſubſequent caſes.

It was awarded that the defendant ſhould pay to the plaintiff two ſums at two ſeveral days, and that ſeveral releaſes ſhould be given *preſently*: the court held this was void, becauſe the releaſe would diſcharge both the arbitration bond and the money awarded to the plaintiff.[8] Here the court muſt have proceeded on the idea that the releaſe was an intire act, and that a releaſe to the time of the ſubmiſſion would not have been performance.

The ſubmiſſion bond was dated the 2d of July: the award was that the defendant ſhould execute a general releaſe to the plaintiff to the 12th of Auguſt following, and that then the plaintiff ſhould give a general releaſe to the defendant: to this it was objected, that as the defendant was to give the firſt releaſe, if the plaintiff afterwards refuſed to give his in return, the defendant would have no remedy; for, if, on ſuch refuſal, the

[8] Adams v. Adams. 2 Mod. 169.

defendant ſhould ſue on the ſubmiſſion bond, and aſſign the breach in this, that the plaintiff had not executed the releaſe on his part, he might plead the preſent defendant's releaſe in bar of this action on the bond.— And here a diſtinction was made by Powell, J. between an award of releaſes generally, and an award of releaſes to be executed to the time of the award made:[9] in the former caſe, he ſaid, the releaſe ſhould be underſtood to relate only to the time of the ſubmiſſion; but in the latter, ſuch a conſtruction could not be admitted, becauſe, going expreſſly beyond the time of the ſubmiſſion, it would releaſe the bond of ſubmiſſion itſelf, and all intermediate acts. But Treby, C. J. ſaid that it had been held in ſuch a caſe, that the ſubmiſſion bond ſhould be excepted.[1] And it certainly had been ſo held, about ſeven years before, in the following caſe. To debt on a bond conditioned to perform an award, the defendant pleaded "no award." The plaintiff, in his replication, ſet forth an award, "that the defendant ſhould pay 5l. to the plaintiff preſently, and give bond for the payment of 10l. more on the 29th of November following, and that the parties ſhould "now" ſign general releaſes; on demurrer, this was argued to be a void award, becauſe mutual releaſes were to be given at the time of the award, which would diſcharge the bond payable in November following. But the court overruled the demurrer, ſaying the releaſes ſhould diſcharge ſuch matters only as were depending at the time of the ſubmiſſion.[2]

9 See this diſtinction 3 Lev. 188, 344. 1 Show. 272.

1 Marks v. Marriot. 1 Ld. Raym. 115, 116. M. 8. W. 3.

2 Rees v. Phelps. M. 1 W. and M. 3 Mod. 264.

CHIEF Juſtice Trevor, however, afterwards[3] ſupported the diſtinction taken by Powell, ſaying that "to hold that a tender of a releaſe to the time of the ſubmiſſion was a ſufficient performance, where the arbitrators had awarded a releaſe to the time of the award," would be to *make* an award, and not to declare the law upon it, and then farewell all awards.

IT is now, however, clearly ſettled, that an award of releaſes up to the time of making the award, is not altogether void, but that it ſhall be conſtrued ſo as to *ſupport* the award, and that for two reaſons: the firſt, that it ſhall be intended that no difference has ariſen ſince the time of the ſubmiſſion, unleſs it be ſhewn ſpecially that there has; the ſecond, that a releaſe to the time of the ſubmiſſion is a good performance of an award ordering a releaſe to the *time* of the award; not becauſe the meaning of the arbitrators is ſo, but becauſe their meaning muſt be controuled ſo far as it is void, by conſtruction of law.[4]

I SHALL conclude this part of the ſubject with one general obſervation; that though an award muſt poſſeſs all the qualities which have been deſcribed as neceſſarily belonging to it, yet the courts, in modern times, have repeatedly declared that they diſapproved of the ſtrictneſs with which they were formerly conſtrued, and that they will always adopt a liberal conſtruction, in order that awards may anſwer the purpoſe for which

[3] M. 13 W. 3. Lee v. Elkins. Mod. 590. Lutw. 545.

[4] Abrahat v. Brandon. 20 Mod. 201. Squire v. Grevill, 6 Mod. 33. 35. 2 Ld. Raym. 964, 5. Cooper v. Pierce. 5 Ld. Raym. 116. vid. 12 Mod. 116. Godb. 164, 5. 2 Keb. 434.

they are intended.[5] Lord Hardwicke too, on one occaſion, declared, that as courts of law had relaxed conſiderably from the rigour formerly obſerved, it might poſſibly be of conſequence to conſider, whether courts of equity might not ſtill take greater latitude; but he ſaid he was unwilling to do this, becauſe it would introduce confuſion and uncertainty, rendering awards a mixed caſe, partly determined by arbitrators, and partly by the authority of courts of equity, and therefore he choſe rather to confine himſelf to one rule.[6]

When an Award, though void for part, ſhall be good for the reſt.

In early times, if one part of an award was void, the whole was conſidered as void: but in the reign of Queen Elizabeth, Holt ſays,[7] in the reign of King James the firſt, it began to be the rule of the courts, in many caſes, to enforce the performance of that which, had it ſtood by itſelf, would have been good, notwithſtanding another part might be bad: but the adoption of this rule without reſtriction, it was ſoon diſcovered, would, in many inſtances, be productive of injuſtice. It became therefore neceſſary to diſtinguiſh in what caſes the rule ſhould be adopted, and in what it ſhould be rejected. The principles by which the application of the rule ſhall be directed are not very accurately explained in the books; but, from a general purview of the caſes, I will venture to expreſs them in general terms, and give under each the caſes which ſeem to juſtify my aſſertions.

[5] Per Ld. Mansfield. 1 Bur. 277.

[6] Atk. 504. (519.) [7] 12 Mod. 534.

If an award be void as to part only of what is ordered to be done by one of the parties, but good as to the reſt, it is not competent to him who is ordered to perform it to object to the whole, on account of the part which is void; but he muſt perform the part for which the award is good, as if it ſtood by itſelf; unleſs the oppoſite party could object to the performance of *his* part, on account of the want of remedy to enforce performance of the part which is void on the other.[8]

Thus, if the ſubmiſſion be of a particular thing, and the award made of that which is ſubmitted, and alſo of ſomething elſe to be done by the ſame party, though with reſpect to the latter the award be void, yet he ſhall be bound to perform the reſt.[9]

As, if the ſubmiſſion be of all matters depending, and the award be that one of the parties ſhall not proſecute any action depending or ariſen at the time of the award made, where there are actions depending between the time of the ſubmiſſion and the award, in which caſe the award is void as to them, yet the award being good for thoſe which were depending at the time of the ſubmiſſion, muſt be ſo far performed.[1]

If it be awarded that one ſhall pay ſo much to the other, and that he ſhall give bond with two ſureties for that ſum, though this be void as to the ſureties, yet he muſt give a bond himſelf.[2]

So, "that the defendant ſhall pay the plaintiff 150l. and find three ſureties for the payment of a *further*

[8] Vid. Rol. Arb. N. 6.

[9] Tomkins v. Webb. 2 Rol. Rep. 46.

[1] 18 Jac. Sayer v. Sayer. Rol. Arb. N. 5.

[2] Vid. 19 E. 4. 1. 18 Ed. 4. 23. cited Cro. El. 432. Rol. Arb. N. 7. 1 Rol. Rep. 270. 2 Lev. 6. 3 Leon. 62.

ſum," though void with reſpect to the ſureties, he muſt pay the 150l. and be bound himſelf for the further ſum, if no objection can be taken to any other part of the award.[3]

So, if it be awarded that the one ſhall make aſſurance of certain land, within the ſubmiſſion, to the other and his *wife*, though this be void as to the wife, who is a ſtranger to the ſubmiſſion, yet it is good for the reſt, and he muſt convey the land to the other party himſelf.[4]

So, if the award be that one of the parties *and* his wife levy a fine, of the land in diſpute, to the other, though this be void as to the wife, yet the huſband muſt levy a fine, otherwiſe he will forfeit his bond.[5]— So, if the award be that he ſhall make an eſtate of certain lands to the plaintiff for life, with remainder to a ſtranger in fee, this is good for the eſtate to the plaintiff for life, and for ſo much muſt be performed, though it be void for the reſt.[6]

So, when it was held that the arbitrator had no power over the coſts of the arbitration, yet "an award that one of the parties ſhould pay a ſum of money to the other, and ſo much for writing the award," muſt have been performed with reſpect to the money to be paid to the other party."[7]

THE ſubmiſſion was by bond, conditioned to ſtand to an award of all controverſies and doubts, had, made,

[3] Id.

[4] M. 37, 38 El. Samon v. Pitt. Rol. Arb. N. 8.

[5] Keilw. 43. a. b. 45 b. 2 Keb. 290.

[6] Bretton v. Pratt. Cro. El. 758. pl. 27.

[7] Perryn v. Barry. Bridgeman 90, 91. Pinckney v. Bullock. 2 Keb. 759. 2 Lev. 3.

moved or ſtirred between the parties from the beginning of the world till the day of the date of the bond: it was awarded that the one ſhould pay to the other 10l. which appeared by his confeſſion to have been received by him; and if it ſhould appear in a month, and due proof ſhould be made that he had received more than he had confeſſed, then he ſhould pay that alſo.—It was objected that all doubts were referred, and the condition contained a proviſo that the award ſhould be made of the premiſes, yet the arbitrators had not made an end of all doubts, as it appeared they doubted whether more was due or not: but the court held, that as it was not averred that there was any doubt moved or ſtirred between the parties at the time of the ſubmiſſion, it ſhould be preſumed that this doubt aroſe in the minds of the arbitrators *after* the ſubmiſſion, and that they added this reſervation only by way of greater caution on their own part: and though ſuch a reſervation was void, yet the award was good for the payment of the 10l.[8]

If that part of the award which is void be ſo connected with the reſt as to affect the juſtice of the caſe between the parties, the award is void for the whole. Thus, where it was awarded "that the defendant ſhould pay to the plaintiff 40l. by inſtalments, namely, 10l. at Michaelmas, 20l. at Chriſtmas, and 10l. at the Annunciation; and, if before the laſt payment it ſhould ſeem to the arbitrator that the defendant was engaged for the plaintiff in any debt not ſatisfied, he ſhould re-

[8] Jeanes v. Fourthe on a writ of error from C. B. and judgment affirmed in B. R. H. 10 Car. Rol. Arb. M. 6.

pay him ſo much as the debt not ſatisfied amounted to; and that the parties ſhould give mutual releaſes;" it was held, that that part with reſpect to the reimburſement being void, and affecting the whole of the award, the whole was void.[9]

I HAVE ventured to aſſert that it is not neceſſary that an award ſhould be mutual, in the ſenſe in which the rule is expreſſed, and in which it is commonly underſtood, namely, that ſomething muſt be awarded in favour of each party: however, when from the tenor of the award it appears that the arbitrator has intended that his award ſhould be mutual, awarding ſomething in favour of one of the parties as an equivalent for what he has awarded in favour of the other; if then by any of the rules for the conſtitution of an award, that which is awarded on one ſide be void, ſo that performance of it cannot be enforced, the award is void for the whole, becauſe that mutuality, which the arbitrator intended, cannot be preſerved.

THUS, where the diſpute related to the title of a copyhold tenement, and it was awarded that the defendant ſhould pay 6l. to the plaintiff on the twenty-firſt of May, and that then the plaintiff ſhould releaſe all his right to the copyhold, and three months after the aforeſaid firſt of May ſhould make further aſſurance to the defendant; at a time when the courts would not ſupply the word "twenty," but for want of it held all that part of the award to be void; it was perfectly conſonant to reaſon and juſtice that they ſhould hold the award void for the whole, and not force the defendant

[9] Winch and Grave v. Saunders. Cro. Jac. 584.

to pay the 6l. when he could not have that in return which was intended by the arbitrator as a conſideration for it.[1]

So, when it was held that the arbitrator had no power over the coſts of the reference, if it had been awarded that one of the parties ſhould pay the other 10l. and that the latter ſhould pay the coſts of reference; the latter part being void, and intended as a recompence or equivalent for the other, it was reaſonable to conſider the whole award as void.[2]

So, where A. and B. ſubmitted, to certain arbitrators, the title of certain land, who awarded that all controverſies ſhould ceaſe concerning the land, and that B. ſhould pay to A. 8l. and that A. his wife and ſon and heir apparent, by the procurement of A. ſhould paſs to B. ſuch aſſurance of the land as B. ſhould require; this was held to be void for the whole; A. could not compel his wife and ſon, who were ſtrangers to the ſubmiſſion, to make the aſſurance, and perhaps the wife and ſon had the eſtate of the land in them, and their paſſing the eſtate was the conſideration for which the 8l. were awarded to be paid by B. to A.[3]

It was awarded that the defendant ſhould pay and ſatisfy the plaintiff for taſk work, and days work done by the latter for the former, and that then the plaintiff ſhould pay to the defendant 25l. and give him a general releaſe of all controverſies: this was held to be void

[1] Yel. 98. Markham v. Jennings. Rol. Arb. K. 15. Brownl. 92.

[2] Rol. Arb. K. 13, 14. Cro. Jac. 577, S. Al. 10. 10 Mod. 201.

[3] Barney v. Faierchilde. Rol. Arb. N. 9.

for the whole, becauſe being void for that awarded to be done by the defendant on account of the uncertainty of how much he was to pay to the plaintiff for the taſk work and days work, the recompence intended for the plaintiff was gone.[4]

If one intire act awarded to be done on one ſide comprehend ſeveral things, for ſome of which it would be good, and for others not, the award is bad for the whole, becauſe the act cannot be divided.—As if an aggregate ſum be awarded to be paid to one of the parties for conſiderations expreſſed in the award, ſome of which are within the ſubmiſſion, and others out of it, this is void for the whole, becauſe it is impoſſible to diſtinguiſh how much was intended for the conſiderations within the ſubmiſſions.—Thus, where the ſubmiſſion was of all controverſies between the plaintiff and defendant, and the wife of the latter, for divers ſums of money laid out for the wife by the plaintiff at her *requeſt* when ſhe was ſole: an award "that the defendant ſhould pay to the plaintiff a certain ſum of money, for all ſums laid out by him for the wife while ſole, without the addition of its being at her *requeſt*," was held void, in thoſe times when the courts were unwilling to preſume any thing in favour of an award, and therefore would not take it for granted that the whole was laid out at the requeſt of the wife: and in this caſe, had any thing been awarded on the other ſide, the award would have been totally void, becauſe it would have wanted that mutuality which the arbitrators had intended to prevail in their award.[5]

[4] 2 Saund. 293.

[5] Waters v. Bridges, adjudged on a writ of error. Cro. Jac. 639.

When it was held that a releaſe extending to a time beyond the ſubmiſſion, was void for the whole, and that the execution of a releaſe to the time of the ſubmiſſion was not a good performance of an award which ordered a releaſe to the time of the award; and when it was held that, without a releaſe, no ſatisfaction could be preſumed, unleſs ſome words were uſed which neceſſarily implied a ſatisfaction: in thoſe times, if money had been ordered to be paid, and then a releaſe from the other to a time beyond the ſubmiſſion, the latter part being void, the whole award would have been void.[6]—This is the doctrine of Rolle in his abridgment of the caſe of Vanlore and Tribb, from his own reports; and from this caſe, as given in the abridgment, all the difficulties with reſpect to releaſes have ariſen.

The caſe, as given in his reports, by no means juſtifies his concluſion here: in theſe the award is ſtated to have been, "that one of the parties ſhould pay ſo much to the other in ſatisfaction of all duties which "he" (the latter as it would ſeem) had againſt "him" (the former apparently) as adminiſtrator to J. S. and that "he" (it appears doubtful which of the two is here meant) ſhould make a releaſe to "him" (here the ſame doubt prevails) of all actions to the day of the award:" the breach aſſigned was the non-payment of the money, and the queſtion was, whether, as the award was confeſſedly void as to the releaſe, "he" ſhould be bound to perform the remainder, that is, to

[6] Vanlore v. Tribb. Rol. Arb. N. 1. cites his own reports.

pay the money.—The doubt with reſpect to the award as here ſtated is whether from the confuſion of the pronouns we are to underſtand that the releaſe was to be given by the ſame perſon who was to pay the money, or by the other to him in conſequence of the payment; if we are to underſtand the former to have been the caſe, as ſeems neceſſarily to be implied from the manner of reaſoning both of the court and counſel, there could be no queſtion but he was bound to pay the money, for that was altogether independent of the releaſe.—It is laid down as a principle in the argument of the counſel, that as the party is bound to perform every thing in the award, therefore he ought to perform that which is good, though part be void; this is adopted by the court, and judgment given accordingly for the plaintiff.[7] Had the releaſe been awarded to be given by the other party on payment of the money to him, then the queſtion could not have been directly whether he who was to pay the money was bound to perform his part of the award; but that would have depended ultimately on the queſtion with reſpect to the releaſe itſelf; and according to the principles which then prevailed, the award with reſpect to the releaſe would have been conſidered as void, and therefore, that being the recompence for the payment of the money, the award would have been of one ſide only, and therefore void for the whole, according to the doctrine of the abridgment.

THE next caſe in the abridgment, is one of a ſubmiſſion on the firſt of May of all matters between the

[7] 1 Rol. Rep. 437. S. C. Bridgeman, 59.

parties, and an award that the one ſhould pay to the other 20s. in ſatisfaction of all matters between them to the time of making the award, which was on the fourth of May.—Though this comprehends more time than the ſubmiſſion, ſays the abridgment, ſtating the words of the court, yet becauſe it ſhall not be intended that there were any matters between them, from the time of the ſubmiſſion to that of the award, if it be not ſhewn on the other ſide, the award is good.[8] Rolle adds his own opinion, that this caſe ſeems to be good law, but that the reaſon on which the court relies, is not the true reaſon, becauſe it *croſſes* the reaſon given for the judgment in the caſe before; for there the award was held to be void, becauſe there *might* have been other diſputes between the time of the ſubmiſſion and the award: but he ſays, it ſeems the reaſon of the preſent caſe is, that thongh there *were* other matters between the ſubmiſſion and the award, and ſo the award void for theſe, yet here there is not one intire act to be done, as in the caſe before of the releaſe; but the 20s. ſhall continue a good ſatisfaction for the other matters ſubmitted; and all the inconvenience is that perhaps the money to be paid was increaſed by reaſon of the intervening matters, and ſo he may ſuſtain ſome prejudice, but no prejudice can be ſuſtained on the other ſide.—The reaſon of the court, however, is more conſonant to the principles of juſtice than that of Rolle—by preſuming that there were no matters between the parties, from the time of the ſubmiſſion to

[8] M. 24 Car. B. R. Kynaſton v. Jones. H. 15 Jac. Ley v. Payne. Hutt. 9. Mo. 885. pl. 1242.

that of the making of the award, the court ſuppoſe that the arbitrator had not in contemplation any injury for which he was to give a ſatisfaction, but thoſe which were within the ſubmiſſion, and that the words ſeeming to comprehend ſomething more, muſt be conſidered only as an inaccurate expreſſion.—But the reaſon ſuggeſted by Rolle, is againſt the juſtice of the caſe; for if in truth the arbitrator, by conſidering other injuries than thoſe ſubmitted to him, had increaſed the ſatisfaction, beyond that which he would otherwiſe have given; and if the party notwithſtanding that increaſe of damages, be not precluded from ſuing his opponent for thoſe injuries which were out of the ſubmiſſion, the intention of the arbitrator does not prevail.

It is only by ſuppoſing that the arbitrators have not expreſſed their real meaning with perfect accuracy, that the following and many other ſimilar caſes can be ſupported, with a due regard to juſtice.

The ſubmiſſion was by A. and B. of all ſuits between them, concerning certain tithes; the award was that A. ſhould pay to B. a certain ſum of money, and that B. ſhould ſuffer all ſuits which he had againſt A. to be diſcontinued, when in fact he had other actions againſt A. which did not concern the tithes: the court held that the award, though void as to the diſcontinuance of the actions which did not concern the tithes, was yet good for the reſt, "becauſe the ſuffering, ſays Rolle, of the actions to diſcontinue, is not an intire act like the execution of a releaſe."[9] But the only fair

[9] Tr. 18 Jac. B. R. Ingram v. Webb. Rol. Arb. N. 4. 2 Rol Rep. 162. Cro. Jac. 663, 664. Palm. 107.

reaſon muſt be that the arbitrator had no other actions in contemplation than thoſe concerning the tithes.

It is indeed laid down by Lord Coke, in general, unequivocal terms, "that though ſeveral things be awarded to be done in ſatisfaction of another, and ſome are within the ſubmiſſion, and ſome out of it and therefore void; and although all were intended by the arbitrators to be a plenary and intire recompence for the things done by the other, yet if any thing to be given or done to the party, though of ſmall value, be within the ſubmiſſion, the award is good, though it appear to have been the intent of the arbitrators, that that which is within the ſubmiſſion, without the reſt, ſhould not be a plenary ſatisfaction for the thing to be done by the other party."[1]—But Juſtice Powell mentions this opinion of Lord Coke in terms of diſapprobation, and ſays, that the judgment in the caſe which Coke had then in contemplation was afterwards reverſed on a writ of error.[2] It well deſerved his diſapprobation; for if it were to prevail, the inadvertence or the blunder of an illiterate arbitrator might in many inſtances be converted into an inſtrument of the groſſeſt injuſtice.

However, when it appears that both parties have the full effect of what was intended them by the arbitrator, though ſomething be awarded which is void; yet the award ſhall ſtand for the reſt.

Thus, if it be awarded that the one ſhall pay the other 40s. in ſatisfaction of all matters between them, and that the latter ſhall give the former a releaſe of all

[1] 10 Co. 131. b. 132. b. Rol. Arb. b. 22.

[2] 1 Leon. 170. Vid. 12 Mod. 587.

matters up to the time of the award, though the award be void as to the releaſe, yet it ſhall ſtand as to the reſt, becauſe without the releaſe, the mutuality intended by the arbitrator remains complete.[3]

So, an award, "that the plaintiff ſhall have and enjoy a certain horſe which was in controverſy between the parties, and that the defendant ſhould pay him 3l. before Michaelmas, towards his charges, and that they ſhall releaſe the one to the other all matters whatſoever, between the time of the award made and St. Michael," though void as to the releaſe, would now be conſidered as valid for the reſt.[4]

So, an award "to pay 10l. in ſatisfaction of treſpaſſes, and that both parties ſhall give mutual releaſes to the time of the award," is good as to the 10l. becauſe, by being in ſatisfaction of the treſpaſs, the mutuality is complete without the releaſe.[5]

THE ſubmiſſion was by bond in the penalty of 2000l. the bond of the plaintiffs was dated on the twenty-ſecond of February, that of the defendant on the ninth of March; the award ordered that the defendant ſhould pay to the plaintiffs 1200l. at four payments; that on the fourth of May he ſhould enter into four bonds for the payment on the days appointed, and ſhould then pay to the plaintiffs 30l. towards their coſts and charges expended; that all actions and controverſies between the plaintiffs and the defendant ſhould ceaſe and determine; and that they ſhould ſeal and deliver to each

[3] Rol. Arb. M. 4. K. 9.

[4] Held contra formerly. Stain v. Wild. Cro. Jac. 352, 353.

[5] Freem. 265.

other general releaſes of all controverſies, ſuits, and demands, to the eighth day of March.—The objection made to this award was that the releaſes being ordered to the eighth of March, the plaintiff's bond of ſubmiſſion, which was dated on the twenty-ſecond of February preceding, would be diſcharged by the defendant's releaſe: but in this caſe the court thought that the queſtion, whether the award as to the releaſes was void, was immaterial; becauſe, it being awarded that all ſuits ſhould ceaſe, the award was reciprocal, and a ſufficient ſatisfaction for the money ordered to be paid by the defendant.[6]

It was awarded that the plaintiff ſhould pay 30l. to the defendant, and that the latter, on the payment, ſhould ſurrender to the former the poſſeſſion of a houſe in which the defendant lived, and deliver to the plaintiff a deed, by which the houſe was intailed to the plaintiff, and deliver up all bonds which he had againſt him, and execute a general releaſe to him, to the 12th of Auguſt, the ſubmiſſion bond being dated the 2d of July preceding, and that the plaintiff ſhould then give a general releaſe to the defendant.—It was objected that the award was not mutual, becauſe the defendant being ordered to give his releaſe firſt, the plaintiff might refuſe to give that awarded on his part, and the defendant had no remedy to enforce it; becauſe if he brought an action on the ſubmiſſion bond, the plaintiff might plead the defendant's releaſe in bar: but it was held that whatever might be the effect of

[6] Kynaſton and Spencer v. Jones. Al. 87. Rol. Arb. N. 5.

ſuch a plea, the award was mutual without the releaſes, and no defect with reſpect to them ſhould vitiate it.[7]

An award conſiſted of the following diſtinct particulars. 1. That the defendant ſhould pay all his own coſts till the day of the ſubmiſſion. 2. That he ſhould execute a general releaſe to the plaintiff, of all actions, &c. unto or upon the ſame day. 3. That he ſhould deliver to the plaintiff all the deeds mentioned in the award relating to the premiſes in diſpute. 4. If he did not deliver them, then he ſhould pay to the plaintiff 50l. 5. That the defendant ſhould procure double ſixpenny ſtamps to certain indentures relating to the premiſes. 6. That the defendant ſhould pay to the plaintiff 11l. for the coſts in the ſuit recited in the award, on or before the ſecond day of May following, and give a bond in the penalty of 74l. with a condition to pay the ſaid 11l. and that the plaintiff on the performance thereof ſhould execute a releaſe to the defendant of all actions unto or upon the day of the ſubmiſſion.

Though the opinion of the greater part of the court was that the releaſe to be made by the plaintiff to the defendant, would, if executed, have been a releaſe to the ſubmiſſion bond; yet they were all of opinion that the award was good, becauſe it amounted to a particular ſatisfaction, and mutual recompence as to each particular matter awarded.[8]

By an umpirage, it was ordered that all actions ſhould ceaſe. 2. That the defendant ſhould pay to

[7] Marks v. Marriot. 1 Ld. Raym. 114, 5, 6.

[8] Lee v. Elkin. 13 W. 3. C. B. Lutw. 545.

the plaintiff 12l. 15s. 3d. 3. That the defendant ſhould deliver to the plaintiff certain goods particularly mentioned, and three boxes, and ſeveral books, without naming them; and that the plaintiff ſhould deliver to the defendant ſeveral articles by name; but that, if any of the goods ſhould be miſlaid or loſt, then the parties ſhould pay the value of them, to be appraiſed by the umpire and the arbitrators, and that the parties ſhould execute mutual releaſes.—In an action on the bond for performing this award, the breach was aſſigned in the nonpayment of the 12l. 15s. 3d.

That part of the award, reſpecting the three boxes and *ſeveral* books, was held to be void, as it clearly is, on account of the uncertainty as to the books; as to that part which relates to the appraiſement of the goods, that might be miſlaid or loſt, by the umpire and arbitrators, doubts were entertained; ſome[9] holding that it was a judicial act, Powell that it was a miniſterial act.—With reſpect to the releaſes awarded to be executed on both ſides, it was reſolved, that, although no time was limited for the execution, nor was it ſaid, that it ſhould be done, on or after the performance of the other parts of the award; yet the award being void, with reſpect to the delivery of the goods, neither the one nor the other was obliged to give the releaſe, for then the goods would be releaſed without any ſatisfaction, which, as was ſaid by one of the judges, would be abſurd.

It was alſo held, that the ſubmiſſion in this caſe containing the proviſional clauſe of "Ita quod," if the

[9] Trevor, C. J. and Blencow, J.

award was void for a part, it was void for the whole; and being void for that part relating to the delivery of the goods, it was void for the whole.[1]

The proper way, however, of conſidering the caſe, ſeems to be this: that part of the award which gives 12l. 15s. 3d. to the plaintiff, and orders the delivery to the plaintiff of certain goods particulary mentioned, and three boxes, with ſeveral books, without particulariſing them, is altogether the conſideration intended by the umpire for the delivery of the goods by the plaintiff to the defendant, and part of that conſideration being void, the plaintiff could not be compelled to perform his part; conſequently if the defendant had been held to the payment of the 12l. 15s. 3d. he could not have had that equivalent which the arbitrator intended him. But had the plaintiff alleged that he had delivered the goods awarded to be delivered on his part, it is conceived, no objection could have ariſen on the part of the defendant on account of the releaſes, becauſe without them the award would then, in every reſpect, have been mutual.

In all the caſes in which objections are made to the award, as wanting mutuality, on account of one part being void, the arguments are founded on the ſuppoſition that the defendant, on performance of his part, has no means of enforcing performance from the plaintiff of the part awarded to be performed by him in return; this ſtrongly favours the argument, that where that objection is removed by an actual previous performance on the part of the plaintiff, the defendant

[1] Cockſon v. Ogle. 13 W. 3. Lutw. 550.

ſhall be bound to perform his, where there is no reaſon to impeach the validity of that.—This opinion is confirmed by the reaſoning of the judges in the caſe of Lee and Elkins.[2]—Powell, J. ſays there is a diverſity to be obſerved; where an award conſiſts of ſeveral things, for one of which it is void, and it is expreſſly ſaid, that on performance of that which is void, the other party ſhall do ſome particular thing, there the performance of that, for which the award is void, is a condition precedent, and muſt be averred before the action againſt the other for not doing his part, can be maintained.—But when there are ſeveral things in an award, for ſome of which it is good, and for others not, and it is further ſaid, that on performance of the premiſes, the other party ſhall do ſomething in return, there the words "on performance of the premiſes," ſhall only apply to that part of the award which is good, and performance of ſo much obliges the other to do what belonged to him. And, in the latter caſe, the opinion of Lord Hale ſeems to have been conformable to that of Powell. The award was that the defendant ſhould pay to the plaintiff 10l. and that the plaintiff ſhould pay to the defendant the expences to the making of the award, and that *then*, each ſhould give to the other a mutual releaſe; the breach being aſſigned in the non-payment of the 10l. by the defendant, it was objected that the award was not mutual, becauſe it was void for the expences to be paid by the plaintiff, and therefore no releaſe was ever to be given; but Hale held that on performance of that, for which the award

[2] 12 Mod. 588.

was good, the releaſe ought to be given.[3]—But this diſtinction was, on good reaſon, denied by Chief Juſtice Trevor, who ſaid, that in the latter caſe mentioned by Powell, as well as in the former, if it appeared that the arbitrators deſigned that ſuch illegal part ſhould be part of the conſideration, in reſpect of which the other was to perform, that illegal part muſt in fact be performed, otherwiſe the oppoſite party would not have that advantage which was deſigned for him; and he would be injured by being forced to pay for a conſideration, of which he had not the benefit.—Thus, if ſeveral things were awarded to be done on the part of the defendant, againſt which no objection could be taken, and alſo that he ſhould give the plaintiff a general releaſe, "unto and upon the day of the arbitration bond," and that then the plaintiff ſhould give *him* a like general releaſe; though, by the Chief Juſtice, it was held that the releaſe was void, as extending to the *day* of the ſubmiſſion, and ſo going beyond the ſubmiſſion, yet he held that the plaintiff was not bound to give the releaſe on his part, independently of the ſame objection to its legality, unleſs the defendant firſt gave *his* releaſe; but if the plaintiff averred performance on his own part, the defendant could not excuſe himſelf from the performance of what was awarded to be done by him, merely on account of the illegality of the part to be performed by the plaintiff.

The Form of the Award.

WHERE the ſubmiſſion is verbal, without a proviſo that the award ſhould be made in writing, a verbal award is ſufficient.[4]

[3] Pinkney v. Hall. 1 Lev. 3. 23 Car. 2.
[4] Cable v. Rogers. 3 Bulſtr. 312.

If the ſubmiſſion be by bond, and the condition contain a proviſo that the award ſhall be made and ready to be delivered, either in writing or by word of mouth; a parol award is in this caſe alſo ſufficient.[5] And where the proviſo is merely that the award ſhall be made and delivered, it ſeems that it may be made without writing;[6] at leaſt it is not neceſſary for the plaintiff to ſhew that it was in writing.—If the proviſo be that the award be made in writing or by word of mouth before two witneſſes, a verbal award alone will not ſatisfy the proviſo, it muſt alſo be pronounced before two witneſſes.[7]

If the proviſo be that the award ſhall be made and delivered under the hands and ſeals of the arbitrators, the award muſt be actually ſubſcribed by them; ſealing alone will not be ſufficient.[8] But if the arbitrator make his mark, that is ſufficient ſubſcription.[9]

And if the proviſo be that the award ſhall be ſealed with the ſeal of the arbitrator before a certain day, it will not be ſufficient for the party pleading the award, to allege that he has it in court ſealed with the ſeal of the arbitrators, he muſt ſhew that it was ſealed at the time of the delivery.[1]—But though, in the beginning of the replication, it be only ſaid, that the arbitrators, by their writing ſealed with their ſeals, awarded; yet if it be afterwards ſaid, that it was ready

[5] Hanſon v. Liverſedge. 2 Vent. 240, 242.

[6] Rous v. Nun. 1 Sid. 155. Vid. ante 116, 117 acc.

[7] Wilſon v. Conſtable, Lutw. 536.

[8] Thaire v. Thaire. Palm. 109, 112, 121.

[9] 3 Salk. 44.

[1] Palm. 121. Jenkinſon v. Allenſon. 3 Keb. 513.

to be delivered under their hands and ſeals, it will be ſufficient to ſatisfy the proviſo.[2]

It was formerly held that a proviſo "that the award ſhould be made by deed indented," was not ſatisfied by an award made in writing without being indented, and that even the acceptance of it by the parties unindented, would not alter the caſe.[3]—It was further held that an averment "that it was made according to the effect and form of the condition would not aid it, becauſe that relates to the delivery to the parties, and *ſo*, it is ſaid, *it hath been often adjudged*.[4] But the good ſenſe of later times, has conſidered this objection as altogether immaterial, and of not more conſequence than if the ſubmiſſion required the award to be made on gilt paper.[5]

Where there is a proviſo that the award be made, "of and upon the premiſes," it is not neceſſary that the award ſhould expreſſly purport to be made "of and upon the premiſes," for unleſs the contrary appear on the face of it, it cannot otherwiſe be intended.—This, at leaſt, ſeems the true concluſion from two caſes reported: where the ſubmiſſion contained that proviſo, and if the arbitrators did not make their award within the time, then an umpire ſhould decide; the arbitrators did not make any award within the time, but the umpire did without profeſſing to make it "of and upon the premiſes:" it was held that the proviſo ex-

[2] Lambard v. Kingsford. Lutw. 558.

[3] Dict. per Hale in Elborough v. Yates. 3 Keb. 525. adj. in Hinton v. Cray. 3 Keb. 512.

[4] Burges v. Pleyer. Freem. 467.

[5] Barnes 56.

tended to the umpire, as well as to the arbitrators; but that though he had not profeſſed to make his award "of and upon the premiſes," it was ſufficient.[6]

Performance what ſhall be.

It is not in all caſes abſolutely neceſſary that performance ſhould be exactly according to the words of the award; if it be ſubſtantially and effectually conformable, it is ſufficient. Thus, if it be awarded that one of the parties ſhould deliver, to the other, the laſt will and teſtament of his teſtator, it is ſufficient to allege a delivery of letters teſtamentary, becauſe theſe are in effect the ſame thing.[7] Where it was awarded that one of the parties ſhould "withdraw" his action, it was much debated whether his ſuffering a diſcontinuance would ſatisfy the award: the report of the caſe is far from being clear,[8] but the prevailing opinion ſeems to have been that it ſhould not; for by this award, it was ſaid, the party muſt do an act; he muſt come into court before the day which was given for the continuance, or before the return of the writ, and ſay that he will no further proceed in his action, on which the entry on the record is, "that the plaintiff comes in his proper perſon and ſays that he will no further proceed in this plea."

A DISCONTINUANCE, however, ſeems a ſufficient performance of ſuch an award, becauſe it has the ſame effect as a retraxit; for though a retraxit be a bar to another action, which a diſcontinuance is not, yet by bringing another action after an award of a diſcontinuance, the party as much diſobeys the award, as if he did the ſame after an award of a retraxit.

[6] 1 Keb. 790. 865.

[7] 4 Ed. 4. 3. cited 3 Bulſtr. 67.

[8] 21 Ed. 4. 38, et ſeq.

WHERE the award orders a releaſe to a time beyond the ſubmiſſion, a releaſe to the time of the ſubmiſſion is ſufficient performance.[9]

PERFORMANCE by the attorney is equivalent to performance by the principal; as if the award be that the party ſhall diſcontinue his ſuit, a diſcontinuance by his attorney is ſufficient.[1]

IF it be awarded that one of the parties ſhall pay a ſum of money to a ſtranger and his aſſigns before a certain day, and before the day, the ſtranger die, the party muſt pay the money to the executor or adminiſtrator; for theſe are the aſſignees in law; and the law is the ſame, where no mention is made of aſſigns, in the award.[2]

WHERE the concurrence and preſence of both parties is not abſolutely neceſſary to the performance, each ought to perform his part without requeſt from the other.[3] Thus, where the award was, that the defendant ſhould reaſſign to the plaintiff certain premiſes mortgaged to him by the latter, it was held, he was bound to reaſſign without the preſence or concurrence of the plaintiff, and if the mortgage had been of a fee, the reaſſignment might be done by leaſe and releaſe. Had the award been that he ſhould reinfeoffe the plaintiff, he could not have performed it without

9 Godb. 164, 5. 1 Sid. 365. 6 Mod. 34, 35. 12 Mod. 8, 117, 589. et vid. ante page

1 Jenk. 136. dict. contra of a retraxit.

2 3 Leon. 212.

3 Nihil aliud eſſe, ſententiæ ſtare, quam id agere, quantum in ipſo ſit, ut arbitri pareatur ſententiæ. Ff. l. 4. t. 8, ſ. 23. n. 2.

the preſence of the plaintiff or ſome one on his behalf to take livery.[4]

Where an act is awarded which may be done two ways, but by the one, it cannot by law be done before a diſtant day, and by the other it may be done immediately, the party muſt do it in that way in which he may do it immediately, unleſs he has a time by the award, which goes beyond the diſtant day. Thus where the award was that one of the parties ſhould grant the reverſion of an eſtate held for term of life, this, before the ſtatute for the amendment of the law, might have been done in two ways; by fine, or by deed, and attornment of the tenant for life, but the fine could not be levied before term, the reverſion muſt therefore have been granted by deed, which might be done immediately; however, it muſt be obſerved, that, before that ſtatute, the conveyance would not have been complete without the attornment of the tenant, which could not be compelled but by "per quæ ſervitia," or "quem redditum reddat;" and theſe could not be proſecuted with effect 'till the term: if, therefore, the party could not have completed the conveyance before term, he could not have been guilty of a breach of the award.[5]

It may ſometimes be a queſtion, when mutual things are awarded, who ſhall do the firſt act. On a ſubmiſſion of a battery committed by one of the parties againſt the other, if it be awarded that the offender ſhall pay a ſum of money, and the other give him a

[4] Roſſe v. Hodges. 1 Ld. Raym. 233, 234.

[5] 21 Ed. 4. 40—43. quære, for the report is very inaccurate.

releaſe of all actions, or a releaſe ſimply, there the payment of the money muſt precede the releaſe, becauſe, according to the old doctrine, ſuch a releaſe would have extended to the money awarded in ſatisfaction. But if the award be that the one ſhall pay money, and the other give him a releaſe of "the" action, this not extending to diſcharge the payment of the money, and the remedy on the award remaining for the recovery of it, after the execution of the releaſe, there is no precedency required, and the offender may ſue on the award, and aſſign a breach in not executing the releaſe without ſhewing that he has paid the money, nor will he be barred, by the other party's alleging the non-payment, in his plea.[6]

If the party, in whoſe favour the award is made, accept of a performance differing in circumſtances from the exact letter of the award, that is ſufficient:—thus, if it be awarded that the one ſhall infeoff the other in a piece of land, and the latter come to him and require him to infeoff J. N. and himſelf, to the uſe of him and his heirs; if he make the feoffment accordingly, this is performance of the award, ſufficiently within the intent, though not exactly within the words.[7] So, if the award be, that the defendant ſhall conduct the ſervant of the plaintiff to London, and the defendant, by the direction of the plaintiff, deliver him to A. B. at Saliſbury to be conducted to London, this is ſufficient. But where the ſubmiſſion bond was to a ſtranger, and

[6] Bilford v. Flint. 2 Bulſtr. 117. vid. 2 Keb. 163. 403. 3 Keb. 608. Sir T. Raym. 169.

[7] 36 H. 6. cited 3 Bulſtr. 67.

not to the party in whoſe favour the award was made, it was held that ſuch a performance would not ſave the penalty of the bond, becauſe, by the law relative to bonds, he was bound to a ſtrict and literal performance.[8] It was afterwards, however, decided on ſolemn argument, that in ſuch a caſe, if the obligor did all he could to perform the award, and the party in whoſe favour it was made prevented the literal performance, this was ſufficient, becauſe when a bond is given to A. by B. conditioned to ſtand to A.'s award between B. and C. there is ſufficient privity between the two latter to make the default of C. in whoſe favour the award is made, excuſe B.[9]

But, without having recourſe to that privity, it may be obſerved that in this reſpect the caſe of an award is different from a common bond, for by a bond to ſtand to an award, the obligor is only bound to perform the award in a reaſonable manner, and it would be too much to ſay it was reaſonable he ſhould compel the other party to accept performance.

If the award be to pay on or before a particular day, payment before the day is equivalent to payment on the day,[1] and ſo one might ſuppoſe if the award were to pay on the day, without the word "before."[2]

If no day be limited for the payment of money awarded, it muſt be paid within a reaſonable time, and

[8] 36 H. 6. cited 3 Bulſtr. 67.

[9] 22 Ed. 4. 27. Brooke Arb. pl. 41.

[1] Hinton v. Crane. 3 Keb. 675, 6.

[2] Si arbiter, me tibi *certo die pecuniam dare* juſſerit, tu accipere noluiſti:—poſſe defendi, ipſo jure pœnam non committi. Sed ſi poſtea tu paraturus fis accipere: impune me non daturum; non enim ante feceram. Ff. l. 4, t. 8. f. 23. n. 3. f. 24.

the party to whom it is to be paid, is not bound to make a requeſt before he bring his action for the recovery of it.[3] But it ſeems rather a ſtrict conſtruction, that if the party who is to pay the money let a conſiderable time elapſe, the other ſhould be at liberty to refuſe it when offered, and be permitted, notwithſtanding ſuch tender and refuſal, to ſue on the ſubmiſſion bond.—Such ſtrictneſs, however, was formerly adopted.—Money was ordered to be paid, by an award dated on the firſt of May. The plaintiff brought his action, aſſigning the breach in the non-payment of the money, the defendant pleaded a tender and refuſal at Michaelmas, and the plea was overruled, becauſe the time elapſed was too long.[4]—There is no doubt, however, at preſent, but that if the tender is actually before the commencement of the action, it is ſufficient; and this is conformable to the civil law on the ſame ſubject.[5]

[3] 21 Ed. 4. 38 et ſeq.

[4] Jenk. 136.

[5] Si dies adjectus non ſit, ineſt quoddam modicum temporis, quod ubi præterierit, pœna ſtatim peti poteſt; et tamen ſi dederit ante acceptum judicium, agi ex ſtipulatu non poterit. Ff. l. 4. t. 8. ſ. 21. n. 12. Utique niſi ejus interfuerit, tunc ſolvi. ſ. 22. Celſus ait, ſi arbiter intra Kalendas Septembres dari juſſerit, nec datum erit: licet poſtea offeratur, attamen ſemel commiſſam pœnam compromiſſi non evaneſcere: quoniam ſemper verum eſt, intra Kalendas, datum non eſſe. Sin autem oblatum accepit, pœnam petere non poteſt, doli exceptione removendus; contra, ubi duntaxat *dare* juſſus eſt. Idem ait, ſi juſſerit *me tibi dare*, et valetudine ſis impeditus, quo minus accipias, aut aliâ juſtâ ex cauſâ: Proculum exiſtimare, pœnam non committi nec ſi, poſt Kalendas, te parato accipere, non dem. Sed ipſe rectè putat duo eſſe arbitri præcepta; unum, *pecuniam dari*, aliud, *intra Kalendas dari*. Licet igitur, in pœnam non committas quod intra Kalendas non dederis, quoniam per te non ſtetit: tamen committis in eam partem, quod non das. ſ. 23

A CONSIDERABLE number of years having elapſed ſince the making of the award, is no objection to the parties being called upon to perform it.

A TESTATOR left his ſon and brother executors; the teſtator was poſſeſſed of a conſiderable perſonal eſtate: the brother poſſeſſed himſelf of it, promiſing to give a juſt account, and that the ſon ſhould have his ſhare of it; but diſputes ariſing between them, theſe were referred to arbitrators, and mutual bonds given to ſtand to the award: The arbitrators awarded that the perſonal eſtate ſhould be equally divided between them, and that each ſhould give the other a general releaſe. The brother having the greateſt part of the eſtate in his hands, promiſed to ſhare it with the ſon, according to the award; the ſon relying on that promiſe, gave his uncle a general releaſe, and wiſhing to have his ſhare, to enable him to diſcharge ſome debts which he had contracted, applied to his uncle, who pretending that he had not money, borrowed 200l. of one Hody, and 300l. of one Holland, for which he gave his bond, and advanced 30l. of his own money, and took a mortgage from the ſon as a ſecurity for the payment of the 530l.—The ſon could never bring his uncle to account, and to divide the teſtator's eſtate according to the award.—When the ſon tendered to his uncle the 530l. with intention to have his mortgage delivered up, the latter declared that on a juſt and fair account there would be nothing due, and that therefore he ſhould have his mortgage delivered up to be cancelled.—The brother made his will, appointing his wife executrix, and died. The widow proved the will, and the ſon exhibited his bill againſt her, praying that he might have his ſhare of his father's eſtate as awarded

to him: the defendant confeſſed the charge in the bill, but ſaid ſhe believed her huſband had performed the award, and inſiſted that ſhe ought not, either as executrix of her huſband, or otherwiſe, to be drawn into account; for that her huſband lived twelve years after the award made: and ſaid, that though Hody's debt was paid, yet ſhe had been ſued for Holland's, and had paid it, and that on payment of that and other ſums expended by her, ſhe was willing to aſſign the mortgage.

THE court decreed an account and diſtribution of what was awarded, as well as a redemption of the mortgage, but that the account of the mortgage ſhould be taken apart and not attend the account on the award. —That the maſter ſhould compute what money was due to the defendant, and on payment of that ſhe ſhould reconvey the mortgaged premiſes to the plaintiff. That the maſter ſhould inquire whether the award had been performed by the brother, and if it had not, then that the defendant ſhould be anſwerable in ſuch manner as the maſter ſhould appoint.[6]

What ſhall be a Breach of the Award.

IF the arbitrators award that a ſuit depending in Chancery between the parties, ſhall ceaſe; it is no breach if the plaintiff in the bill file another in the ſame cauſe, if he do not ſue out proceſs on it; for it is ſaid, till proceſs be ſued out, a ſuit is not properly depending, and till that time the defendant cannot be ſaid to be moleſted: that this reſembles the caſe of a counterbond from the principal obligor in an original bond to ſave his ſurety harmleſs; where, though the original bond be forfeited, yet this in itſelf is no damnification, and the counterbond is

[6] Sweet v. Hole. Ca. Temp. Finch, 384.

not forfeited till ſome actual damage happen to the ſurety.[7]

If an award order that the defendant ſhall reaſſign to the plaintiff certain mortgaged premiſes, it will be a breach if he do not reaſſign without requeſt.[8]

An award that all ſuits ſhall ceaſe between A. and B. does not extend to ſuits, between A. on one ſide, and B. and a third perſon on the other, and conſequently the proſecution of a ſuit between ſuch parties is not a breach of the award.[9]

A continuance from term to term is no breach of an award that the plaintiff in an action ſhall not proſecute or proceed during the ſame term.[1]

It was awarded that the defendant ſhould pay to the plaintiff 8l. or 3l. and coſts of ſuit in an action of treſpaſs between the plaintiff and defendant, as ſhould appear by a note under the attorney's hand, "at the pleaſure of the defendant."—The queſtion was whether the defendant was bound to procure the note of the attorney, and to make his election, or the plaintiff was bound to tender him the note, before he could bring his action and aſſign a breach in the non-payment of the one or the other. This queſtion, it was argued, depended on another, which was this; whether, in the preſent caſe, the attorney was to be conſidered as a ſtranger to the plaintiff; for if he was, it was not incumbent on the plaintiff to give notice to the de-

[7] Freeman v. Sheene. 2 Bulſtr. 98. 1 Rol. Rep. 7, 8. Cro. Jac. 340. Brownl. 122.

[8] 1 Ld. Raym. 234.

[9] Barnardiſton v. Fowlyer. 10 Mod. 204, 5.

[1] Gray v. Gray. Cro. Jac. 525.

fendant of the fum due by the note, but the latter was, at his peril, to procure it from the attorney; but, if the attorney was to be conſidered as the ſervant of the plaintiff, and it was in his power to compel him to deliver the note, then the defendant was not bound to make his election till that was delivered to him.—The judges were at a loſs how to determine, and the court not being full, the queſtion was adjourned.—But afterwards the ſubject was reſumed, and judgment given in favour of the plaintiff, on the principle, that, though the attorney is to many purpoſes the ſervant of the principal, yet in the caſe before the court, it did not lie in the knowlege of the plaintiff, to what the ſum amounted, and he could not compel the attorney to make the note.[2] But this judgment is open to ſome obſervation.—Muſt not the attorney be conſidered as the agent of the plaintiff? and, if he had refuſed to make the note, at his requeſt, might he not have been compelled, by an application to the court for that purpoſe?

If, by an award made in the middle of a term, it be ordered that one of the parties ſhall ceaſe a certain ſuit which he has againſt the other; it may appear trifling to lay it down, as an important point, that it will be a breach in the plaintiff in the ſuit to proſecute it to judgment afterwards in the ſame term: but it was, in truth, ſeriouſly argued that this was no breach of ſuch an award; becauſe, by fiction of law, the judgment relates to the firſt day of the term, and therefore the award being made in the middle of the term, was of a

[2] March. 109. 157.

thing which it was impoſſible for the party to perform; the ſuit having ceaſed by the judgment, by relation, before the award was made.—And ſuch is the imbecility of the human mind, when its views are contracted by the technical dogmas of a ſingle ſcience, that the judges, inſtead of rejecting this as mere jargon and abſurd nonſenſe, very gravely obſerved, that though, by fiction of law, every judgment related to the firſt day of the term, yet as the plaintiff had in his declaration expreſſly averred that the defendant, after the time of the award made, had continued to proſecute his ſuit to judgment, and though it appeared to be of the ſame term, yet the defendant ought to have taken advantage of it, by ſpecial demurrer.[3]

If an award be that the one ſhall make a leaſe for a term of years to the other rendering rent, and the leaſe be accordingly made, and the tenant do not afterwards pay the rent, this is no breach of the award on the part of the tenant, nor is his ſubmiſſion bond forfeited; the remedy of the leſſor for his rent is the ſame as in every other caſe of landlord and tenant: the award was completely performed by his acceptance of the leaſe with the rent reſerved.[4]

So, if it be awarded that the defendant enter into a bond for the payment of money to the plaintiff at a future day; if he give the bond, that is performance of the award, and by non-payment at the day, he will forfeit only the bond awarded, not the bond of ſubmiſſion.[5]

[3] Huys v. Wright. 1 Jac. Yelverton 35.

[4] Benl. 15. pl. 16. 27 Hen. 8. More. 3. pl. 8. there ſaid to be 28 Hen. 8.

[5] Str. 903. 1 Barnard. 463.

So, in the caſe of an award to give a note for the payment of money, the giving of the note accordingly will be performance, and the plaintiff muſt on non-payment be confined to his action on the note.[6]

If an award be made between the grantee of a rent and the terre-tenant of the land out of which the rent iſſues, "that the grantor ſhall ſtand acquitted of the rent," the grantee is not bound by this to give the tenant a releaſe; it is ſufficient if he never purſue any remedy for the recovery of the rent, by action or diſtreſs.[7]

[6] Booth v. Garnett. Str. 1082. [7] 2 Bulſtr. 96.

CHAP. VI.

The REMEDY *to compel* PERFORMANCE, *when the* AWARD *or* UMPIRAGE *is properly made.*

IN the Roman law, the only remedy which either party could have againſt the other for diſobedience of the award was to ſue for the penalty expreſſed in the ſubmiſſion.[8] But with us the remedy is various, according to the various *forms* of the ſubmiſſion.

THOUGH the ſubmiſſion be verbal, it has been ſeen,[9] that in all caſes an action may be maintained on the award, whether it be for the payment of money, or for the performance of a collateral act; where it was of the latter kind, however, it was not but by ſlow degrees that it was held that the act of ſubmiſſion implied in itſelf a promiſe to perform the award; before the courts went ſo far, they held that the promiſe was collateral to the ſubmiſſion, and that where it was laid to have been made at the *ſame time* with the ſubmiſſion, proof of the latter might have been conſidered by the jury as a foundation for preſuming the former: but if the promiſe had been laid to have been made at any other time, though on the ſame day with the ſubmiſ-

[8] Vid. p. 8. 9.

[9] P. 11.

ſion, then in an action on the caſe, proof muſt have been given of an actual promiſe.[1]

WHERE the award, on a parol ſubmiſſion, is for the payment of money, the action on the award may be an action of debt, as well as where the ſubmiſſion is by deed, and as well where the award is verbal, as where it is in writing.[2] It may alſo be an action of *aſſumpſit*: in all other caſes on a parol ſubmiſſion, an *aſſumpſit* is the only ſpecies of action that will lie.

WHEN the courts would not ſupport an action on an award of a collateral thing, where the ſubmiſſion was verbal, unleſs there were actually mutual promiſes to ſtand to the award, on conſideration of a certain ſpecific ſum, it was, of courſe, neceſſary that the declaration ſhould run in ſome ſuch form as this: "Whereas certain differences ſubſiſted between the plaintiff and the defendant, and they had ſubmitted themſelves to the award of J. S. concerning the premiſes, and in conſideration of 6d. given by the one to the other, the one aſſumed to the other to ſtand to his award," that aſſumption being ſtated in the terms of it.[3] When mutual promiſes only were held to be a ſufficient foundation for this action, it was no longer neceſſary to ſtate any conſideration for them in the declaration:

[1] Vid. Read v. Palmer. P. 24 Car. Al. 69, 70.

[2] I do not find any direct authority for this, but the general tenor of the caſes ſeems to juſtify the concluſion. Smith v. Kirfoot. 1 Leon. 72. and Ormlade v. Coke. Cro. Jac. 354, are actions of debt on the award, but it does not appear whether either the ſubmiſſion or the award was verbal or in writing.

[3] Vid. Goodman v. Fountain. Cro. El. 861. Colſton v. Harris. Id. 904.

when the act of submiſſion was of itſelf conſidered as an implied promiſe to perform the award, it became of courſe ſufficient to ſtate the ſubmiſſion.

In all actions on the award, however, whether debt or aſſumpſit, it muſt neceſſarily be ſhewn that the parties ſubmitted, before the award can be properly introduced; and that ſubmiſſion muſt be ſhewn in direct, unequivocal terms; 'that the arbitrator was nominated "on behalf" of the defendant,' is not ſufficient; it muſt appear that he was in effect nominated *by* the defendant, which the former expreſſion, it is ſaid, does not ſufficiently import, for the nomination may have been by ſome friend, to which the defendant might not have conſented.[4]

It is alſo ſaid, that it muſt appear for what cauſe the parties ſubmitted;[5] perhaps the reaſon may be, that it ought to appear whether the award be according to the terms of the ſubmiſſion.

The ſubmiſſion, too, muſt be ſo ſtated as to correſpond with the award and ſupport it; otherwiſe the plaintiff cannot have judgment; therefore, where the declaration recited 'that certain differences had ariſen between the plaintiff and the defendant, and that they had ſubmitted to the arbitration of J. S. who had awarded, "of and upon the premiſes," that the defendant ſhould pay to the plaintiff 30l. in ſatisfaction of all ſums due to him out of the eſtate of one Woolly,' and the breach was aſſigned in the non-payment of this money; though a verdict was given for the plaintiff,

[4] Dilly v. Pelhill. 2 Str. 923.

[5] Brooke Arb. pl. 34, cites 5 Ed. 4. 1. which ſeems a wrong citation.

yet the judgment was arreſted, becauſe it did not appear by the ſubmiſſion as recited, that the defendant was executor, adminiſtrator, or truſtee for Woolly, or that he had any thing of his, or had ſubmitted on his behalf.[6]

When the action is on a mutual aſſumpſit to pay a certain ſum on requeſt, if the defendant ſhould not ſtand to the award, an actual requeſt to pay that ſum, before the action brought, muſt be ſtated, for in a caſe like this the requeſt is an eſſential thing to intitle the plaintiff to his action; and there is a difference between a mere duty and a collateral ſum; in the firſt caſe, as where there is a promiſe to pay on requeſt all ſums lent to the defendant, no actual requeſt is neceſſary; the bringing of the action is a requeſt; but in the latter caſe, an actual requeſt is neceſſary, becauſe the promiſe of payment on requeſt is as a penalty, and collateral.[7] —And the averment "that though requeſted he had not paid," is not a ſufficient allegation of the requeſt made; it muſt be ſhewn, by poſitive affirmation, to have been made before the action brought.[8]

In an action on the aſſumpſit to perform the award, the plaintiff may aſſign ſeveral breaches; this caſe is not like that of a penal obligation, in an action on which, at common law, one breach only could be aſſigned, that being ſufficient to forfeit the obligation; but, in the aſſumpſit, only damages are recoverable

[6] Adams v. Statham. 2 Lev. 235. 2 Show. 61.

[7] Birks v. Trippet. 1 Saund. 33. 2 Keb. 126.

[8] Semb. for in the caſe here cited the words "tho' requeſted" were inſerted.

according to the extent of the loſs ſuſtained by the plaintiff on account of the non-performance, and that may ariſe on every breach. In ſuch a caſe, however, if one of the breaches be aſſigned in non-performance of a part of the award which is void, and intire damages be given, the judgment will be arreſted: thus, when an award of a releaſe to a time beyond the ſubmiſſion was held to be void, if it had been awarded that the defendant ſhould pay 15l. to the plaintiff in ſatisfaction of a judgment, and that he ſhould alſo releaſe to him all demands to the time of the award; and in an aſſumpſit on this award, the breach had been aſſigned in non-payment of the money, and in not giving the releaſe, if then intire damages had been given, a judgment on that verdict would have been erroneous.[9]

When the ſubmiſſion is by bond, if the award be for the payment of money, an action of debt on the award lies, as well as an action on the bond;[1] but the latter is the action moſt uſually brought, in which the order of pleading commonly obſerved is, that the plaintiff declares on the bond as in ordinary caſes of actions on a bond; the defendant then prays oyer of the condition, which being ſet forth, he pleads that the arbitrators or the umpire made "no award;" then the plaintiff replies, not barely alleging that they did, but ſetting forth the award at large, and aſſigning the breach by the defendant, and on that the whole queſtion ariſes as on an original declaration. The defendant

[9] Jenk. 264. vid. Yelv. 35 a dictum which ſeems contra, with reſpect to the intirety of the damages.

[1] Vid. Str. 923. Freem. 410, 415.

then either rejoins that they made "no *ſuch* award," on which the plaintiff takes iſſue—or, he demurs, and the plaintiff joins in demurrer.[2]

WHERE, by the condition of the bond, the award muſt be made before a certain day, the defendant, inſtead of pleading ſimply that no award was made, may plead that no award was made before that day, becauſe he is not bound to perform an award made after it; then the plaintiff in his replication muſt allege the award, which he ſets forth, to have been made before the day.[3]

THE plaintiff muſt indeed ſhew that the award was made within the time limited, whether the defendant plead in this manner or not; for without that, his right of action will not be completely ſtated.[4]—But an allegation under a "videlicet" will be ſufficient: thus, "that the arbitrators, after the execution of the bond, and before the exhibiting of the plaintiff's bill, videlicet, on ſuch a day, made their award," is ſufficient. And a diſtinction is taken, between a caſe, where the words under the "videlicet" are repugnant to the preceding matter, and where they are not; in the former they are merely ſurpluſage, and muſt be rejected; in the latter, they are an affirmation ſufficiently poſitive that the award was made, on the day mentioned after the "videlicet," and no other day can be preſumed [5]

To this the defendant cannot rejoin, by ſaying that the arbitrators gave him no notice before the day, of

[2] 5 Ed. 4. 108. Brooke, pl. 33.

[3] 31 H. 8. Brooke Arb. pl. 42.

[4] 1 Sid. 370.

[5] 1 Saund. 169. 2 Keb. 361, 388. 3 Bur. 1729, 1730.

any award made; for independently of any objection that might be made to the ſubſtance of the rejoinder, on account of the arbitrators not being bound to give notice of the award,[6] it is a departure from his plea, by which he had denied the exiſtence of any award at all, before the day.[7]—In one book, we are told, that if the defendant wiſh to avail himſelf of want of notice, he muſt ſet the award forth in his plea, and then aver that he had no notice of it before the day.[8] This, however, ſeems an inconſiſtency; for how can he ſet forth that of which he had no notice? and if in fact he be enabled, at the time of his plea, to ſet forth the award, he will ſtill, in many caſes, be bound to perform it, though he had no notice on the day when it was made. The plaintiff too, might take iſſue on the fact, whether the defendant knew of the award before the commencement of the action.—And it appears, by ſubſequent reſolutions, that, where the condition of the bond contains a proviſo, "that the award ſhould be made and delivered to the parties, on or before a particular day," by which a delivery accordingly becomes eſſential to bind the parties, the defendant "proteſting that no award was made," may allege as a plea, "that after the making of the bond, and before or on the day appointed, no award was delivered to the parties, of or upon the premiſes, ſpecified in the condition of the bond.[9]

If the plaintiff can contradict this plea, it is ſaid, that he muſt do it in direct terms, alleging expreſſly

[6] Vid. p. 107, et ſeq. [7] Keilw. 175. a. [8] Id. ibid.
[9] Bendl. 39. Benl. 108. 2 Keb. 402.

that the arbitrators made their award, ſetting it forth with certainty, and that they delivered it to the parties in writing within the time limited.—It will not be ſufficient, it is ſaid in ſome places,[1] to allege the delivery, by way of inducement, in ſuch terms as theſe, "That the arbitrators having, at ſuch a time and place, undertaken the burthen of the award, after the execution of the bond and before the day appointed, *by* their award made in writing, and *then* and there delivered by the ſaid arbitrators to the ſaid parties, awarded, &c." It is however only ſaid, in this caſe, that all the juſtices argued againſt the plaintiff, but no judgment was given. In another book,[2] it is adjudged that the allegation of delivery in this manner by inducement is ſufficient.

The proviſo contained in the condition of the ſubmiſſion bond was, that the award ſhould be made and ready to be delivered by three o'clock in the afternoon of the ſixth of April: the defendant pleaded that the arbitrator made no award of the premiſes before three o'clock of the day aforeſaid, in the condition aforeſaid, ſpecified: it was objected that this plea was uncertain, becauſe there were two moments of time which might ſatisfy the words three o'clock; and the award might have been made before three o'clock in the afternoon, though it was not made before three in the morning; the court held that this would have been a good exception, if the plaintiff had demurred for this cauſe, but as he had replied, the objection was not now open to him.[3]

[1] Dyer 243. b. [2] Cro. Jac. 285.

[3] Bedam v. Clerkſon. 1 Ld. Raym. 123, 124.

EVERY thing neceſſary to ſhew that the award was made according to the terms of the ſubmiſſion, muſt be ſtated by the plaintiff; as, if the ſubmiſſion contain a proviſo that the award be made in writing or *ore tenus* before two witneſſes, it is not ſufficient to ſet forth an award alleging it to have been made *ore tenus*; it muſt alſo be ſaid to have been made before two witneſſes.[4]

So, formerly, if the proviſo had been that the award ſhould be by deed indented, the plaintiff muſt have alleged it to have been ſo; otherwiſe it was thought, it would not have appeared that the arbitrators had purſued their authority.[5]

So, where the condition contains a proviſo that the award be put in writing under hand and ſeal of the arbitrators; in pleading it muſt be ſaid to have been made under *hand* and ſeal, and not under ſeal only.[6]— But, when the proviſo requires that the award ſhall be *ready* to be delivered, it is not neceſſary to allege that it was *ready*; it is ſufficient to ſay that it was made; the allegation of the latter implies the former.[7]

BUT where the proviſo was, that the award ſhould be made and ready to be delivered on or before a certain day, at a certain ſhop in London; and the plaintiff ſhewed an award made at York, ſaying that it was ready to be delivered at the ſhop in London, this was adjudged to be a void publication and delivery, becauſe

[4] Wilſon v. Conſtable. Lutw. 536.

[5] 2 Keb. 156. but ſee page 263.

[6] 1 Bulſtr. Scot v. Scot. Traire v. Traire. 2 Rol. Rep. 243. Sallows v. Girling. Cro. Jac. 278. 2 Mod. 77, 78.

[7] 1 Keb. 739. 1 Lev. 133. 6 Mod. 82. 2 Ld. Raym. 989.

a particular place was appointed, where the parties were to expect it, and not elsewhere.[8] It has also been held that, in this case, an "averment that the award was ready to be delivered according to the form of the condition," was not sufficient, for that it must be said at the very place; and that a delivery at another place would not be sufficient, notwithstanding the party's acceptance, though it was observed that the insertion of a particular place in the proviso, was only that the parties might go there to see the award.[9]

It is not necessary to state the date of the award; if it be alleged to have been made on a day which is within the time of the submission, that is sufficient, and then it shall be intended to have no date, and shall be considered as binding from the day of the delivery.[1]

It is held, in a great many books, that the plaintiff must mention the place where the award was made, because, it is said, the place is issuable, and matter of substance;[2] however, it is allowed to be sufficient, if the place appear by way of recital.[3]

In introducing the award, after having stated that the parties submitted to the award of the arbitrators by name, it will be sufficient afterwards to say, that the aforesaid arbitrators, without repeating their names, proceeded to consider the matters, and made their

[8] Vid. Hardres 399. 1 Show. 98, 242. Carth. 158. 3 Mod. 330. Ld. Raym. 115. Freem. 416. 2 Rol. Rep. 193, 194. Cro. Jac. 578.

[9] Elborough v. Yates. 2 Keb. 874. 3 Keb. 69, 125. But the judgment is reported contra in 2 Lev. 68.

[1] 6 Mod. 244. 2 Ld. Raym. 1076. Salk. 76, 498. 3 Bulstr. 312.

[2] Vid. Cro. El. 758. 2 Vent. 72. et vid. 9 H. 6. 5. and Cro. El. 66.

[3] 2 Keb. 390.

award; becauſe the word "aforeſaid" refers to the arbitrators mentioned before; and for the ſame reaſon, wherever in any ſubſequent part of the pleadings they are introduced, it may be done by the ſame epithet without name.[4] But if the name be miſtaken in any part, that, it is ſaid, will render the pleading bad. In ſetting forth the condition, it was expreſſed to be, to ſtand to the award of two by name, and if they made no award, then to the umpirage of "Randolfe" Wulley; the defendant pleaded, that neither the aforeſaid arbitrators, nor the ſaid "Ranulf" Wulley, made any award: this was held not to be a good plea, becauſe Ranulf was not the ſame name as Randolfe, and the word "aforeſaid" prefixed to Ranulf was not ſufficient to remove ſo weighty a difficulty in the opinion of two of the judges;[5] though another[6] took a diſtinction between the making of the award itſelf, and the manner of pleading it, obſerving, that where the ſubmiſſion was to Randolfe, and the award was made by Ranulf, this was another man, but it ſeemed otherwiſe in pleading, for here the word aforeſaid aſcertained Ranulf to be the ſame man as Randolfe.

It was anciently held, that the plaintiff, after ſetting forth the award, muſt ſhew that he had himſelf performed that part which he was ordered to perform, unleſs by the terms of the award the performance on the part of the defendant was to precede the performance by the plaintiff.[7]

[4] Lumley v. Hutton. 1 Rol. Rep. 271.

[5] Coke and Houghton.

[6] Dodderidge.

[7] Vid. Brooke 45. pl. 22. verſ. ſinem and the year books paſſim.

But now there are only two cafes in which the plaintiff muft even fuggeft performance on his part: the firft is where the part awarded to be done by him is void, and cannot be enforced by the law, and unlefs he avers performance, the defendant may object to the whole award for want of mutuality.[3] The fecond is where, by the terms of the award, performance on the part of the plaintiff is a condition precedent to that on the part of the defendant; for there he muft fhew that he has done every thing neceffary to intitle him to call on the oppofite party. But tender by the plaintiff, and refufal by the defendant, will be fufficient, unlefs the thing to be done by the plaintiff can be done without the concurrence of the other.

Thus, where the fubmiffion was concerning certain lands, and the arbitrators awarded that the plaintiff fhould, on the fecond of March then next following, pay to the defendant 7l. 10s. for every acre of the land, to be meafured by an able meafurer, in the prefence of the arbitrators and umpire, or fome or two of them, after the rate of feven yards to the pole; on payment of which, the defendant, his heirs or affigns, fhould pafs, convey, or furrender to the plaintiff or his heirs, or fuch as he fhould appoint, all the faid lands, with warrantry againft the defendant and his heirs, and all claiming under him; or in default of fuch payment the plaintiff and his heirs fhould feal and deliver a releafe of all his claim to the faid lands, and every part of them, and a general releafe of all actions, fuits, and demands: the plaintiff having ftated this award, averred

[3] Vid. ante p. 218. et feq.

that it had been tendered to the defendant on the day limited for the making of it by the ſubmiſſion, according to the effect of the condition; he alſo averred an admeaſurement made the ſame day, according to the effect of the award, on which the lands were found to contain 12 acres, at the rate of ſeven yards to the pole, and 80l. were the ſum to be paid, which he had tendered accordingly, but which the defendant had refuſed to receive, and that the plaintiff had requeſted him to paſs a ſurrender to him and his heirs, which he had alſo refuſed. This appears to have been thought the proper mode of pleading in this caſe.[9]

A DISTINCTION is taken with reſpect to the manner of declaring in an action of debt on the award itſelf, and the manner of ſetting forth the award in the replication in an action on the ſubmiſſion bond; a diſtinction which, when it was inſiſted on that every award ſhould appear on the face of it to be mutual, was of more importance than it is at this time.

IN declaring on the award it is not neceſſary to ſet forth any more of it than is ſufficient to ſupport the plaintiff's claim to the money awarded: it was not neceſſary, even in former times, in this action, to ſhew an award that was mutual; if the defendant wiſhed to impeach it, by ſhewing that it was not mutual, or that there was any thing by way of condition precedent to the payment of the money, he might do it by pleading.[1] But in an action on the bond the award muſt have ap-

[9] Hunter v. Benniſon. Hardies. 43, 44.

[1] Smith v. Kirfoot. 1 Leon. 72. Leake v. Butler. Litt. 312, 313, cited 1 Bur. 281. vid. 1 Rol. Rep. 437.

peared to be mutual, as ſet forth by the plaintiff. In an action on the award too, the plaintiff might declare, that *among other things* it was awarded: whereas on the bond, "among other things" would have vitiated the replication.[2] Farther than this the diſtinction does not appear to be very eſſential; for, in every other reſpect, the mode of taking advantage of any variance between the award ſet forth and the real award is the ſame; as is alſo the effect of that variance, whether it be material or not.

If the plaintiff ſet forth the award with a *profert in curia*, the defendant craves oyer, and demurs for the variance; if the plaintiff ſet forth the award without the profert, the defendant anſwers "no ſuch award," on which iſſue is joined: if, on the demurrer, the award ſet forth vary materially from the real award, judgment will of courſe be given againſt the plaintiff: if, on the iſſue joined, the award ſet forth differ materially from that given in evidence, the judge will direct the jury to find for the defendant; if there be no material variance, in the one caſe *judgment*, and in the other a *verdict*, will be given in favour of the plaintiff. In the caſe of a general verdict in his favour, it muſt be preſumed, that there was no material variance; if at the trial it be doubted whether the variance be material or not, a ſpecial verdict may be taken, and the queſtion argued in court, as on a demurrer.[3]

[2] Vid. Litt. 312, 313. 1 Mod. 36. Comyns. Tit. Arbitrament. I. 2. I. 5.

[3] Foreland v. Marygold. 1 Salk. 72. S. C. Foreland v. Hornigold. 1 Ld. Raym. 715. Perry v. Nicholſon. 1 Bur. 278.

The form of declaring in debt on the award is ſaid to have been taken from a writ in the regiſter, in which ſo much only of the award is ſet forth as is neceſſary.[4] That writ, however, is very far from juſtifying the aſſertion. It is a writ in treſpaſs on the caſe, ſued by the party againſt whom the award is made for the payment of money to the other at a future day, againſt that other for having ſued for the money before the day appointed.[5]

There is a diſtinction better founded, with reſpect to the defendant's plea, that he did not ſubmit. In the action on the award, there is nothing which can preclude the defendant from the benefit of this plea: before he can plead at all, the plaintiff muſt have ſhewn every thing neceſſary to maintain his action, and the defendant does not contradict himſelf by pleading that he did not ſubmit; but in an action on the bond, ſuch a plea is not good. The plaintiff, in his declaration, only ſets forth the bond, from which it does not appear from what cauſe it was given; the defendant cannot therefore, at that period, immediately plead that he

[4] Per Ld. Mansfield. 1 Bur. 280. and in Litt. 312, 313.

[5] —Oſtenſurus quare cum iidem B. et C. pro certis debatis inter ipſos motis, in arbitrium T. et E. ad hoc per ipſos B. et C. electorum in omnibus ſe poſuiſſent et ſubmiſiſſent, et licet iidem arbitratores præfatum B. ad decem libras ſolvendas eidem C. ad certos terminos nondum elapſos arbitrati fuiſſent et adjudicaſſent: prædictus tamen C. pro debito prædicto verſus præfatum B. coram præfatis juſtitiariis proſequitur, et ipſum B. ea occaſione laboribus variis et expenſis plurimis multipliciter fatigat et inquietat minus juſte, in ipſius B. damnum non modicum et gravamen ut dicit, &c. Reg. 111. a.

did not ſubmit, becauſe by ſo doing he will ſhew that he knows the condition of the bond to contain his ſubmiſſion: when he prays oyer of the condition, and that is conſequently given; he cannot then plead that he did not ſubmit, becauſe the condition implies that he did: if he wiſhes to have the effect of ſuch a plea, he muſt plead that it is not his deed.[6]

More exactneſs is required in ſetting forth a written than a verbal award; the former muſt be ſtated more particularly, every reference being to ſome particular part of the award itſelf, and not to any thing alleged by inducement. But it is not neceſſary that a verbal award ſhould be ſo exactly ſhewn, becauſe it may be very difficult to prove the preciſe words; the effect and ſubſtance is ſufficient: thus, where the plaintiff, by inducement, alleged that, at the time of the ſubmiſſion, there was a certain ſuit depending between him and the defendant, and then ſtated that the arbitrators having undertaken the burthen of the award, ordered, among other things, that the defendant ſhould pay to the plaintiff all ſuch monies as he had expended about the "ſuit aforeſaid:" it was held that this ſhewed ſufficiently that the award was made of the action mentioned by inducement.[7]

Where the ſubmiſſion is to arbitrators, and in their default to an umpire, the defendant, after oyer of the bond and condition, muſt not merely ſay that the arbitrators made no award, but that neither they nor the

[6] Keind v. Carter. 2 Keb. 73. 1 Sid. 290. Vid. 2 Str. 923.

[7] Hanſon v. Liverſedge. 2 Vent. 242. Vid. the pleadings in that caſe.

umpire made any, otherwiſe his plea will be incomplete, and the plaintiff may demur to it: but if, inſtead of demurring, he chooſe to reply, it is not neceſſary for him to take any notice of the arbitrators, but he may immediately ſet forth an award made by the umpire.[8]

After ſtating the award, the plaintiff muſt aſſign a breach by the defendant; for the breach is the cauſe of action itſelf, and unleſs that be aſſigned the defendant may demur to the replication; the plea of "no award" is a total denial of all cauſe of action, and therefore the plaintiff does not anſwer it without ſhewing a breach.[9] And if the defendant, inſtead of demurring, rejoin that the award ſet forth is not the deed of the arbitrators named, or that they made "no *ſuch* award;" though the fact be found in favour of the plaintiff, yet he ſhall not have judgment, becauſe on the whole of the record, no cauſe of action appears.[1]

If after ſetting forth the whole award, the plaintiff aſſign the breach in a part which is void, the effect will be the ſame as if he aſſigned no breach at all; but though part of the award ſet forth be void, yet if, notwithſtanding that, the remainder be good, an aſſignment of a breach in any part of the latter will maintain the action. Thus if the award be, that the defendant and another ſhall enter into a bond to the plaintiff; this being void as to the ſtranger, the breach muſt not be aſſigned, "that the defendant and the ſtranger did

[8] Hinton v. Crane. 3 Keb. 675.

[9] Wynche. 121. Yelv. 24, 78. [1] Barret v. Fletcher. Yelv. 153.

not enter into the bond," but "that the defendant himſelf did not enter into it."[2]

WHERE money is awarded to be paid, on or before a particular day, it has been held that, in aſſigning the breach, it muſt not be merely ſaid, that it was not paid on the day; it muſt be added that it was not paid before the day; and this is ſaid to be the neateſt way of aſſigning the breach in this caſe.[3] But in another caſe, where an objection of this kind ſeemed to be that which moſt affected the manner of pleading, it was held that an allegation of non-payment on the day implied that it was not paid before the day.[4] Perhaps a diſtinction may be made, between an allegation of payment *on* the day, in the active or in the paſſive voice; if it be ſaid that "he did not pay" on the day, that applies to the ſimple fact of payment at that particular time, and does not imply that he did not pay before: but "that the money was not paid by him" on the day, implies that it remained yet unpaid.—However, without adverting to ſuch a diſtinction, it has ſince been held that though payment before the day will be good evidence of payment on the day, where payment on the day is pleaded; yet, in pleading, parties ought to purſue the words of the condition.[5] By the latter words, I ſuppoſe, it is meant that the plaintiff in aſſigning the breach ſhould follow the very words of the award. However, the breach will be ſufficiently

[2] Godb. 165. 3 Bulſtr. 313. 2 Keb. 601. 1 Ld. Raym. 114, 123, 234. 2 Mod. 309. 12 Mod. 585.

[3] 12 Mod. 585, 6.

[4] Bridg. 91.

[5] 2 Vent. 221. 3 Lev. 293.

aſſigned by alleging that the defendant did not pay according to the form and effect of the award aforeſaid; the rule of pleading, in ſuch a caſe, being that where the day of payment or performance appears before on the record, there, in averring performance, or in aſſigning a breach for the want of it, the day needs not be ſpecifically mentioned, but it may be aſcertained by a reference to a former part of the record.[6]

If the award ſet forth, be that the defendant, at a certain place, and between certain hours, ſhall pay the plaintiff a ſum of money; in aſſigning a breach for non-payment, the plaintiff muſt not only ſhew that he himſelf went to the place between the appointed hours, and that the defendant was not there, he muſt alſo ſhew that he continued there till the laſt moment; it is not to be preſumed, till the contrary be ſhewn, that he continued there till the laſt moment; for the defendant has no opportunity of ſhewing the contrary by a rejoinder, becauſe that would be a departure from his plea of "no award made."[7]

It was awarded that the defendant, on the delivery of the award, ſhould pay the plaintiff 22l. 2s. 10½d. In an action on the ſubmiſſion bond, on "no award" being pleaded by the defendant, the plaintiff aſſigned the breach by averring the delivery on ſuch a day, and the non-payment on the delivery.—The defendant demurred, and it was inſiſted on his behalf that the breach was not well aſſigned, becauſe, though it was ordered that the defendant ſhould pay the money on

[6] Lutw. 545. 12 Mod. 586.

[7] Fitzgib. 54, 55. 1 Barnard. K. B. 151.

the delivery of the award, yet the law, by a reaſonable conſtruction, would allow him a convenient time for payment: the award might have been delivered to him on his journey on the highway, at a great diſtance from his habitation, when it could not be preſumed he had money to pay; and if this conſtruction were allowed, then the breach was aſſigned too ſtrictly: it ought to have been that the money was not paid on the delivery of the award, nor at any time after. But the majority of the court were of opinion that the breach was well aſſigned, and that it ſhould not be intended that the money was paid after; and if, in fact, it had been paid, within a reaſonable time after, it ought to have been ſo pleaded by the defendant.[8]

If the award be that the defendant ſhall pay a ſum of money to the plaintiff, when he ſhall be requeſted; in the aſſignment of the breach in non-payment, a requeſt muſt be directly ſtated, becauſe, by the award, the money is not due, but on ſpecial demand; there being a difference in this reſpect between a debt due on bond or on contract, where no demand is neceſſary, and the caſe of an award; and therefore an allegation that though often requeſted, the defendant has not paid, will be ſufficient in the former caſe, but not in the latter.[9]

The breach muſt always be aſſigned with ſuch preciſion, as to ſhew that the award was made of the thing in which the breach is alleged; therefore, where the

[8] Strong v. Saunders. Lutw. 389.

[9] Waters v. Bridges. Cro. Jac. 640. vid. Rodham v. Stroher. 3 Keb. 830.

plaintiff, in his replication, alleged that the defendant had filed a certain bill in Chancery againſt him, ſetting it forth in the words of the bill, and that afterwards they had ſubmittted to arbitrators, who awarded that a "certain" ſuit which was depending in Chancery between them ſhould ceaſe, and then ſhewed that the defendant had ſince filed another bill, averring that both bills were for the ſame matter: this was held to be badly pleaded, becauſe it did not appear that the award was made concerning the firſt bill, as the defendant might have ſeveral bills in Chancery againſt the plaintiff.[1] But it was admitted that if he had ſaid, that the arbitrators had awarded that the "ſaid" ſuit ſhould ceaſe, this would have ſhewn that the award related to the particular bill ſet forth.

If the award be to pay the rent mentioned in a certain indenture, in aſſigning the breach, it is not neceſſary to ſet forth the indenture at large—but if it be that the rent ſhall be paid in ſuch manner and at ſuch times as is expreſſed in the indenture, then the indenture muſt be ſet forth at length, or the manner and time particularly deſcribed.[2]

Where the award is in the alternative that the defendant ſhall do one thing or another; in aſſigning the breach upon this, the plantiff muſt ſay that he has neither done the one nor the other, becauſe if he has done either, he has obeyed the award.[3]

[1] Freeman v. Sheene. 1 Rol. Rep. 8. Cro. Jac. 339. Brownl. 122. 2 Bulſtr. 93.

[2] Anon. 1 Vent. 87.

Semb. contra. Sav. 120, where one of the things is void.

WHERE ſeveral things are ordered to be done by the defendant, the plaintiff, it is ſaid, can aſſign a breach only in the non-performance of one where the action is on the bond, becauſe an aſſignment of two breaches will be liable to the objection of double pleading.[4]—In a caſe, however, which occurred in the ſixth of the preſent king, it is only ſaid that it is not neceſſary to aſſign breaches of every matter in an award, becauſe the breach of any one is a forfeiture of the penalty of the bond; that if the breach be well aſſigned in one point, for which the award is good, the plaintiff muſt have judgment on demurrer for the whole penalty of the bond, and when he has once recovered that, he can never maintain another action, on the ſame bond, to recover the penalty again, on a ſecond breach.[5]

WHERE the award is for the payment of money, and the plaintiff brings his action on the ſubmiſſion bond, but does not properly aſſign the breach, the court, it is ſaid, will not in general grant him leave to diſcontinue, unleſs under peculiar circumſtances, becauſe he may have his remedy on the award itſelf.[6] It appears, therefore, that judgment againſt the plaintiff, in one form of action, ariſing from miſtake in the pleadings, is no bar to another.

IF the defendant, inſtead of pleading the uſual plea, "that the arbitrators made no award," plead ſome

[4] 21 H. 6. 18. b. Comyns Dig. Arbit. I. 6. The St. 8 and 9 W. 3. c. 11. ſ. 8. with reſpect to the aſſignment of ſeveral breaches in actions on bonds for the performance of covenants, &c. does not ſeem to apply to the caſe of awards.

[5] Fox v. Smith. 2 Wilſ. 267, 9. vid. Addiſon v. Gray S. P. Id. 293.

[6] Freem. 410, 415.

collateral matter, which, if true, would be a bar to the action on the award, the plaintiff, without ſetting forth the award, or aſſigning a breach of it, may take iſſue on the plea, and go to trial on that fact; or if he doubt the effect on the plea, he may admit the truth of it by demurring, and put the whole of the cauſe on its validity.[7]

The ſtatute of limitations[8] cannot be pleaded to an action of debt on an award under the hand and ſeal of the arbitrators; the words of the ſtatute, as applicable to actions of debt, are "all actions of debt grounded on any lending or contract without ſpecialty," and though perhaps, in ſtrictneſs, an award, under the hand and ſeal of the arbitrator, may not, to all purpoſes, be conſidered as a ſpecialty, that denomination being, with propriety, given only to an inſtrument under the hand and ſeal of the party who is to be bound by it, yet it may be ſo far conſidered as partaking of the nature of a ſpecialty, as to be within the meaning of the ſtatute; the purpoſe of that ſtatute was to limit the time for bringing actions on a ſimple contract without writing under hand and ſeal, the proſecution of which a long time after the cauſe of them had accrued, was often the occaſion of perjury in witneſſes who took upon them to ſwear to circumſtances of which from the length of time they muſt be ſuppoſed to have an imperfect remembrance: but this reaſon can never apply to a caſe which may be ſo eaſily aſcertained as an award under the hand and ſeal of an arbitrator: the words of the ſtatute are applicable to debt of another

[7] Yelv. 25. 79. Cro. Jac. 300.

[8] 21 Jac. c. 16. ſ. 3.

kind, and the decifions given on thefe words alfo favour this courfe of argument.—The ftatute fays, it fhall extend to all actions of debt for arrearages of rent; but on thefe words, it has been determined, that it was only an action of debt for arrearages of rent on a parol leafe which could be barred by the length of time, and that they did not extend to rent reſerved on a leafe under hand and feal.—On thefe grounds the whole court, except Keeling, C. J. held that an action of debt on an award, though not a fpecialty, was not barred by the ftatute; the words not being, "all actions of debt without fpecialty generally," but, "all actions of debt without fpecialty, which are grounded on any lending or contract;" this action was clearly not grounded on lending; neither could it with propriety be faid to be grounded on fuch contract as was intended by the ftatute; it was true indeed, all actions of debt were founded on contract either expreſs, or implied by the law, and this was a contract implied, but had the ftatute meant to extend to fuch contracts, the words "founded on lending or contract" would have been fuperfluous and ufeleſs; and it clearly appeared what kind of contracts were meant, by coupling the word contract with lending; and if the more extenfive conſtruction of the act were adopted, it would extend to all actions of debt without fpecialty whatever.[9]

WHERE the defendant pleads the common plea of "no award," he cannot in general, after the replication, rejoin any thing elſe than that there was "no

[9] Hodſen v. Harridge. 2 Saund. 64. S. C. very inaccurately reported. 2 Keb. 464, 497, 533, 536.

ſuch award:" if the award be void, he muſt demur, becauſe a void award is as no award, and the bond is not forfeited by non-performance.[1] He muſt not rejoin that the award is void, becauſe that is a departure from his plea.[2] Nor can he allege payment or performance of the thing, in which the breach was aſſigned, for that will alſo be a departure.[3] So, if the award ſet forth in the replication order general releaſes to the time of the award, he cannot rejoin that a new cauſe of action aroſe, between the time of the ſubmiſſion and the award.[4] But if the award was made by an umpire, and the defendant had only pleaded that the arbitrators made no award, he may, on the umpirage being ſet forth, rejoin performance; for that does not contradict his plea.[5]

So, if the ſubmiſſion be general of all matters in controverſy between the parties, with a proviſo that the award be made of the premiſes; the defendant may plead, that the arbitrators made no award of the premiſes, and if the award ſet forth in the replication do not comprehend all the ſubjects that were in controverſy, he may rejoin that there were *other* things in controverſy of which the arbitrators had notice, and of which they made no award, concluding "that therefore they made no award of the premiſes"—which is ſo far from a departure from his plea, that it is a confirmation of it.[6]

[1] Jenk. 116.

[2] 1 Keb. 414. pl. 12. 678. pl. 72. 2 Keb. 156.

[3] Comyns Dig. Arbit. I. 6. Pleader, F. 7.

[4] 1 Keb. 434. contra Freem. 266.

[5] Hil. 1791. B. R.

[6] Middleton v. Weeks. Cro. Jac. 200. vid. Farrer v. Gate. Palm. 511.

If the defendant conceive the award to be bad, inſtead of pleading "no award," and then demurring to the award ſet out in the replication, he may himſelf ſet forth the award, averring that the arbitrators made no other, without alleging performance.—Then the plaintiff demurs, and the queſtion comes before the court on the validity of the award.[7]

If the defendant has performed the award, he may after ſetting it forth in his plea allege performance. But it is ſaid, that he cannot plead ſimply that he has performed, but muſt ſhew in what manner.[8] But it is conceived that this applies only to the caſe of an award in the alternative, where in order to diſcharge himſelf he muſt ſhew, which of the two things he has done.[9]—and he needs only ſhew performance, in words adapted to thoſe of the award itſelf. Thus if an award be "that a ſuit which the defendant had againſt the plaintiff ſhall ceaſe," it is ſufficient to ſay that the plaintiff ſtood acquitted of that ſuit; it is not neceſſary to ſay that he gave him a releaſe.[1]

Where the award is void, with reſpect to any thing awarded to be done by the defendant, he needs only aver performance of that for which it is good, and take no notice of that which he conceives to be bad.[2]

An averment of tender and refuſal, is ſufficient, but the better opinion ſeems to be that it muſt be accom-

[7] Vid. Riſden v. Inglet. Cro. El. 838.

[8] 28 H. 8. Mo. 3 pl. 9. Bamfield v. Bamfield. 2 Keb. 238. 26 H. 6. 27 H. 6. 1. Fhbt. 51. a. Freeman v. Sheene. 1 Rol. Rep. 7, 8. Cro. Jac. 339. 2 Bulſtr. 93. vid. 36 H. 6. 8. 39 H. 6. 11. b.

[9] 36 H. 6. 12. Brooke 27. 39. 51. 19 E. 4. 1. 17 E. 4. 5. 18 E. 4. 23. Rol. Arb. F. 2. Al. 86. 3 Leon. 61.

panied with an averment that he is ſtill ready to perform.[3]

Where it appears by the award that the plaintiff is to do the firſt act, it is ſufficient for the defendant to ſay that he has not yet done it, but that he is ready to perform his part as ſoon as the plaintiff does his. Thus, if the award be that the plaintiff ſhall prepare an obligation ſealed with wax, and carry it to the defendant, who ſhall put his ſeal to it, in ſatisfaction to the plaintiff, it is ſufficient for the defendant to ſay that the plaintiff has not yet tendered to him the obligation, and that he is ready to ſeal it, when it ſhall be offered.[4]

If the defendant ſet forth the award and allege performance generally, and then on a breach being aſſigned in the replication, he rejoin and ſhew a ſpecial performance, this will be a departure. In an action on a ſubmiſſion bond, the defendant after oyer of the condition, ſet forth this award, 'that whereas the defendant had lent the plaintiff 30l. for ſecuring of which the plaintiff had mortgaged certain lands to the defendant, and whereas there was a controverſy between them concerning that matter, it was awarded that the plaintiff ſhould pay to the defendant 35l. before a particular day, and that in the mean time he ſhould permit the defendant to enjoy the poſſeſſion of the mortgaged lands, and that on payment of the ſaid 35l. the defendant ſhould account to the plaintiff for the meſne profits, and deliver over to him the mortgaged deed, and reaſſign to him the mortgaged lands, and that they

[3] 22 H. 6. 39. b. vid. Morgan's Precedents, 525.

[4] M. 5 E. 4. 7. a. Fhbt. 52. a. Brooke. Arb. 36. Rol. Arb. Z. 6.

ſhould give mutual releaſes;' then he alleged performance generally: the plaintiff replied that he had paid the 35l. before the day appointed, but that the defendant had not reaſſigned; the defendant rejoined that he had delivered the mortgage deed to the plaintiff and was ready to reaſſign, but that the plaintiff had not requeſted him: the plaintiff demurred, and it was reſolved that this rejoinder was a departure from the plea, becauſe there he had pleaded performance generally, and here he had only ſhewn a ſpecial performance.[5]

It has ſeveral times happened that the defendant, by ſetting forth an award partially, has impoſed conſiderable difficulty on the plaintiff how to anſwer him. The firſt caſe of that kind which occurs is that of Veal and Warner—in which the defendant ſet forth an award that he ſhould pay the plaintiff 3100l. and give him a general releaſe, which was conſidered as an award of one ſide, and therefore void; and he averred that he had paid the money; the plaintiff took iſſue on the payment; the defendant, inſtead of joining iſſue, rejoined that the plaintiff was not at liberty to ſay he had not paid the money, becauſe he had, by his certain writing, acknowleged the receipt of it. To this the plaintiff demurred, as he well might, becauſe the rejoinder was a departure from the plea: the defendant joined in demurrer, and would have had judgment in his favour, becauſe, notwithſtanding his allegation of performance, it was of no conſequence whether he had performed it or not, the award being only on one ſide,

[5] Roſſe v. Hodges, 1 Ld. Raym. 234.

and therefore void. But on application from the plaintiff, leave was granted to diſcontinue, becauſe it appeared that the award was alſo that the plaintiff ſhould releaſe all actions to the defendant, which made it mutual; and the court reprehended the trick that had been put upon the plaintiff, adding to the rule for diſcontinuance, this reaſon, that it was for the foul practice of Saunders the defendant's counſel.[6] But Saunders excuſes himſelf by the hardſhip of his client's caſe, ſaying that the bond was only in the penalty of 2000l. and the ſum awarded was 3100l. when in fact the plaintiff was in the debt of the defendant, and the arbitrators had been in colluſion with the plaintiff.— And further that a bill being afterwards filed in the Exchequer againſt the plaintiff procured the defendant relief.

The defendant on oyer ſet forth an award that he ſhould pay to the plaintiff 12l. 10s. and averred performance: the plaintiff replied that true it was the arbitrator had awarded that the defendant ſhould pay to the plaintiff 12l. 10s. in full ſatisfaction of all differences between them, and tendered iſſue on the non-performance. The defendant demurred, becauſe the plaintiff had concluded to the country, having alleged new matter without which the award was void, and the defendant was deprived of the opportunity of his traverſe to that matter; and the plaintiff ought not to have his judgment, becauſe it did not appear to the court whether the award was good or not: and of this opinion were Jones, C. J. and Charlton, J. after two

[6] Veal v. Warner, 2 Keb. 568. 1 Saund. 326.

arguments at the bar. But Windham and Levinz were of a contrary opinion, becauſe the defendant had admitted the award to be good, and taken upon him to plead performance; and when the plaintiff had ſhewn that matter which proved the award to be good, the defendant ſhould not be permitted to traverſe that, to prove it bad, but if the truth was that the award was not in ſatisfaction of all matters, and ſo only on one ſide, he ought to have pleaded "no award;" but when he had pleaded it as a good award, and by the replication it appeared to be ſo, he ſhould not be admitted a traverſe to prove it bad, for that would be a departure from his plea, and equivalent to ſaying in the latter that there was an award made, and in his rejoinder that there was not.[7]

In the caſe of Strike and Benſley a queſtion of the ſame kind occurred, but remained ſtill undecided.—On oyer of the condition, it appeared to be, of a ſubmiſſion to perform the award of four arbitrators, with a proviſo that it ſhould be made on or before the fifteenth of February, and if not, then to perform the umpirage of T. B. ſo that it were made on or before the twenty-third of February.—The defendant pleaded that *before* the 15th two of the arbitrators made no award, but that the umpire on the 23d awarded that the defendant ſhould pay to the plaintiff 6l. and ſhould afterwards releaſe to him, and that he ſhould permit the plaintiff to enjoy a particular cloſe. The defendant averred that he had paid the 6l. that he was always ready to execute a releaſe, and that he had not

[7] Seal v. Crowe. 3 Lev. 165.

diſturbed the plaintiff in the enjoyment of the ſaid cloſe.—The plaintiff in his replication confeſſed that the ſaid two arbitrators did not make any award, and that the umpire had awarded as pleaded by the defendant, but averred that he had further awarded, that the plaintiff on payment of the ſaid 6l. ſhould execute a releaſe to the defendant; then he averred that the defendant had not paid the ſaid 6l. but did not take iſſue on it, but traverſed that the umpire had awarded *only* as the defendant had alleged.—On demurrer the caſe was argued ſeveral times; the principal objection made by the defendant's counſel was that no ſufficient breach was alleged in the replication; for the defendant having ſhewn an award by the umpire that the defendant ſhould pay to the plaintiff 6l. and the plaintiff having replied that the defendant had not paid it, he ought to have taken iſſue on it, and not to have concluded with a verification.—To this it was anſwered that though the replication might be faulty in not having taken iſſue on the payment, and alſo, becauſe the plaintiff by the traverſe in the replication had prevented the defendant from rejoining: yet the plea was faulty, becauſe by the award the defendant was to ſeal and execute to the plaintiff a general releaſe; and he had only ſaid that he was always ready to do it, whereas he ought to have expreſsly averred that he had done it; or that he had tendered a releaſe which had been refuſed; that therefore no replication was neceſſary, and the firſt fault being in the plea, that in the replication was not material.—Treby, C. J. was of opinion, that in this caſe it was not neceſſary to ſhew any breach, becauſe the bar was merely idle and impertinent, for it did not appear that the umpire had

any authority to make an award, and then it was the ſame thing as if it had been ſaid that the arbitrators had not made any award before the ſubmiſſion, or that a mere ſtranger had not made any award: the plea admitted that the arbitrators might have made it, for it was ſaid that two of them had not made any award before the 15th of February, whereas by the ſubmiſſion, they had authority to do it on the ſame day.—The plaintiff might have demurred to the plea, and although he had replied, yet the defendant having demurred to the replication, the plaintiff might take advantage of the imperfection of the plea, the firſt fault being in that.—He admitted, however, that if the defendant had pleaded "no award," a breach ought to have been ſufficiently aſſigned.—Powell, J. was of a contrary opinion. He ſaid, that though it was a general rule of pleading that judgment ſhould be given againſt him who committed the firſt fault, yet that could not have place in the caſe of an award.—Had the defendant pleaded that he had not ſubmitted, or any other collateral matter, it would not have been neceſſary for the plaintiff to aſſign a breach, but he might follow the defendant in his own way: but when the defendant pleaded "no award," or that which was equivalent, a breach ought properly to be aſſigned.—And the plea here amounted to a plea of "no award." The other judges delivered no opinion, but the plaintiff had leave to diſcontinue.[8]

In ſuch a caſe as this, if the plaintiff demand oyer of the award, and have it ſet forth at full length,

[8] Strike v. Benſley. Lutw. 525.

assigning a breach in the same manner as if the defendant had pleaded "no award," he will be secure against any objection from the manner of pleading.—To an action of debt on a bond, after oyer of the condition, which was to perform an award, so that it were made on or before the 21st of May, otherwise to perform the umpirage of a third person to be nominated by the arbitrators, the defendant pleaded that no award was made by the arbitrators, but that they on the 20th of May nominated J. H. to be umpire, who on the 28th of May by writing awarded the defendant to pay the plaintiff 40l. on the 11th of June next, which he had paid: the plaintiff craved oyer of the award, which recited that there had been considerable dealings between the plaintiff and the defendant, and that the plaintiff had paid the defendant all his demands, and that 40l. were due to the plaintiff; and therefore it ordered the payment of the said 40l. to the plaintiff.—The plaintiff then assigned a breach in the non-payment of the 40l.—The defendant demurred, and on many objections being taken to the award, the plaintiff had judgment, no objection being taken to the manner of pleading.[9]

If, on an award partially set forth and performance pleaded by the defendant, the plaintiff in his replication shew that the arbitrators awarded something more beside that which was set forth by the defendant, and shew a breach in non-performance of that, "without this that they awarded only as the defendant had set forth:" he will be secure against any objection to

[9] Elliot v. Cheval. Lutw. 451.

he form of his replication.—The defendant ſet forth an award, that he ſhould cauſe all ſuits to ceaſe which he had againſt the plaintiff, and averred that he had cauſed all ſuits to ceaſe. The plaintiff replied that it was awarded beſides that the defendant ſhould pay him 15l. which he had not paid, without this that the arbitrators had awarded only as the defendant alleged: it was objected on the part of the defendant, that this replication was not good, becauſe it traverſed that which was not alleged by the plea, and it was a rule that nothing ſhould be traverſed but what was expreſsly alleged. The plea had not alleged that the arbitrators had awarded only as was therein ſet forth. The court held that the replication would have been good without the traverſe, and it was good with it; for when the defendant pleads that it was awarded that all ſuits ſhould ceaſe, this muſt be underſtood to be the whole of the award, and when the plaintiff replied that they had awarded more, he might well take a traverſe.[1]

In ſuch a caſe the defendant cannot rejoin, alleging that the additional part of the award ſet forth by the plaintiff was accompanied by another circumſtance which rendered it void for that part.—In the caſe immediately preceding, he had rejoined that the arbitrators had awarded that he ſhould pay the 15l. *at* the houſe of J. D. a ſtranger, and that for this the plaintiff was to releaſe all actions to the day of the releaſe. He did this, on the ſuppoſition that the award of payment *at* the houſe of J. D. was void, as expoſing him to an action of treſpaſs, and that therefore he was not bound

[1] Linſey v. Aſhton. Godb. 255. 1 Rol. Rep. 6.

to perform it. The plaintiff demurred, and inſiſted that this was a departure from the plea; for when the defendant had pleaded an award in bar, it muſt be underſtood to be the whole award, and he had contradicted that intendment by afterwards ſetting forth another part—and of this opinion was the court.

If, in truth, from the default of the defendant, no award has been made within the time limited, the plaintiff may, to the plea of "no award," reply that default of the defendant.

He may reply that the defendant revoked the authority of the arbitrators, and it is not neceſſary to ſtate that the arbitrators had notice of the revocation, for ſuch notice is implied in the very word revoked; but he muſt ſhew that the countermand was before the day appointed for making and publiſhing the award, for otherwiſe there is no forfeiture of the bond.[2]

In debt on a bond conditioned to pay ſuch coſts as ſhould be ſtated by two arbitrators choſen by the parties: the defendant pleaded that none were ſtated, which was in effect that no award was made.—The plaintiff replied that the defendant had not brought in his bill: on demurrer, the court inclined to think that before any default could be aſſigned in the defendant, the plaintiff ought to have ſhewn the appointment of an arbitrator by himſelf.[3]

Where the ſubmiſſion is by bond, the condition containing a proviſo that the award ſhall be made within a limited time; if that time elapſe without any

[2] 8 Co. 81.

[3] Baldway v. Ouſton. 1 Vent. 71. 2 Keb. 624.

award being made, and the parties, by mutual consent, enlarge the time; though the award be made within this enlarged time, the party in whose favour it is made cannot maintain an action on the bond to recover the penalty for non-performance: the defendant has bound himself in a penalty, to abide by an award, if made within a given time; but that cannot extend the penalty to an award made after that time under a new agreement;[4] and where the agreement to enlarge the time is in writing, it must be on a fresh stamp.[5]

After the practice began of referring matters to arbitration under a rule of *nisi prius*, application was of course made in the name of the party in whose favour the award was made, to enforce performance by an attachment as for a contempt in disobeying an order of the court.—The courts of law, however, for a considerable time listened with much reluctance to such applications. They said it was then a matter of the first impression; that no attachment lay for non-performance of an award, under these references; that it was a novel practice, thus to imprison the body of a a man, without his being heard; that the defendant might deny that any award was made; that they would not try such issue upon affidavits; that if such applications were encouraged, all awards might be affirmed as good, how void soever they might be—but that the successful party might have his action on the award, and then the validity of it might be discussed.[6]

[4] Brown v. Goodman. 3 Term Rep. 592. n.

[5] Vid. ante, p. 139.

[6] 1 Keb. 130, 138, 559. 1 Sid. 452, 3130. Sir T. Raym. 35, 152. 2 Keb. 22, 645.

And at firſt, a diſtinction was made between the caſe, where the party, after having, by rule of *niſi prius*, conſented to ſubmit, afterwards withdrew his ſubmiſſion before any award was made, and the caſe where, continuing his ſubmiſſion, he afterwards refuſed to perform the award. In the former caſe the attachment was generally granted; in the latter it was refuſed, becauſe in the former there was no other remedy; in the latter the oppoſite party might have his remedy on the award.[7]

Sometimes the objection was only to the manner in which the application for an attachment was made; it having been declared that an attachment ſhould not be granted on a general ſuggeſtion of a breach of the award without notice to the party againſt whom it was moved; but that he who would have an attachment muſt ſuggeſt a breach by "affidavit," and then the defendant might come in and ſhew cauſe why an attachment ſhould not iſſue, and ſo the matter might come in debate.[8]

While the courts of law, however, were ſo unwilling to enforce obedience to an award by proceſs of contempt; the courts of equity made no difficulty in doing it, where the ſubmiſſion was under one of their rules.[9]

In ſuch a caſe, it has lately been decided, that where an order has been made that the award ſhall ſtand, but no writ of execution of the order has been ſerved on the party againſt whom the award is made, the proper

[7] 2 Keb. 22. 3 Keb. 844. [8] 1 Keb. 634.
[9] Hide v. Pettit. 22 Car. 2. 1 Ca. Ch.

motion is "that he ſhall ſtand committed for non-performance;" not that an attachment may iſſue againſt him:" and the ſervice of notice of this motion muſt be perſonal, not on the party's clerk in court, and the reaſon given for requiring this perſonal ſervice is that, by the reference, the cauſe is out of court:—but where a writ of execution of the order has been ſerved on the party, a motion for an attachment may be made, though the *ſubmiſſion* did not contain any expreſs undertaking to perform the award, or has not been made a rule of court.[1]

Afterwards the courts of law ran into the contrary extreme, and in all caſes granted an attachment, whether the award was void or not in point of law, obſerving that the reference being by rule of court by conſent of counſel in the cauſe, there ought to be a rule for performance, for the abuſe to the court; that if no attachment were to go, the party in whoſe favour the award was made, would be deluded by the trial being put off, and there ought either to be no ſubmiſſion, or that ought not to be eluſory.[2]

But now the courſe of proceeding to obtain an attachment is this; the award muſt be tendered to the party againſt whom it is intended to move for the attachment, and if he refuſe to accept it, affidavit of the due execution of the award, and of ſuch tender and refuſal, muſt be made, and on that an application made to the court to have the order of *niſi prius* made

[1] Knox v. Simmonds. 3 Brown. Ch. Rep. 361.—This ſeems to be the meaning of the report, which is ſomewhat confuſed.

[2] 3 Keb. 164, 446. Comb. 303,

a rule of court; then a copy of this rule muſt be ſerved on the party refuſing to accept the award; if he ſtill refuſe to accept it, an affidavit muſt be made of perſonal ſervice of the rule, and of the diſobedience to it; and then on application, grounded on that affidavit, an attachment will be ordered of courſe.[3]

When the award is accepted, but the money being demanded is not paid, an affidavit muſt be made of the due execution of the award, and of the demand and refuſal of the money. And an indorſement on an award unſtamped, is a ſufficient authority to a third perſon to demand the money awarded; it is not neceſſary that there ſhould be a warrant of attorney for that purpoſe.[4]

On references at *niſi prius*, it is not unuſual for the plaintiff to take a verdict by conſent, for ſecurity. And if the award be made in his favour, he may, at his election, either enter up judgment on the verdict, and take out execution for the ſum awarded, if that does not exceed the ſum for which the verdict was taken; or he may proceed by attachment. But, he cannot enter up judgment without leave of the court;[5] and to obtain that, it is as neceſſary to produce an affidavit of the due execution of the award, and the demand of the money awarded, as it is, to obtain an attachment.[6]

Where the ſubmiſſion is by bond with conſent to have the "award" made a rule of court, it is ſaid, that the court will not grant its interpoſition; and it is certain, that the words of the ſtatute do not extend to that caſe; they provide only for the caſe of a conſent

[3] 1 Crompton's Practice, 264. [4] 2 Bl. Rep. 990, 991.

[5] 1 Salk. 84. [6] Barnes, 58.

to have the "submiſſion" made a rule of court.[7] But where the ſubmiſſion has been made a rule of court, it is not neceſſary there ſhould be another application to have the award made a rule of court, in order to ground an attachment: that will be granted without ſuch application.[8]

THE party in whoſe favour an award is made, when the ſubmiſſion is according to the ſtatute, may have his remedy by attachment, though he may have obtained judgment in an action on the bond, or on the award; for he may perhaps think an attachment a more expeditious and effectual proceſs than ſuing out execution on the judgment.[9]

AND though the defendant may be in cuſtody on an attachment, the court will not ſtay proceedings in an action of debt on the bond, or on the award, becauſe if the defendant die in execution on the attachment that execution is at an end, and cannot be revived againſt his heirs or executors; for the ſtatute ſays, that the attachment ſhall be proſecuted as in the caſe of a contempt in other caſes: and a contempt dies with the perſon, and cannot be proſecuted againſt his repreſentatives;[1] but if he die in execution on a judgment, the plaintiff may ſtill have an execution on his goods.[2] But, if the defendant be taken in execution on the judgment, the attachment will be diſcharged.[3] And if

[7] Vid. Harriſon v. Grundy. 2 Str. 1178. Anon. 2 Barnard. B. R. 163.

[8] Salk. 71.

[9] 1 Salk. 73. 10 Mod. 333.

[1] Determined by the Judges in Webſter v. Biſhop. Prec. in Ch. 223. 2 Vern. 444.

[2] Paterſon v. Groſs. 2 Barnard. B. R. 227.

[3] Vid. Richardſon v. Chancey. 1 Barnard. 386. cited B. R. H. 107.

an action be brought before an application is made for an attachment, it will be refused, during the pendency of the action, unless some very particular reason appear to the court for granting it.—This case was compared to the case of the several remedies which are allowed on a mortgage, a bill for foreclosure, an action on the bond, and an ejectment to obtain the possession, which are allowed to be all used at once. But Lord Hardwicke answered, that these several remedies were for different purposes, and remedies to which the party is intitled by the course of law, without the leave of the court; but the two remedies in the present case had but one object, that of enforcing obedience to the award, and the one was by the course of law, while the other depended on the discretion of the court.[4]—In a late case, where an action had been brought on an award in the King's Bench, and the plaintiff applied to the court of common pleas for an attachment, offering to discontinue his action, the court refused it, on the ground that he had made his election.[5]

If the time limited for making the award expire without any award made, there must be a second application for making the submission to a second arbitrator a rule of court, or else the court cannot grant an attachment for non-performance of the second arbitrator's award.[6] And the submission must be made by the parties on the record: therefore, an attachment

[4] Stock and Huggins v. De Smith. B. R. H. 106. vid. Hutchins v. Hutchins. Andr. 297. Anon. id. 299.

[5] Badley v. Loveday. Puller and Bosanquet's Rep. in Com. Pleas, 81.

[6] Owen v. Hurd. 2 Term Rep. 643, 4.

was refuſed, where it appeared that a ſubmiſſion to an award between A. and B. had been made a rule of court; but no award having been made within the time, the diſpute had been referred to a ſecond arbitrator, by B. and C. who were the real parties, without an application to make this ſubmiſſion a rule of court.—And the court would not go into the merits, though the defendant offered to wave the objection, becauſe they had no juriſdiction.[7]

When the ſubmiſſion is made a rule of court according to the ſtatute, the affidavits, to ground an attachment, need not be intitled in any cauſe, for till the rule for the attachment is granted, there is no proceeding in court.—But the affidavits in anſwer muſt be intitled.[8]

In both forms of ſubmiſſion, it is diſcretionary in the court, to enforce the award by attachment or not. —The plaintiff had brought an action againſt the defendant for diverting a water-courſe; the matter was referred to arbitrators, who awarded that the defendant ſhould fill up a canal, reſtore the ſtream to its former courſe, and do ſeveral other matters relating to the water-works. The plaintiff afterwards applied to the court for an attachment for non-performance of the award, and read ſeveral affidavits to found his application. The defendant in anſwer read ſeveral affidavits to prove his compliance with the directions of the award. The court therefore refuſed an attachment, on account of the contrariety of evidence, and left the plaintiff to his remedy by action.[9]

[7] Owen v. Hurd. 2 Term Rep. 643.

[8] Bevan v. Bevan. 3 Term Rep. 601.

[9] Sir Thomas Hales v. Taylor. 1 Str. 645.

THEY may alſo refuſe to enforce an award by attachment, when it appears to be a hard caſe upon the defendant, though they cannot for that reaſon ſet the award aſide.[1]

AN attachment for non-performance of an award is only in the nature of a civil execution, and therefore a party cannot be arreſted on it, on a Sunday.[2]

WHEN the award is for the payment of money, the only remedies to enforce performance are thoſe which have hitherto been conſidered [3]—But when it is for the performance of any collateral act, it may ſometimes be enforced by a bill in equity, which will decree a ſpecific performance.

WHEN the award is made in conſequence of a reference by order of a court of equity, it ſeems to be a reaſonable concluſion, from the tenor of all the caſes on that ſubject, that a bill will generally lie for a ſpecific performance: but when the ſubmiſſion is merely voluntary, without the interpoſition of a court of equity, ſuch a bill will not lie, unleſs there has been ſome acquieſcence in the award by the parties to the ſubmiſſion, or an agreement afterwards to have it executed.[4]

BUT if, in the caſe of ſuch a ſubmiſſion, the plaintiff, who ſeeks by his bill to enforce the performance on the part of the defendant, has himſelf performed his part, a court of equity will decree a performance by

[1] Vid. B. R. H. 106, and 1 Bur. 278.

1 Term Rep. 266. denies 1 Atk. 58. to be law.

[3] 3 P. Wm. 189, 190.

[4] Dict. per Lord Hardwicke. 1 Atk. 74. (62) Biſhop v. Webſter. Abr. Eq. Ca. 51. Vid. 2 Rep. in Ch. 18 fo. ed. Semb. contra Id. 16.

the defendant,[5] even where the defendant ſhews that the plaintiff has put the ſubmiſſion bond in ſuit in a court of law; unleſs the award order ſomething which it is againſt the conſtant courſe of a court of equity to enforce. Thus, where, among other things, it was charged by the bill that the father of the plaintiff and defendant was ſeiſed to him and his heirs male with the fee expectant of ſeveral lands in Henfield, and the plaintiff conceiving he had been ſeiſed in fee of the lands in Henfield, conveyed the ſame to the defendant and the heirs male of his body, leaving the fee in himſelf; that differences ariſing about the eſtate tail, Mr. Juſtice Croke, who had been choſen arbitrator between the plaintiff and the defendant, had awarded that the defendant ſhould enjoy a former eſtate tail ſettled by their father, on him and his heirs male, and that the plaintiff ſhould confirm the ſaid eſtate tail at the charge of the defendant, and that the defendant ſhould do no act to bar or diſcontinue the ſaid eſtate tail, or the remainder of the plaintiff, without the conſent of the latter, except it were for a jointure for his wife; the Lord Chancellor, though he held that the defendant ſhould anſwer as to other parts of the award, declared that as it was abſolutely againſt the conſtant courſe of the court to decree a perpetuity, or give any relief in that caſe, he would allow the defendant's demurrer as to this part of the bill.[5]

[5] Poole v. Pipe. 18 Car. 2. pr. Hyde Chancellor. 3 Rep. in Chan. 20.

[6] Biſhop v. Biſhop. 1 Rep. in Chanc.

On a ſubmiſſion by bond, it was awarded that the plaintiff, in the bill, ſhould pay the defendant 900l. and ſeal a releaſe to the defendant; that the defendant ſhould aſſign ſeveral ſecurities which he had from the plaintiff. The bill ſtated that the plaintiff had ſold ſome lands to raiſe the 900l. expecting the defendant would accept it, as he had intimated he would, and tendered him the 900l. and a releaſe executed according to the award: though there was no other execution on the part of the plaintiff, and though it was conceived, that the award was *extrajudicial, and not good in ſtrictneſs of law*, yet the Lord Chancellor decreed that it ſhould be ſpecifically performed.[6]

On a bill brought to compel the defendant to make ſpecific performance of an award, the caſe appeared to be thus: the plaintiff and defendant, who were brother and ſiſter, had a diſpute about the fee ſimple of a ſmall parcel of land under the father's will; they entered into a bond in the penalty of 200l. to ſtand to the award of arbitrators with reſpect to the diſpute. The arbitrators awarded that the plaintiff ſhould pay 10l. to the defendant on a particular day, and 30l. on a future day; and that on this the defendant ſhould procure his wife to join with him in a fine and deed of uſes, and thereby convey the premiſes to the plaintiff and her heirs. The plaintiff paid the defendant the 10l. on the day on which it was awarded to be paid; ſhe afterwards tendered the remaining 30l. on the day on which that was awarded to be paid, and the defendant was willing to take the money, but would not execute the fine and

[6] Norton v. Manſell, 2 Vern. 24. S. C. 2 Rep. in Chan. 304.

deed of uſes. On the opening of the caſe, the Maſter of the Rolls ſaid he thought this a ſtrange bill, for which he knew no precedent; and that the plaintiff muſt ſue her bond. The plaintiff's counſel urged that the defendant, having accepted the 10l. had thereby undertaken to perform the award, and cited the caſe immediately preceding, where he ſaid the court had decreed a ſpecific performance, though the award had not been executed, and though, in ſtrictneſs of law, it was void. The Maſter of the Rolls replied, that, in that caſe, the award not being good in law, there might be reaſon to decree a ſpecific performance of it. But he deſired to know what the defendant's counſel could ſay as to the defendant's having accepted part of the money. It was contended that it was ſufficient, that, unleſs in very extraordinary circumſtances, there was no inſtance of a bill being brought for a ſpecific performance of an award: that beſides, this was an unreaſonable award, that the huſband ſhould procure his wife to join with him in a fine, which it might not be in his power to do; and therefore the court ought not to oblige him to it. His Honour anſwered that there were a hundred precedents, where, if the huſband, for a valuable conſideration, covenant that his wife ſhall join with him in a fine, the court had decreed that the huſband ſhould do it. In the preſent caſe the defendant, by his acceptance of part of the money awarded, had undertaken ſpecifically to perform the award. His Honour therefore decreed, that on payment of the reſidue of the money awarded, the defendant ſhould perform the award, and that he ſhould pay coſts; it being contrary to good conſcience to take the money

awarded, and yet refuſe to perform his part of the award.[7]

THOUGH an award made in conſequence of a voluntary reference be defective in form, or might have been at firſt avoided for uncertainty, yet if the parties have long acquieſced in it, and performed it, a court of equity will prevent its being afterwards diſturbed by a ſuit at law.

IN a bill filed in Chancery by one Scot againſt one Wray, it appeared that ſome differences having formerly ariſen between one Roger Whittey and the defendant Wray, reſpecting certain lands, the deciſion was referred to arbitrators, who awarded that Whittey ſhould have the lands; and there was a proviſo in the award, that if any doubts ſhould ariſe upon it, the arbitrators ſhould expound them: the defendant Wray had found a defect in the award, which was, that it ordered Whittey to have the lands without ſaying that he and his heirs ſhould have them, for which reaſon he inſiſted that Whittey ſhould have them but for life; on which three of the four arbitrators then ſurviving, by a writing under their hands and ſeals, declared they meant that Whittey ſhould have the lands to him and his heirs for ever, and that the latter words were left out by miſtake: it appeared further, that Whittey, being in poſſeſſion, had conveyed the lands to Scot, the preſent plaintiff, and his heirs; and that the defendant, claiming under an old deed of entail, ſought to eject the plaintiff out of the premiſes.

THE Chancellor, on peruſal of the award, and of the explanation of it, and alſo of the depoſitions of the

[7] Hall v. Hardy. 3 P. Wms. 187.

two arbitrators who were alone ſurviving of the four, and which depoſitions correſponded with the former explanation, conſidering that the award had been long ſince made and executed on both ſides, and adopting the opinion of two judges whom he had called to his aſſiſtance, declared, that notwithſtanding it had been made on a voluntary reference, without the direction of the court, it ought in juſtice and equity to be ratified and confirmed, and he accordingly decreed that Scot and his heirs ſhould enjoy the land againſt the defendant, and all claiming under him, according to the award and explanation.[8]

On the ſame principle the court refuſed to reverſe a decree on a bill of review which had been made ſixteen years, in conſequence of a reference to ſettle the differences between the parties; though the plaintiff, in the bill of review, aſſigned for error, that the cauſe had been referred to four commiſſioners, and only three certified, and that the leaſe on which he now inſiſted was not then in iſſue, and that he had never aſſented to the certificate.[9]

If the plaintiff in the bill was limited to a time for the performance of his part, and does not perform it within that time, the defendant ſhall not be bound by the award; yet if, ſubſequently to the time, he has accepted of part performance, he ſhall be bound for ſo much as that is an equivalent for.

In a bill filed by Suſan Ewes and William Reeve againſt Edward and William Blackwall, the circumſtances of the caſe appeared to be theſe.

[8] Scot v. Wray, 1 Rep. in Chan. 46.

[9] Id. Goddard v. Goddard. 15 Car.

THE plaintiff Reeve being ſeiſed of a certain manor and lands, in part freehold and part copyhold, mortgaged them to the defendants, on condition to have them reconveyed to the plaintiff Reeve and his heirs, on payment of ſome money due to them: ſome differences afterwards aroſe between the parties about the amount of thoſe ſums, and ſuits being commenced by the plaintiffs for a new redemption, a reference was propoſed, and accordingly, by agreement, all matters were referred to two perſons, who made an award that Reeve ſhould pay to Edward Blackwall, as due to him, the ſum of 6543l. 13s. 9d. and to William Blackwall 3500l. as due to him: but that if Reeve ſhould procure bonds or bills under hand and ſeal, by which the ſaid Edward Blackwall ſtood bound to any perſon or perſons for his own juſt debts, which with intereſt ſhould amount to the debts aforeſaid, and the ſaid bonds and bills ſhould be delivered up to the ſaid Edward within five weeks from the date of the award, then the defendants ſhould accept them in full diſcharge of their debts, and then reconvey to Reeve, his heirs and aſſigns, all the lands which were by him mortgaged to them, diſcharged of all incumbrances incurred by them, or any claiming under them, with all deeds and evidences concerning the ſame, and diſcharge all bonds and ſecurities whatever, which they had againſt Reeve or his eſtate; but if Reeve ſhould fail in the performance of what was awarded, then the defendants ſhould have the full benefit of their ſecurities for the whole money ſtated to be due to them as before mentioned.

THE bill further ſtated, that within the time limited for payment of the ſaid money, there was a great quantity of graſs fit to be cut off the eſtate, which it

was agreed the defendant Edward ſhould cauſe to be cut and made into hay, and that if the plaintiff Reeve performed the award, and paid the money and charges for cutting the graſs, and making it into hay, then he ſhould have it to his own uſe: that in part performance of this award, the plaintiff Reeve borrowed of the other plaintiff Suſan Ewes, the ſum of 700l. and paid the ſame to the defendant Edward Blackwall, by the hands of Henry Johnſon, Eſq. but not within the five weeks from the date of the award; and farther paid to him, by the ſame hand, the ſum of 6543l. by delivering up ſeveral bonds, in which Edward ſtood bound to ſeveral perſons for his own debts; and that in conſequence of this the ſaid Edward and the plaintiff Reeve conveyed the lands in the bill mentioned, or the greateſt part of them, to Henry Johnſon and his heirs.

THAT, in further purſuance of the award, the plaintiff Reeve paid the defendants, or one of them, in money or in bonds, or ſtatutes, in which the ſaid Edward and John Blackwall, or one of them, were bound, the ſum of 2058l. 15s. 6d. part of the ſaid 3500l. appointed to be paid by the award to the ſaid Edward Blackwall, for the debt of the other defendant William Blackwall, which they had accepted, and the plaintiff had tendered and offered to deliver up ſome other bonds and ſecurities, in which the ſaid Edward ſtood bound for his own debts, and which amounted to the reſidue of the ſaid ſum of 3500l. and required the defendant to accept the ſame, and that the ſaid William Blackwall ſhould ſurrender the copyhold lands to the plaintiff Suſan Ewes and her heirs, and convey the freehold lands to the plaintiff Reeve and his heirs,

diſcharged of all incumbrances, and perform the award ſpecifically, and account for the value of the hay.

On hearing, the court diſmiſſed the bill as to the hay, and decreed that the money paid and "accepted" by bonds or otherwiſe, was well paid, and ſhould go towards the ſatisfaction of the debt due to William Blackwall, as well on bond as on mortgage, ſo far as the ſame would reach; and that the award, in the bill ſet forth, not being performed by the plaintiff within the time, ought not to be concluſive and binding to the ſaid William Blackwall, to cut off any part of his juſt debt, and that therefore the award ſhould ſtand diſſolved from that time. That the maſter ſhould compute what was due to William Blackwall for principal and intereſt by bond or mortgage, beyond what had been already paid by bonds or in money, and that on payment of that balance, at a time to be appointed by the maſter, the defendant ſhould reconvey and ſurrender the mortgaged premiſes to the plaintiff, or to his appointment, diſcharged of all incumbrances, as the maſter ſhould direct, and then deliver up the mortgages and bonds, and other writings, and in default of payment the defendants ſhould take the benefit of their ſecurities.[1]

However far a court of equity may aſſiſt a plaintiff to procure the execution of an award, it will not compel a defendant to diſcover a breach, by which he may charge himſelf with the penalty of a ſubmiſſion bond.[2]

[1] Suſan Ewes and Wm. Reeve v. Ed. and Wm. Blackwall. Rep. temp. Finch, 22.

[2] Biſhop v. Biſhop, 25 Car. 1 Rep. in Ch.

CHAP. VII.

The MEANS *of procuring* RELIFF *againſt an* AWARD *when improperly made.*

WHERE the objection taken to the award is, that it is contrary to ſome of thoſe rules, which the law has preſcribed to be obſerved in the conſtitution of an award, that objection may be taken when the award is put in ſuit. This is equally applicable to the caſe of a ſubmiſſion by the mere act of the parties, and to that where the mere act of the parties is accompanied by the interpoſition of a court. And where the object is merely to ſet aſide an award from legal objections appearing on the face of it, this can be effected *only* in a court of law: a court of equity will not in ſuch a caſe lend its aſſiſtance.[3]

BUT when the ſubmiſſion is by the mere act of the parties, then, in order to be relieved againſt the award on account of any extrinſic circumſtances, the defendant cannot make theſe a defence to the action on the award or on the ſubmiſſion bond: he cannot give in evidence

[3] Vid. Champion v. Wenham. Ambl. 245.

any thing to impeach the conduct of the arbitrators; the award is a determination of judges chosen by the act of the party himself, and nothing extrinsic to that judgment can be offered in evidence to overturn it; if such evidence were admitted, the plaintiff would come entirely unprepared: to support his action he has only to prove the submission and the award; the corruption or partiality of the arbitrators, it is said, may be wholly unknown to him; it concerns only the arbitrators themselves: there is no precedent at law of any *writ* to set aside an award; corruption or partiality has never been pleaded, and the statute of William the third shews that an award at law must stand, where there is no objection to the terms of it; for, as to awards made under that statute, it says they must stand, unless controverted and set aside in two terms.[4]

In this respect the Roman law is somewhat different from ours; for though it provides no direct method, by which the party against whom the award is made can impeach the conduct of the arbitrators, yet by a rescript of Antoninus, it is provided that the enmity of the arbitrators to the defendant may be set up as a defence against the plaintiff's action for the penalty expressed in the submission.[5]

[4] Vid. 1 Saund. 327. 2 Vesey, 315. Wills v. Maccarmick, C. B. 2 Wilf. 149.

[5] Cum quidam arbiter ex aliis causis inimicus manifeste apparuisset, testationibus etiam conventus, *ne sententiam diceret*, nihilominus nullo cogente dicere perseveraſſet: libello cujusdam id querentis, Imperator Antoninus subscripsit, *posse eum uti doli mali exceptione*. Et idem cum a judice consuleretur apud quem pœna petebatur, rescripsit, *etiamsi appellari non potest, doli mali exceptionem in pœnæ petitione obstaturam*. Per hanc ergo exceptionem quædem appellandi species est, cum liceat retractare de sententiâ arbitri.—Ff. l. 4. t. 8. f. 32. n. 14.

With us, in such a case, the only relief is in equity, which often sets aside awards, and gives that kind of relief, which seems naturally to arise out of the circumstances; as by directing accounts, or granting injunctions to stay all legal proceedings which had been pursued, on the foundation of the award being good. Though bills of this sort are received with some prejudice, because arbitrators are judges of the party's own nomination, yet, if on partiality a court of equity should not relieve, arbitrators would have too great a power, and might abuse it from corrupt motives.[6]

In a bill filed to have an award set aside, it was alleged by the plaintiff, that he had been arrested at the suit of the defendant, on which both parties submitted to two arbitrators, and on the event of their not agreeing, then to an umpire; on the non-agreement of the arbitrators, the umpire awarded 36l. to be paid by the plaintiff in the bill to the defendant, and as was suggested in the bill, without hearing the plaintiff. The defendant, in his answer, set forth that he held lands by lease of the plaintiff; that being indebted to several persons, he was persuaded by the plaintiff, his landlord, to make over his goods to him, and deliver him up the lease, in order to protect it against his creditors; but the plaintiff abusing his trust, had insisted the goods were his own by an absolute surrender; that this being the greatest subject of difference between them, it was referred to arbitration, and all this matter appearing before the arbitrators in the presence of the umpire, the latter had made the award. It appeared on the proofs

[6] 2 Vesey, 315. 2 Wilf. 149.

in the cauſe that the plaintiff had goods of the defendant only to the amount of 7l. 10s. but that he might have been heard, if he had pleaſed. The court thought the award ought not to be ſet aſide for any ſuppoſed hardſhip in the caſe, as the umpire had exerciſed his judgment in the recompence he had given to the defendant for the injury he had ſuſtained, and the bill was diſmiſſed with coſts.[7]

The ſame rule applies to the caſe of an award made in conſequence of a reference at *niſi prius*; for to a court of equity, that is nothing more than a voluntary reference. Thus, where the plaintiff tenant for life, remainder in tail to his firſt, &c. ſons, remainder to the defendant in tail, had committed waſte for which the defendant had brought his action, and at *niſi prius*, by conſent of the parties, the matter was referred to two of the jury, under a proviſo that they ſhould make their award by Michaelmas, otherwiſe that an umpire ſhould decide: no award was made by the arbitrators, but the umpire gave the plaintiff in the action, the defendant in the bill, 384l. damages. The bill was exhibited to pray relief; 1. Againſt theſe damages, as exceſſive; 2. For miſconduct in the umpire, becauſe he had declared before the umpirage made, that he would not meddle in the matter, and afterwards that he had made it for fear he ſhould be arreſted, from whence the plaintiff's counſel inferred that he had been menaced; and laſtly, becauſe after the ſubmiſſion the plaintiff had repaired the premiſes, and proved repairs done, and that 40s. would complete them.

[7] Waller v. King. 2 pt. Ca. in Law and Eq. 63, 64. Vid. Greenhill v. Church. 3 Rep. in Ch. 49, to the ſame point.

THE defendant inſiſted that the umpirage ought not to be ſet aſide without fraud or partiality proved; that the time when the umpire had ſaid he would not meddle in the buſineſs, was in Auguſt, before the time he was to make his umpirage, as the truth really was; and that the plaintiff had notice given him by the umpire to attend, which he did not, ſo that the umpire had no notice of the repairs, and if he had, that was not material to avoid the award.[8] In another report of the ſame caſe,[9] it appears, that the tenant for life had no iſſue; that the value of the eſtate was 70l. per annum, and that the tenant for life, who had ſuffered ſome mills and houſes, of which the eſtate conſiſted, to go greatly out of repair, had, before the umpirage made, repaired all the waſte to within 40s. and forbidden the arbitrators to make any award, and had alſo forbidden the umpire, who notwithſtanding made the umpirage as before ſtated: one ground of impeaching the umpirage was that the umpire had refuſed to hear the plaintiff; but of that no other proof was given than that he had ſaid, the plaintiff might bring what witneſſes he would, he would not believe them, becauſe he knew the premiſes himſelf, and was well ſatisfied about the value of the repairs. With reſpect to the outrageouſneſs of the damages, it was ſaid, that the defendant had but a remote remainder after an eſtate tail, and yet he had as much given him, as if he had been to come immediately to the eſtate: it was anſwered, that the damages were not to be meaſured by

[8] Brown v. Brown. 1 Ca. Ch. 140.

[9] 1 Vern. 157.

the quantity of the tenant's eſtate, but by the injury done to the inheritance; that were it neceſſary to conſider the exceſſiveneſs of the damages, they might have been given for the treble value; and that no fraud or colluſion being proved, the court could not ſet the award aſide, unleſs there were a manifeſt error in the body of the award.

In bills to have an award ſet aſide for corruption or partiality, it is uſual to make the arbitrators defendants, unleſs the parties be reſtricted from ſo doing by the terms of the ſubmiſſion;[1] the arbitrators, it is ſaid, may plead the award in bar, but they muſt ſupport their plea, by ſhewing themſelves impartial, or the court will give a party a remedy, by making them pay coſts.[2]

But in order to avoid the inconvenience of having a bill filed againſt them, it is not unuſual for the arbitrators to inſiſt on its being made a condition of their acceptance of the office, that no bill in equity ſhall be brought againſt them: in which caſe, if they are made parties to a bill for ſetting aſide the award, they may apply to have their names ſtruck out, which will be immediately ordered.[3]

A bill will not lie to compel the arbitrator to diſcover the grounds on which he made his award; it is unreaſonable that he ſhould be put to ſo much trouble and expence: if there be any palpable miſtake made by the arbitrator, or a miſcalculation in an account that had been laid before him, the party aggrieved may

[1] Ca. temp. Finch, 131. [2] 2 Atk. 396, (412.)
[3] Id. 396, 397, (412, 413.)

bring his bill againſt the party, in whoſe favour the award is made, to have it rectified.[4]

When a caſe is referred at *niſi prius*, it is uſual to inſert in the order of reference a condition that the parties ſhall file no bill in equity, either againſt the arbitrators or againſt each other: if notwithſtanding this condition, a bill in equity be filed, the plaintiff incurs the danger of being attached for a contempt, by the court of which the order of reference was made a rule: but it is in the diſcretion of that court to grant an attachment or not according to the circumſtances of the caſe: and in a caſe which lately occurred in the common pleas, it was actually refuſed.[5]

The uſual inſertion of this condition in the order of reference at *niſi prius*, has been conſidered as a tacit admiſſion that a court of equity has a diſcretion to entertain a bill for ſetting aſide an award for partiality or corruption, though made under ſuch a reference, and though no application for redreſs had previouſly been made to a court of law, and refuſed: on this principle Lord Loughborough over-ruled a general demurrer to a bill filed to ſet aſide an award for partiality and corruption, made under an order of reference at *niſi prius* in the court of King's Bench, though no application had been made to that court, and though two years had elapſed from the time when the award was made, before the filing of the bill.[6]—And where an application has been made to the court of law, but

[4] 3 Atk. 644. (609.)

[5] Burton v. Petrie, cited by Lord Loughborough. 2 Vez. Junr. 543.

[6] Lonſdale v. Littledale. 2 Vez. Junr. 451. vid. 2 Atk. 155, (162.) Bunb. 265. 2 Barnard. 152.

without ſucceſs, the party may ſtill have recourſe to a court of equity againſt partiality and corruption: the proceeding under the authority of the court of law may be altogether incompetent; for that which would ſubvert the award, may ariſe out of the anſwer in equity only; where the mode of compelling a diſcovery in anſwer to pointed interrogatories has much the advantage of that by affidavits in a court of law.[7]

Where the ſubmiſſion is according to the ſtatute, and application has been made in the court of which the ſubmiſſion is a rule, for an attachment for non-performance, by one party, and to have the award ſet aſide, by the other; and both applications have been unſucceſsful, then a bill will lie to obtain relief againſt the corruption or partiality of the arbitrators.

The caſe of Mr. Ward of Hackney is a very remarkable inſtance of this kind. It came twice before the court of Chancery; it was a bill to ſet aſide an award made by Walker and Floyd, two arbitrators out of three, in conſequence of a reference to put an end to a cauſe of long ſtanding, in which an account was before a maſter: the ſubmiſſion was made a rule of the court of King's Bench. The party, againſt whom the award was made, obtained a rule to ſhew cauſe, why it ſhould not be ſet aſide, on account of partiality and miſbehaviour in the arbitrators. On ſhewing cauſe, the court was divided, ſo that the award could not be ſet aſide. The other party afterwards moved for an attachment for not performing the award, the court

[7] Vid. all the authorities laſt before cited.

was ſtill equally divided, and of courſe no attachment was granted. The party in whoſe favour the award was made, having no advantage from the ſubmiſſion being made a rule of court, brought a common action on the ſubmiſſion-bond. Ward, the party againſt whom the award was made and the defendant in the action, filed his bill in Chancery merely to be relieved againſt the award, only praying general relief. The defendant to the bill, by his anſwer, inſiſted that the King's Bench had determined, and therefore the award ought not to be ſet aſide. The cauſe was heard by Lord Macclesfield,[8] who was a little doubtful on account of the proceedings in the King's Bench, as the award was by virtue of a ſubmiſſion by rule of that court, within the act of Parliament; he therefore heſitated whether he ſhould give relief, as the whole matter was ſubject to the juriſdiction of a court of common law, who had inquired into it, and were not of opinion to ſet it aſide: all he did at firſt, therefore, was to refer it to the maſter to ſtate what the King's Bench had done; and the maſter ſtated the caſe as above.—Lord Macclesfield was then of opinion that the King's Bench had not determined either way, not having thought fit to ſet aſide or to confirm the award, becauſe they had refuſed the only proceſs to carry it into execution; and therefore he held, with reaſon according to the opinion of Lord Hardwicke, that the caſe ſhould be conſidered as an award by ſubmiſſion, without a rule of court, and that if a court of common law, which had this ſummary juriſdiction, refuſed to exerciſe it, and left the party on

[8] 21ſt April, 1719.

one ſide to his action, it left the other to ſeek relief by a bill in equity.[9]

How far a court of equity will interpoſe to grant relief againſt partiality or corruption in the caſe of an award made in purſuance of the ſtatute, either when no application to ſet the award aſide on that account has been made to the court of which the ſubmiſſion has been made a rule, within the time limited by the ſtatute, or when ſuch application has been made without ſucceſs, but no application has been made on the other ſide for an attachment, appears to have been till lately by no means a ſettled point.

The words of the ſtatute ſo far as they affect this queſtion are theſe: "in caſe of diſobedience to ſuch arbitration or umpirage, the party neglecting or refuſing to perform and execute the ſame, or any part thereof, ſhall be ſubject to all the penalties of contemning a rule of court, when he is a ſuitor or defendant in ſuch court, and the court on motion ſhall iſſue proceſs accordingly, which proceſs ſhall not be ſtopped or delayed in its execution by any order, rule, command, or proceſs of any court, either of law or equity, unleſs it ſhall be made appear on oath to *ſuch* court, that the arbitrators or umpire miſbehaved themſelves, and that ſuch award, arbitration, or umpirage, was procured by corruption or other undue means. And any arbitration or umpirage procured by corruption or undue means, ſhall be judged and eſteemed void and of no effect, and accordingly be ſet aſide by any court of law or equity,

[9] Ward v. Periam, cited 2 Atk. 155, (162,) 396, (412.) 2 Veſey, 216, 317.

ſo as complaint of ſuch corruption or undue practice be made in the court where the rule is made for ſubmiſſion to ſuch arbitration or umpirage, before the laſt day of the next term after ſuch arbitration or umpirage made and publiſhed to the parties; any thing in this act contained, to the contrary notwithſtanding."

I FIND but one caſe reported till very lately relative to this queſtion, and that is by no means concluſive or ſatisfactory. It is reported in two books, with a little variation: in the one,[1] it appears that an application had been made without ſucceſs in the court of King's Bench, to have the award ſet aſide, before the filing of the bill; in the other,[2] it is ſaid that no application had been made to that court.

THE bill was filed to have ſatisfaction on a note of hand for 3184l. given to one Richardſon by Cambel, one of the defendants to the bill, and party to the ſubmiſſion, which had come to the hands of the plaintiffs by meſne aſſignments, and to ſet aſide an award which ordered that note to be delivered up by the plaintiffs: the bill charged that the note had never been produced to the umpire; that one of the plaintiffs informed the umpire that Alardice, the other plaintiff, was gone to Scotland, to inquire whether the defendant Cambel had paid this note to ſeveral ſhipowners there, as he pretended; that Alardice was the only perſon who knew any thing of the affair, and therefore the other plaintiff deſired the umpire to wait for his return, which he promiſed to do, but afterwards made the umpirage *before* Alardice's return; that both the umpire

[1] 1 Barnard. K. B. 75, 152. [2] Bunb. 265.

and Cambel promiſed the award ſhould be only conditional, and that Alardice ſhould be heard after his return from Scotland: and there were other charges in the bill of undue practice in making the award.—One report[3] ſtates, that the defendants pleaded the ſubmiſſion to the award, the election of the umpire, and the award within the time; that the ſubmiſſion had been made a rule of the court of King's Bench; that there had been no application made to that court according to the ſtatute, and therefore that all other courts were now precluded from taking cognizance of the cauſe; the other report[4] ſtates, that Cambel pleaded that the umpire made an abſolute and impartial award, according to the beſt of Cambel's belief, but that it had been delivered above two terms before the filing of the bill, ſo that the plaintiffs were now too late to take his exceptions; that the umpire put in an anſwer to the bill in a particular manner, and ſet it forth with a great many circumſtances.—By both reports it appears that the defendants gave no anſwers to the expreſs charges in the bill, verifying their plea only in general terms, and denying combination.

THE principal queſtion being, whether courts of equity, as well as the court of law, of which the ſubmiſſion had been made a rule, were not confined by the ſtatute to the time thereby preſcribed, for the allowance of exceptions to the award; the Chief Baron is reported to have been of opinion that they were not. He obſerved that before this ſtatute, agreements made in any cauſe depending in courts of law, and after-

[3] Bunb. [4] Barnard.

wards made rules of thoſe courts, had equally the advantage of that ſpeedy remedy, which now all extrajudicial agreements may have on this act of Parliament. They were, however, open to the inſpection of courts of equity, who might examine into any circumſtances of fraud or miſbehaviour: as the law then ſtood, if courts of law had enforced ſuch agreements by attachments, for proper reaſons courts of equity might have granted injunctions. This ſtatute had indeed confined the courts of equity in caſes of ſubmiſſions under the proviſions of it; it ſaid in general that no injunction ſhould lie upon ſuch attachment: but a bill to diſcover whether there was partiality or not, he ſaid, was left as it was before, and would not affect the proceedings on the attachment. On the whole, he thought the plea ought to be overruled; but that if the reſt of the Barons thought it as well that the plea ſhould ſtand for an anſwer, he would not oppoſe it. Hale and Comyns agreed with the Chief Baron as to the principal point; Carter differed from them: but they all agreed that the plea ſhould ſtand for an anſwer, with liberty to except.[5]

In a late caſe Lord Chancellor Loughborough intimated an opinion that the juriſdiction of a court of equity was not excluded by a reference under the ſtatute; and ſaid it had never been ſo received.[6] And I ſuppoſe his Lordſhip, had the queſtion been directly before him, would have decided that the juriſdiction of a court of equity is in all caſes as little excluded by a

[5] Alardice v. Cambel in the Exchequer. 1 Barnard. 75, 152. Bunb. 265.

[6] Lord Londſdale v. Littledale, 2 Vez. Junr. 453.

ſubmiſſion under the ſtatute, as by a reference at *niſi prius*.

When the practice of referring cauſes at *niſi prius* was but new, and the courts had juſt overcome their reluctance to enforce, by attachment, awards made in conſequence of ſuch references; it was a matter of ſome difficulty, to procure relief againſt the corruption or miſconduct of the arbitrators. Holt is reported to have maintained, with even indecent warmth, that an award ſhould not be impeached for any ſuch miſconduct, and for no better reaſon than that it was contrary to all practice within his experience; which was that the integrity of the arbitrators, whom the parties, by conſent, had choſen to be their judges, ſhould never be arraigned any more than the integrity of any other judge. The other three judges,[7] however, could not adopt the ſentiments of the Chief, with reſpect to this unimpeachable integrity of arbitrators; they ſuppoſed it poſſible, that they might be influenced by corrupt motives, and ſaid, it was abominable to countenance them in ſuch proceedings, and they ought to be puniſhed for having abuſed the office of a judge. Accordingly an application being made to have an award ſet aſide, which had been made by arbitrators, choſen by the conſent of parties, under a rule of *niſi prius*, which had afterwards been made a rule of the court of King's Bench, and affidavits being produced of the miſconduct of the arbitrators, they were ordered to attend, and all their proceedings being examined, one[8]

[7] Powell, Powys, and Gould.

[8] Morris v. Sir Richard Reynolds. 2 Ld. Raym. 857.

report of the caſe ſays, great miſconduct appeared; but another[9] ſays the award was examined and confirmed; that the plaintiff moved for an attachment for non-performance; but that the court held that the non-performance, while the matter was under examination, was no contempt.

WHEN the ſubmiſſion is by reference at *niſi prius*, there is no time limited for making an application to ſet aſide an award for any cauſe, whether for corruption or for an objection appearing on the face of the award; and the defendant has the ſame advantage in ſhewing cauſe againſt an attachment being granted on the application of the plaintiff.[1]

WHEN the ſubmiſſion is by conſent to have it made a rule of court according to the ſtatute, no application can be made to have the award ſet aſide till the ſubmiſſion be actually made a rule of court;[2] but it is not neceſſary, as ſuggeſted in one book,[3] that the ſubmiſſion be made a rule of court before the award made; that may frequently be impoſſible, becauſe the award may be made in the vacation, before any term arrives after the ſubmiſſion.[4]

BY the words of the ſtatute, however, the complaint muſt be made before the end of the next term after making the award; and it is ſaid[5] that nothing is a ground within that ſtatute for ſetting aſide an award but the miſconduct of the arbitrators: and accordingly

[9] S. C. 1 Salk. 73.
[1] Vid. 2 Atk. 155, (162.) and a Dictum of Lord Macclesfiel'd's. 1 Barnard. 461. Str. 301. 2 Bur. 701.
[2] 1 Str. 301. 2 Veſ. 317. 2 Str. 1178.
[3] 3 P. W. 362.
[4] Vid. 1 Barnard. 153.
[5] 1 Str. 301.

the court will not grant a motion to ſet aſide an award for an objection appearing on the face of it; though that will be a good reaſon for refuſing an attachment to enforce it.[6] But as that ſtatute was made to put awards made according to the directions of it, on the ſame footing with awards made in conſequence of references at *niſi prius*, and is declaratory of what the law was with reſpect to them, any other objection may be made to an award founded on a ſubmiſſion of the former kind, which might be made to one founded on a ſubmiſſion of the latter;[7] and where the objection ariſes on the face of the award, it may be made at any time, on ſhewing cauſe againſt an attachment, though it be after the time allowed by the ſtatute for complaining againſt corruption.[8]

WHERE the ſubmiſſion was by conſent under an order of a court of equity in a cauſe depending there, it was formerly held that exceptions might be made to the award, as to a maſter's report. And when the party complaining of the award alleged that the arbitrators had not conſidered certain particulars, which were in iſſue in the cauſe, it was alſo held the court would order the arbitrators to certify whether they had conſidered them, and would examine into the merits of the award; and if it were found unjuſt, performance would not be decreed, even though it were expreſſed in the order of reference, that the award to be made

[6] Vid. Hutchins v. Hutchins. Andr. 297. Pedley v. Goddard. 7 Term Rep. 73.

[7] Vid. 2 Bur. 701.

[8] Barnes, 57. Id. 55 contra. Vid. Pedley v. Goddard. 7 Term. Rep. 73 acc.

ſhould be final, and confirmed by a decree of the court without exception or appeal.[9]

But this doctrine, ſo far as it relates to *exceptions* being taken to an award, has been ſince in a great meaſure overruled.—In one caſe[1] Lord Thurlow is reported to have ſaid in general terms, that where a matter in a cauſe had gone to a reference, a party could not *except* to the award, but that the queſtion of its validity muſt come on upon further directions.

In a ſubſequent caſe, exceptions having been taken to an award, a motion was made to diſcharge the order for filing them, on the ground that the award being made by perſons appointed Judges by the parties themſelves, was final and concluſive.—The Lord Chancellor[2] ſaid 'if it remained open to exceptions it ſeemed to be rather a reference than an award; that it was intended in the preſent caſe that the whole matter ſhould be referred to the arbitrators in excluſion of the court, except as to the coſts; that the proper motion would be "to ſet aſide the award," and the topics in the exceptions might be diſcuſſed on ſuch a motion:' and he expreſſed his diſapprobation of the caſes, in which the former doctrine had been maintained.[3]

In another caſe the preſent Chancellor[4] declared that if parties litigating conſented to ſubſtitute arbitrators inſtead of a maſter, they might: but if they agreed

[9] 1 Ch. Ca. 186. 1 Vern. 469, 470; 2 Vern. 109.

[1] Woodbridge v. Hilton. 1 Brown. Ch. Rep. 389.

[2] Thurlow.

[3] Rice v. Williams. 3 Brown. Ch. Rep. 163. The ſame caſe, but in a ſubſequent ſtage ſeems to be reported in 1 Vez. Junr. 365. under the name of Price v. Williams.

[4] Lord Loughborough, in Morgan v. Mather. 2 Vez. Junr. 22.

to refer the *whole* matter to judges of their own choice, HE could not correct the error of THEIR judgment on the facts.

IN two croſs ſuits depending in Chancery between Dick and Milligan, and Milligan and Dick, an order was made by conſent, by which it was referred to the Maſter to take the accounts. A reference to arbitrators afterwards took place; and by the order of reference the arbitrators were to take an account of all dealings and tranſactions, in like manner, as if the ſame had been referred to the Maſter; and it was ordered that the parties ſhould be bound and concluded by the award, and ſhould obſerve the ſame; and further directions were reſerved:—when the award was made, Dick was very much diſſatisfied with it, though no corruption or miſconduct was imputed to the arbitrators; after a great deal of diſcuſſion, however, he obtained leave to file exceptions to it; and the right to file them was ſupported on theſe grounds: that the preſent reference differed from a general reference of all matters between the parties; that the arbitrators in this caſe were only to make an inquiry in the character of the Maſter, in order to pave the way for the deciſion of the court; that by the terms of the order of reference, they were to take the accounts in the ſame manner as the Maſter, and that therefore they were under the controul of the court.—A diſtinction was admitted between a reference to an arbitrator to find only a particular fact, and a general reference of all matters where the award was to be final: but here the court[s] were all clearly of opinion, that though it was

[s] Lords Commiſſioners Eyre, Aſhurſt, and Wilſon.

expreſſed that the accounts ſhould be taken as before a Maſter, yet this was controuled by the latter words of the order, which provided that the parties ſhould be concluded and bound by the award. It was alſo admitted by the court, that where there was any thing on the face of the award, which, being compared with the proceedings in the cauſe, it appeared ought not to be there, or ſomething omitted which ought to be in it, that was proper matter of exception, but that exceptions ought to be confined to matter appearing on the face of the award, compared to matter appearing in the pleadings and the orders in the cauſe. With regard to matters of fact, however, there was an eſſential difference between a reference to a Maſter and a reference to an arbitrator; the latter was conſtituted judge of the facts without appeal, the former was only a miniſter to prepare ſomething for the court, which was really the judge: In the other caſe the arbitrator was the judge and not the court, which, by the reference, had diveſted itſelf of all judgement. This was the caſe of all arbitrations in courts of law; and there was no diſtinction as to that point between arbitrations in courts of law and in courts of equity. Why ought ſuch diſtinction to be made? becauſe, it was ſaid, a court of equity has ſomething to do upon further directions. This was an appearance of argument, that it was proper an award in a court of equity ſhould be more particular than in a court of law; but when the reference was general, and the award was to be final, the court had nothing further to diſpoſe of but the coſts.[6]

[6] Dick v. Milligan, et e conv. 4 Brown. Chan. Rep. 117, 536, 2 Vez. Jun. 23.

For what cauſes an Award may be ſet aſide.

THE moſt frequent ſubject of complaint againſt an award ariſes from ſome imputed miſconduct of the arbitrators; but neither this nor any thing elſe extrinſic of the award itſelf can be ſhewn for cauſe againſt an attachment; it muſt be made the ſubject of a ſpecific motion to ſet the award aſide.[7] If the ſubmiſſion be to three, or any two of them, and two, by any undue means, exclude the third, that alone is ſufficient to cauſe the award to be ſet aſide.[8]

So, if the arbitrators hold private meetings with one of the parties, and admit him to be heard, to induce an alteration in their award, this is ſuch groſs partiality as to induce a court of equity to ſet it aſide.[9]

WHERE an umpire was choſen by the arbitrators by throwing croſs and pyle, this was thought ſufficient reaſon to ſet aſide the umpirage.[1]

So, where the ſervant of the perſon choſen umpire had, before the award made, given out that he was ſure his maſter would award 150l. and it appeared that the arbitrators had differed, the one conſenting to give 35l. and the other inſiſting on 95l. and that the umpire coming in had given 150l.—theſe circumſtances the court conſidered as an evidence of fraud and corruption, and therefore decreed the arbitration bond to be given up.[2]

So, where the arbitrators promiſed to hear witneſſes, but afterwards made their award without hearing any,[3]

[7] Vid. Anon. Andr. 299. Holland v. Brooks. 6 Term Rep. 161.
[8] 2 Vern. 515.
[9] Id. ibid.
[1] Id. 485.
[2] Id. 101.
[3] Id. 251.

So, where they promiſed not to make their award 'till one of the parties who was not well, ſhould come abroad, but they made it before.[4]

THERE were ſeveral ſtated accounts between the plaintiff and the defendant, by which conſiderable ſums were due from the defendant, to the plaintiff, but the arbitrator, without regarding any of theſe ſtated accounts, made up an account in his own way, bringing in the plaintiff indebted to the defendant 25l. and intended to award the former to aſſign over to the latter a mortgage which he had on the other's eſtate, on which mutual releaſes were to be given. The plaintiff underſtanding what award the arbitrator was about to make, ſent a meſſenger about two or three days before the time for making the award was expired, to inform him that the plaintiff deſired him to defer making his award until he ſhould talk with him about his demands to ſupport the ſtated accounts, and know what objections were made againſt them. The arbitrator, however, would not defer making his award. The Lord Chancellor, on a bill filed by the plaintiff to have the award ſet aſide, ſaid that it was acting unduly to proceed in making the award, when the plaintiff had deſired to be heard againſt the arbitrators determining in contradiction to ſo many ſtated accounts. And though it was anſwered that the application from the plaintiff was within two or three days before the time for making the award was expired, and with an intent that no award ſhould be made; and though it did not appear that the plaintiff was ready to be heard within

[4] Id. ibid.

the time, yet as there ſeemed to be juſt ground for the plaintiff to deſire to be heard, and it was difficult to aſſign a reaſon for rejecting ſo many ſtated accounts ſo recently allowed and paſſed between both the ſubmitting parties, the court ſet aſide the award with coſts.[5] In the caſe of Ward, before mentioned, Walker, one of the arbitrators, had ſaid he would make Ward pay coſts; Lord Macclesfield thought this ſuch a declaration, that though Floyd, the other arbitrator, joined in the award, he decreed ſatisfaction to be acknowledged on the judgment on the bond of ſubmiſſion, and inverted Walker's threats by making *him* pay coſts.[6]

Lord Hardwicke approved of this decree, and on the authority of it made a ſimilar one in the caſe of Chicot and Lequeſne. There were three arbitrators, G. Vine, and Myhill: the award was made without the latter hearing it, or having an opportunity of conference to convice the others, or be convinced. It appeared in evidence, that at one of their meetings Vine ſaying he ſhould conſider and judge on plain facts, G. replied, he ſhould not mind facts, that being convinced Mr. Letellier had miſuſed the Lequeſnes, and having it now in his power he would mulct his repreſentatives. Lord Hardwicke declared, that if theſe were words of warmth only, they were a declaration made by a perſon who was to act the part of a judge; and if he carried that heat and paſſion into execution, the award ought not to be ſuffered to ſtand. If it was the reſult of his judgment on the merits, it

[5] 3 P. W. 362. Spettigue v. Carpenter.

[6] 2 Veſ. 317.

was a partial refult; his Lordfhip therefore ordered that G. and M. fhould be examined on interrogatories before the maſter, Vine having been examined before; and if it fhould come out that G. did make that declaration, he would follow the precedent, and make him pay coſts.[7]

Arbitrators had inſiſted on three guineas a piece to be paid them by each of the parties, before making their award, for their trouble and expences. The defendant refuſed to do it on his part, and the plaintiff paid the whole money. The court thought this a matter of ſo delicate a nature, and the example ſo dangerous, that they ſet aſide the award on that account, becauſe if it ſhould be ſuffered, it would be hard to diſtinguiſh what was corruption.[8]

It has been thought that the circumſtance of the arbitrator's employing the attorney, of the party in whoſe favour the award was made, to draw it up, was a proof of corruption: but there is no caſe to that purpoſe, nor does it at all appear a ſufficient reaſon for ſetting aſide an award: the arbitrator employs the party's attorney as his own: and if this objection were good, it is apprehended a great many awards might be ſet aſide which are perfectly fair.[9]

If the arbitrators appear to have an intereſt in the ſubject of the reference, a court of equity will conſider this as a ſufficient ground for ſetting aſide the award.—Therefore, where it appeared that the award related to a cargo, in which the arbitrators were intereſted, and that five days after the award made they attached

[7] 2 Veſ. 216—218. [8] B. R. H. 54. 2 Barnard. 463.
[9] Vid. 1 Barnard. 430.

the money awarded for debts owen to them by the party in whoſe favour they had awarded, the court ſet aſide the award, preſuming that the arbitrators might have ſet too great a value on the cargo, from the intereſt they had in the ſubject.[1]

It is reported to have been ſaid by Lord Hardwicke, that arbitrators are not bound to give notice to the parties of the time when, and of the particular place where, they intend to meet:[2] it is not eaſy, however, to ſee the reaſon or juſtice of this obſervation.

In the ſame caſe his Lordſhip is reported to have ſaid, "that the *only* ground to impeach an award is "collusion, or groſs miſbehaviour in the arbitrators:" This propoſition is certainly not correct.[3] Without colluſion or groſs miſbehaviour, a material miſtake in point of fact, an erroneous ſtatement of an account, even a plain miſtake in point of law, coupled with other circumſtances, are grounds for an examination in a court of equity, from the reſult of which the award may be partially affected in a greater or a leſs degree, and ſometimes totally ſet aſide.[4]

Thus, though a court of equity, where the only object of the bill is to ſet aſide an award, will not permit the plaintiff to diſcuſs legal objections to it, but will confine him to thoſe for partiality and corruption; yet if the bill, beſide praying to ſet aſide the award,

[1] 2 Vern. 251.

[2] Tittenſon v. Peat. 3 Atk. 497, (530).

[3] Vid. S. S. Company v. Bumſtead. Vin. Arb. 140. pl. 39.

[4] Cornforth v. Green. 2 Vern. 750. cited in Ridout v. Pain. 3 Atk. 462, (494).

pray alſo for an account, he will be permitted to make legal objections in order to let in ſuch an account.[5]

If indeed the arbitrators appear to be miſtaken in a *doubtful* point of law, the award may be permitted to ſtand, though the court, after great deliberation, ſhould be of a different opinion.[6]

And in a late caſe, where no lawyer could doubt upon the point of law, this diſtinction was laid down by the Court of King's Bench: That where the arbitrators, meaning to follow the law in their determination, happen to miſtake it, this is a good reaſon for ſetting aſide their award, ſo far as it is affected by that miſtake: but, where knowing what the law is, or laying it intirely out of their conſideration, they make what they conceive, under all the circumſtances of the caſe, to be an equitable deciſion, it is no objection to the award that in ſome particular point it is manifeſtly againſt law.

A man, having five grand-children by a deceaſed daughter, and a daughter living who had two children, by his will gave to his eldeſt grand-ſon, by his deceaſed daughter, a legacy of two thouſand pounds, to one of his grand-daughters by his deceaſed daughter two thouſand pounds, to each of the other three children of his deceaſed daughter, and to each of the two children of his living daughter, one thouſand pounds, and to his living daughter a pecuniary legacy, about which it was diſputed whether it was intended by the teſtator

[5] Vid. Champion v. Wenham. Ambler 245.

[6] Diſt. pr Ld. Hardwicke. 3 Ath. 462, (495.)

to be one, two, or three thouſand pounds: to his daughter, and to ſeveral of his grand-children, he gave ſeveral real eſtates, in words which conveyed only an eſtate for life to each of the reſpective deviſees. There were other bequeſts, about which there was no diſpute; and of the reſidue of his perſonal property, conſiſting of various particulars, and amounting in the whole to about twelve thouſand pounds, he made no diſpoſition. He made his two ſons-in-law executors. His eldeſt grand-ſon by his deceaſed daughter claimed the half of the book debts, and a conſiderable ſum beſides, as partner in his trade. The executors reſiſted this claim; in conſequence of which a general ſubmiſſion was made to the award of three gentlemen, who were ſuppoſed to have been well acquainted with the intentions of the deceaſed. The parties to the ſubmiſſion were the executors of the firſt part; the eldeſt grand-ſon by the deceaſed daughter of the ſecond part; and the ſame grand-ſon, the huſband of the living daughter, and the reſt of the grand-children, and the huſbands of ſuch of them as were females and married, of the third part.—The arbitrators, by their award, among other things, for which the award was not impeached, directed that the ſeveral deviſees of the real eſtate ſhould hold the ſeveral parts reſpectively deviſed to them, in fee-ſimple; that the executors ſhould pay to the eldeſt ſon of the deceaſed daughter a conſiderable ſum, as the balance due to him as partner with the teſtator; that they ſhould alſo pay him another ſum, being the moiety of the book debts due to the partnerſhip; and that the remainder of the book debts, together with all the reſidue of the perſonal property, ſhould be equally divided among the ſeven grand-children of the

teſtator.[7] The ſubmiſſion to this award was made a rule of the Court of King's Bench, under the ſtatute.—On the part of the huſband of the deceaſed daughter an application was made to the court to ſet aſide this award, on theſe objections:—firſt, that the arbitrators had declared the eldeſt grand-ſon by the deceaſed daughter of the teſtator to have been a partner in his trade, whereas, in fact, he never had been ſuch partner, and the queſtion of partnerſhip had never been diſcuſſed by the arbitrators in the preſence of the applicant; and, ſecondly, that the arbitrators had, in two particulars, taken upon themſelves to *make* a will for the teſtator, inſtead of *explaining* what he had made; firſt, that they had given to the ſeveral deviſees of the real eſtates, eſtates in fee-ſimple, whereas the teſtator had given them only eſtates for life; the conſequence of which was that the reverſion in fee belonged to the living daughter and to the eldeſt ſon of the deceaſed daughter in coparcenery; and, ſecondly, that they had directed the reſidue of the perſonal property to be divided equally among the *ſeven* grand-children of the deceaſed; whereas, by the ſtatute of diſtributions, it belonged, in equal moieties, to the *living* daughter, and to the *five* grand-children by the *deceaſed* daughter.

The firſt objection was fully anſwered by the affidavits of the arbitrators, and of the eldeſt grand-ſon of the teſtator by his deceaſed daughter; and by the ſame affidavits it appeared, that with reſpect to the real eſtates the award had only confirmed ſome agreements which had been made among the parties themſelves.

[7] Vid. this award in the Appendix.

With reſpect to the objection to the manner in which the arbitrators had diſpoſed of the reſidue of the perſonal property, the court ſuggeſting the diſtinction above-ſtated, directed that the arbitrators ſhould make an additional affidavit, and ſtate whether they had intended to follow the ſtatute of diſtributions, or had laid it intirely out of their conſideration, and decided on equitable circumſtances.

THE arbitrators made ſuch additional affidavit, in which they ſtated, "that in diſpoſing of the reſidue "among the ſeven grand-children they did not con- "ceive they were making any diſtribution of it ac- "cording to any fixed rules of law upon the ſubject, "but that they were dealing out to the ſeveral parties "intereſted what appeared to them to be, according to "the beſt of their judgment, under all the circum- "ſtances of the caſe, ſtrict and impartial juſtice, "agreeably to what they believed to have been the "intention of the teſtator."

THE court thought this a ſufficient anſwer to the objection, and diſcharged the rule.[8]

WHERE any circumſtance is ſuppreſſed by either of the parties, or concealed from one of the arbitrators, and if the arbitrator declare that had he known that circumſtance he would not have made ſuch an award, that will be a ſufficient reaſon for ſetting aſide the

[8] Ainſley v. Goff. Hilary Term, 1799.—In this caſe the court acted as a court of equity. It might have been taken as a preliminary objection to the application that the court could not under the ſtatute enter into *legal* objections to the award in this ſtage; but that objection was not ſtarted.—Vid. ante p. 341, 342.

award. Thus where certain marriage articles were ſhewn only to one of the arbitrators, and the other after the award made declared that, had he ſeen the articles, he would not have conſented to the award—Lord Hardwicke ſet the award aſide.[9]

On a ſubmiſſion at *niſi prius* of all matters in difference between the parties, the arbitrator, on ſettling all articles of account, found one of them indebted to the other in a ſum of 50l. but that the party ſo indebted was ſecurity for the other in a bond; he therefore awarded that the party indebted ſhould pay the 50l. but not until the other had either diſcharged the bond or indemnified the ſecurity againſt it. At the time of the reference the party indebted was in Ireland, and the matter was conducted on his behalf by his attorney, who was not acquainted with any other circumſtance than thoſe laid before the arbitrator; the party to whom the money was awarded indemnified the other againſt the bond or diſcharged it, and then brought an action for the 50l. holding the other to bail: it was then diſcovered that the defendant was bound as a ſecurity for the plaintiff, in another bond to a conſiderable amount; a circumſtance which was within the plaintiff's knowledge at the time of the reference, but which he had concealed. The arbitrator now ſwore that had this circumſtance of the other bond been laid before him, he would not have awarded the 50l. without providing that the plaintiff ſhould either diſcharge the ſecond bond, or indemnify the defendant againſt it. On theſe circumſtances being ſtated to the court, they

[9] 1 Atk. 77, (64.)

granted a rule to ſhew cauſe: but the event I have not heard.[1]

In the two caſes immediately preceding, it was alleged, that the arbitrator had declared, "that had he been acquainted with the facts concealed he would have made a different award." The two following caſes, however, ſhew that ſuch an allegation is not neceſſary, and that it is ſufficient "that, from the nature of the facts concealed, it may be reaſonably ſuppoſed his award would have been different."

In the time of Lord Talbot a bill was filed in Chancery for an account againſt the defendant, as Supercargo of the South Sea Company. At the hearing all matters were referred, an award was made, and mutual releaſes executed. The plaintiffs exhibited a new bill, ſuggeſting, that ſince the award they had received information of effects to the value of 119,000 dollars, concealed by the defendant from the arbitrators. The defendant pleaded the award and releaſes, and anſwered that the account taken by the arbitrators was fair and juſt, but did not anſwer to the concealment particularly mentioned in the bill. Lord Talbot, after remarking that by the expreſs words of the ſtatute awards were to be ſet aſide only for partiality or corruption in the arbitrators, declared that this rule was too confined to be applied to a bill filed in a court of equity, and that there were other reaſons equally cogent—ſuch were fraud and concealment in either of the parties. It was true, he ſaid, that arbitrators were in the nature of judges, and in ſome reſpects had a

[1] M. 1790. B. R.

greater latitude, not being confined within the rules of a court of law or equity, and therefore might make ſuch allowances as could not be admitted in the courts of judicature: but, as at law, where a judgment is obtained by fraud or ſurprize, nothing was more common than to ſet the judgment aſide; and, as upon decrees, bills of review were daily brought in this court, where evidence had ariſen, which could not be obtained at the time of the decree; ſo there was the ſame reaſon in the caſe of awards. In the preſent caſe it could not be imagined that the defendant had accounted for the matters in queſtion, and that this muſt have occaſioned a conſiderable difference in the award. For theſe reaſons the plea was overruled, and the defendant ordered to anſwer.[z]

An annuity had been granted, payable out of certain eſtates, of which part came afterwards to the plaintiff and part to the defendant. Diſputes having ariſen reſpecting the proportions in which this annuity was to be paid, a bill was filed in the Court of Exchequer, praying a decree for the apportionment of the payments; the parties ſubmitted to have the queſtion referred, by order of the court, to arbitration; the appointment was of *courſe* to be regulated by the reſpective values of the parts of the eſtate in the hands of the parties. An award was made: a bill was afterwards filed by the plaintiff, charging that the defendant, in the account he had laid before the arbitrators of the particulars of the eſtate in his hands, had ſuppreſſed ſeveral parcels, and wilfully miſrepreſented its

[z] Southſea Company v. Bumpſtead. 2 Eq. Ca. Abr. 80.

extent and value. The bill further charged that the plaintiff had not till lately discovered the fraud, and prayed to have the matter opened. One member of the court,[3] observing that the plaintiff alleged a material part of the circumstances of the case to have been unknown to him till after the award, said it might well be questioned whether this alone would have been sufficient to let in further inquiry; but they all agreed that the subsequent charge of wilful concealment by the defendant ought to preclude him from having any benefit from the award; that the suggestion was, that, according to the principle of decision actually adopted by the arbitrator, he must have drawn a different conclusion if he had not been deceived, and therefore they thought that the fact of the concealment should have been investigated.[4]

One case is reported where a court of equity set aside an award, principally on the ground of excessive damage. The plaintiff in the bill had called the defendant, who was a butcher, a bankrupt knave; the matter was submitted to arbitration, and the arbitrators gave the butcher 495l. to repair his honour. The Court of Chancery thought this excessive, and set aside the award, and directed a trial at law, and the jury gave him 10l.[5] One of the books,[6] however, in which this case is mentioned, says that the court did not set aside the award merely for excessive damages, but because it appeared that one of the referees was the

[3] Mr. Baron Thompson.

[4] Gartside v. Gartside. 3 Anstr. Rep. Exch. 735.

[5] Butcher of Croydon's case. 3 Chan. Rep. 76. 2 Vern. 251. 1 Eq. Ca. Abr. 49, (50.)

[6] Vern. 254.

butcher's couſin: yet it muſt be obſerved, that the exceſs of damages muſt have been the principal reaſon, becauſe it is certain the relationſhip of the arbitrator to the party is not a reaſon for impeaching an award.

By the Roman law, the party who thought he had reaſon to complain of an award might be relieved againſt it for reaſons of the ſame nature with thoſe which are the foundations of relief in our courts.[7]

Where the ſubmiſſion is under the ſtatute or by reference at *niſi prius*, the court will liſten to an application to have the award ſent back to the arbitrator to reconſider it, on the ſuggeſtion that he had not ſufficient materials before him; and perhaps too, to rectify any trifling or apparent miſtake: but when the ſubmiſſion is according to the ſtatute, ſuch application muſt be made, within the time thereby preſcribed, though no miſconduct be imputed to the arbitrator.[8]

If an award appear on the face of it to be contrary to the rules of a court of equity, that will be a reaſon

[7] Ita demum autem committetur ſtipulatio, cum adverſus eam quid fit, ſi ſine dolo malo ſtipulantis factum eſt: ſub hac enim conditione committitur ſtipulatio, ne quis doli ſui præmium ferat. Sed ſiquidem compromiſſo adjiciatur, *ſiquid dolo in ea re factum ſit*: ex ſtipulatu conveniri, qui dolo fecit, poteſt. Et ideo, ſi arbitrum quis corrupit vel pecunia, vel ambitione, vel advocatum diverſæ partis, vel aliquem ex his quibus cauſam ſuam commiſerat; vel ſi adverſarium callide circumvenit. Et omnino ſi in hac lite doloſe verſatus eſt: locum habebit ex ſtipulatu actio. Et ideo, ſi velit de dolo actionem exercere adverſarius: non debebit cum habeat ex ſtipulatu actionem. Quod ſi hujuſmodi clauſula in compromiſſo adſcripta non eſt, tunc de dolo actio, vel exceptio locum habebit. Hoc autem compromiſſum plenum eſt, quod et doli clauſulæ habet mentionem.—Ff. l. 4. t. 8. ſ. 31.

[8] 2 Term. Rep. 781.

for ſuch a court to ſet it aſide; as if it concern an infant, to whom a ſum of money is awarded; and it is alſo awarded that the guardian ſhall give a bond that the infant ſhall, at his full age, convey certain land in diſpute: for this, it has been ſaid, is inequitable, becauſe the infant may die, or if he live to full age, may refuſe to convey.[9]

How far an Award may be pleaded to a bill filed to ſet it aſide.

In our books mention is frequently made with approbation of a maxim adopted from the civil law, "that, that againſt which "relief is prayed cannot be pleaded in bar "of ſuch relief."[1] Yet there are two caſes to which this maxim ſeems peculiarly applicable, but in which it has ſeldom prevailed; I mean the caſe of an award, and the caſe of a releaſe.

The learned author of "a treatiſe of the pleadings by Engliſh Bill," following the authority of decided caſes,[2] has without any comment expreſſive of diſapprobation, laid down, 1ſt, "That an award may be "pleaded to a bill to ſet aſide the award, and open the "account; and that it is not only good to the merits "of the caſe, but likewiſe to the diſcovery ſought by "the bill. But that if fraud or partiality be charged "againſt the arbitrators, thoſe charges muſt not only "be denied by way of averment in the plea, but the "plea muſt be ſupported by an anſwer ſhewing the "arbitrators to have been incorrupt and impartial."—2dly, "That if the plaintiff has releaſed the ſubject of

[9] 1 Ca. Ch. 279, 280.

[1] Non competit exceptio ejuſdem rei, cujus petitur diſſolutio.

[2] 2 Atk. 395, 501.

" his demand, the defendant may plead the releaſe in " bar of the bill which prayed that the releaſe might " be ſet aſide, notwithſtanding the objection that a plea " of the releaſe is in ſuch a caſe *exceptio ejuſdem rei* " *cujus petitur diſſolutio*." [3]

HAVING, without ſucceſs, taken a great deal of pains to reconcile this doctrine to my own notions of propriety and conſiſtency in pleading, I will detail the moſt remarkable of the caſes I have been able to find on the ſubject, and ſubmit a few remarks to the conſideration of the reader.

A. and B. partners in a concern of buying and ſelling diamonds in France in the year 1719, having ſome diſputes, ſubmitted them to arbitration; the arbitrators made their award, with which A. not being ſatisfied, filed a bill in chancery againſt B. and the arbitrators for an account, and to have the award ſet aſide: B. as to the account pleaded the award; and the arbitrators, as to a diſcovery of ſeveral particulars prayed by the bill, and as to any relief againſt *them*, pleaded the ſubmiſſion, and that by conſent, it was made an order of this court.—The Lord Chancellor allowed B.'s plea as to the account, but over-ruled the plea of the arbitrators as covering too much, that is to ſay, ſeveral particulars, which might tend to ſhew a partiality in their proceedings.[4]

HAD the bill taken no notice of the award, but prayed merely for an account, I can ſee the good ſenſe

[3] Mitford 209.

[4] Godfrey v. Boucher, 4 G. 2. 3 Vin. Arb. 139. pl. 38. cited 2 Eq. Ca. Abr. 92. pl. 4.

of allowing the former to be pleaded in bar of the latter, provided the former cannot be impeached on any of the grounds on which an award may be impeached: but here the bill ſtates the award, with reaſons of complaint againſt it, and prays that it may be ſet aſide as a preliminary ſtep towards taking the account.—I cannot underſtand how the award itſelf, the very object of complaint, ſhould be ſet up as an obſtacle to relief againſt that complaint.

In 1730 a bill was filed by the South Sea Company againſt Bumſtead, one of their ſupercargos: at the hearing all matters were referred; an award was made, and mutual releaſes were executed.—The Company brought a new bill, ſuggeſting that ſince the award, they had received information of effects to the value 119,000 dollars, concealed by the defendant from the arbitrators. The defendant pleaded the award and releaſes, and anſwered that the account taken by the arbitrators was fair and juſt, but did not anſwer to the concealment particularly mentioned in the bill.—Lord Chancellor Talbot ſaid, "It is a rule, and ſo are the "expreſs words of the ſtatute, that awards made "between parties ſhall not be ſet aſide but for cor-"ruption or partiality in the arbitrators; but there are "other reaſons equally miſchievous and proper for "relief in this court; as where there is fraud or con-"cealment in either of the parties. It is true arbi-"trators are in the nature of judges, and in ſome "reſpects have a greater latitude, not being confined "within the rules of law or equity, and therefore may "make ſuch allowances as could not be admitted in "courts of judicature: but as at law, where judgments "are obtained by fraud or ſurprize, nothing is more

"common than to ſet the judgment aſide; ſo upon "decrees, bills of review are daily brought in this "court, where evidence ariſes which could not be "obtained at the time of the decree: there is the ſame "reaſon in the caſe of awards; and in this caſe, it "cannot be imagined that the defendant had accounted "for theſe matters, ſuppoſing the fact to be true, for "this would have occaſioned a conſiderable difference "in the award:" for *this* reaſon the plea was over-ruled, and the defendant ordered to anſwer.[5]

THE plea, therefore, was over-ruled; not becauſe it was conſidered as improper in itſelf, but becauſe it was not ſupported by an anſwer to the charge of concealment. Had that charge been anſwered, the plea would have been ſuſtained: but it may be remarked that had anſwered, the charge been the plea would have been unneceſſary.

SIR Edward Deſbouvrie, a freeman of London, poſſeſſed of a very great perſonal eſtate, had a wife, a ſon, and a daughter. He compounded with his wife as to her cuſtomary ſhare, and made his will, by which he gave to his daughter 10,000l. upon condition that ſhe ſhould releaſe her orphanage part, together with all her claim or right to his perſonal eſtate by virtue of the cuſtom of the city of London, or otherwiſe, and made his ſon executor, his daughter being about twenty-three years of age.

AFTER the death of the teſtator, the daughter agreed with her brother to accept the legacy on the

[5] South Sea Company v. Bumſtead, 15 March, 1734. 2 Eq. Ca. Abr. 80. pl. 8. 3 Vin. Arb. 140. p. 39. not ſo diſtinctly reported in the latter book as in the former. Vid. this caſe ante, p. 356.

terms on which it was given her by her father's will: a releaſe was accordingly prepared, and before ſhe executed it, her brother informed her, that ſhe had it in her election, to have an account of her father's perſonal eſtate, and to claim her orphanage part.—She declared ſhe would accept of the legacy, that being a ſufficient proviſion for any young woman; ſhe executed the releaſe, and her brother paid to her the 10,000l. with intereſt.—She afterwards married an attorney, who filed a bill to have this releaſe ſet aſide, charging that the perſonal eſtate of which the father died poſſeſſed, was much above 100,000l. the daughter's ſhare of which by the cuſtom would, under all the circumſtances of the caſe, amount to upwards of 40,000l.

The brother, the defendant, pleaded this releaſe.

On behalf of the plaintiff it was argued, that as the bill was filed for the purpoſe of having this releaſe ſet aſide, the defendant ought not to be admitted to plead it in bar, the rule being "non poteſt adduci exceptio "ejuſdem rei cujus petitur diſſolutio." But the Lord Chancellor interrupted the counſel, ſaying, this was every day's practice; and that otherwiſe "no releaſe "or award could be pleaded to a bill that was brought "to ſet aſide the ſame."[6]—The maxim being adopted, the conſequence is inevitable, "that no releaſe or award can be pleaded to a bill brought to ſet them aſide:" and I think it is againſt good ſenſe to permit them to be ſo pleaded.

[6] Puſey v. Sir Edward Deſbouvrie, 3 P. Wms. 315, 316.

Lingood and Eade had been partners in trade; upon the diſſolution of the partnerſhip, ſome diſputes ariſing, a ſuit in chancery was for ſome time carried on between them; in the courſe of which a propoſal was made and accepted, of referring all matters in controverſy, and the ſubmiſſion was made an order of that court: one condition was that the arbitrators ſhould be reſtrained from bringing a bill in equity againſt the arbitrators: they awarded that 9150l. were due to Eade on the balance of accounts: Lingood brought a bill againſt the arbitrators and Eade, charging corruption and partiality, and praying that they might ſet forth the general accounts between the plaintiff and the defendant Eade relating to the partnerſhip.—To ſo much and ſuch part of the bill as ſought a general account the defendants refuſed to make diſcovery, and pleaded the award in bar.

The bill further prayed a diſcovery on what account or accounts of the parties the arbitrators founded their award.

To this part alſo, they refuſed to diſcover, and pleaded the award itſelf in bar.

Lord Hardwicke is reported to have ſaid: "There "are many inſtances in this court, where arbitrators, "to a bill charging corruption and partiality, may "plead the award in bar to the diſcovery; but then it "is incumbent upon them to ſupport their plea, by "ſhewing themſelves incorrupt and impartial, or other-"wiſe the court will give a party a remedy, by making "arbitrators pay coſts."

"The great doubt with me is, as this award ſeems "executory and not final, whether it is a good award

" at law, then how can the arbitrators plead it in bar " to the diſcovery, prayed by the bill?"[7]

HERE it may be remarked, that an award can only be impeached either from objections appearing on the face of it, or from extrinſic circumſtances, ſuch as improper conduct in the arbitrators, or concealment in one of the parties: if the plaintiff ſeek to ſet aſide the award from any alleged intrinſic defect, he will, of neceſſity, expoſe ſuch defect by his bill: if in doing this he ſet out the *whole* award fairly, it ſeems altogether irreconcileable to common ſenſe, that the defendant ſhould be permitted to anſwer the complaint againſt the award, by pleading the award itſelf with all its alleged defects.—In ſuch a caſe, if the defendant think he can ſupport the award on its intrinſic merits, the proper mode of doing this ſeems to be, to demur to the bill.—If the plaintiff ſet out the award partially, ſtating only ſuch parts as he ſuppoſes, taken by themſelves, would render the award void, this may ſometimes be anſwered by the defendant, by ſtating ſuch other parts as, coupled with the apparently faulty parts ſtated in the bill, would render the whole valid: but I apprehend this might as well be done by anſwer as by plea.[8]

WHEN the ground of impeaching the award ariſes from extrinſic circumſtances ſtated in the bill, the above dictum admits that the mere ſtatement of the

[7] Lingood v. Croucher. 2 Atk. 395, (411.)

[8] This reaſoning proceeds on the aſſumption that a bill will lie to ſet aſide an award merely from objections appearing on the face of it, which however, it has been ſeen, is not the caſe.—Vid. ante, p. 327.

award by way of plea is not ſufficient without a denial of thoſe extrinſic circumſtances in ſupport of it. As the complaint againſt the award ariſes from thoſe extrinſic circumſtances only, I apprehend the mere denial of them, *without* a plea, would be a ſufficient anſwer to the bill.

LINGOOD had preferred his petition to ſet aſide the award in the matter between him and Eade;[9] this petition was diſmiſſed, but without prejudice to his bringing a bill for the ſame purpoſe: he brought a bill accordingly againſt the arbitrators and Eade, by which he prayed that he might have inſpection of all the accounts, from which the arbitrators framed their award; that the award might be ſet aſide, and that the defendant Eade might account generally for all tranſactions during his partnerſhip with the plaintiff.

EADE pleaded, that in former cauſes between him and the plaintiff in this court, an order was made the 18th of November 1740, at the requeſt and by the conſent of the parties, that all matters in difference between them relating to their joint dealings, or otherwiſe, ſhould be referred to certain perſons whom he named in his plea, the award to be made on the firſt day of May then next; that by a ſubſequent order of court, with the conſent of the plaintiff's counſel, the time for making the award was enlarged till the firſt of November, and by a third order till the firſt of February; that the arbitrators met 45 times, the plaintiff

[9] The reference muſt, therefore, have been made under an order of the court, in the courſe of a cauſe depending, otherwiſe the court could not have entertained this petition.

and defendant being preſent at the greateſt number of the meetings, and having fully heard and examined the plaintiff and the defendant, and their ſeveral witneſſes, made their award within the time limited: and among other things declared that they had taken an account of the outſtanding debts due to or owing by or from the complainant and the defendant, or either of them, on account of their joint dealings, and they awarded that each ſhould pay and diſcharge one equal moiety of the ſeveral debts therein mentioned; that is to ſay, to Samuel Torin 92l. 10s. 9d. to Slingſby Bethel 82l. 18s. 2d. and to John Hide 15l. which the ſaid arbitrators found to be then remaining due from the complainant or defendant, or one of them, on their joint accounts, be the ſame more or leſs than as above mentioned.

That the arbitrators have ſet forth in a ſchedule to their award, an account of ſundry debts and effects owing to the partnerſhip, amounting to 5094l. 14s. 2d. which debts and ſecurities they awarded to belong in moieties to the plaintiff and the defendant; and for the better getting in the ſame, the arbitrators recommended to the defendant and complainant to conſent that an order might be made by this court for the appointment of a proper perſon, converſant in mercantile affairs, to collect in the ſame for their joint uſe; and in caſe either of the parties ſhould refuſe to conſent thereto, the arbitrators did make it their humble requeſt to this court to order the ſame, as the moſt probable means of preventing future litigation between the parties.

That the arbitrators did award and declare, that excluſively of the above matters, there was then due

from the plaintiff to the defendant the ſum of 9194l. 19s 6d. on a juſt balance, which they awarded to be paid by the plaintiff to the defendant by inſtalments of 2000l. on each payment, with intereſt at 4l. per cent. from the ſecond of the ſame February.

THAT laſtly they did award, that upon payment of the ſaid ſum of 9194l. 19s. 6d. the plaintiff and defendant ſhould mutually execute and deliver to each other reſpectively a good and ſufficient releaſe and diſcharge, (the form to be ſettled by one of the maſters of this court, in caſe this court ſhould be pleaſed to give directions for the ſettling thereof), whereby the ſaid parties ſhould reſpectively releaſe to each other all matters in difference between them relating to their joint dealings, &c.

"THE defendant for plea further ſaith, that all the "ſaid particulars ſo awarded are fair and juſt; all "which matters and things he pleads in bar to the "plaintiff's bill, and ſubmits to the court, whether he "is obliged to make any other or further anſwer."

THE validity of this plea being argued before Lord Hardwicke, on the validity of the award, his Lordſhip expreſſed himſelf thus: "Though the bill is brought "for two purpoſes, yet one is conſequential to the "other. Firſt to ſet aſide the award. Secondly for a "general account.

"THE prayer of the bill to ſet aſide the award muſt "be founded upon the fraud, corruption, or miſbe-"haviour of the arbitrators; for it would be improper "to come into this court to ſet it aſide merely for an "objection in point of form. The other part of the "bill is the original right the party had before the "award."

"I MUST conſider the plea as it is pleaded to the "latter part of the bill, the general account. For to "be ſure, the plaintiff is intitled to an account, unleſs "the award is a bar; and therefore the court muſt "enter into all the legal objections againſt the award, "which a court of law would have done, as it is in- "ſiſted on by the plea to prevent the general account."

THAT the bill was brought for two purpoſes; to ſet aſide the award, and for a general account; and that the latter was conſequential to the former: that the prayer of the bill to ſet aſide the award muſt be founded on the fraud, &c. of the arbitrators; that it would be improper to go into a court of equity to ſet aſide an award merely for an objection in point of form; and that the other part of the bill is the original right the plaintiff had before the award: all this I underſtand.—

HAD the bill been brought to have an account on the mere ſtatement of the original tranſactions without taking any notice of the award, and had the defendant pleaded the award in bar of that account, then I could have underſtood that the whole queſtion before the court was the legal validity of the award: and the award being pleaded to a bill ſeeking to ſet *aſide* the award, and to have an account, I can alſo underſtand, that unleſs that award be proof againſt all legal objections, it ſhall *not* be admitted as a plea in *bar* of the account: but admitting the award thus pleaded to be ever ſo valid in point of law, I can*not* underſtand why it *ſhould* be admitted as a plea in bar of the account, when the very foundation of the complaint againſt it is not its legal invalidity, but ſome extrinſic circumſtance which renders it inequitable that the plaintiff ſhould be bound by it.

Lord Hardwicke himſelf, indeed, ſeems in a conſiderable degree to have conſidered the ſubject in the ſame light; for, though after having minutely examined all the legal objections to the award, he ſaid "he was of opinion it was good to a common intent, "and that the plea conſequently muſt be allowed "againſt the general account;" yet he added, "that "the plaintiff was not precluded at the hearing of the "cauſe from objecting to the award for fraud or par-"tiality in the arbitrators:" which was in effect admitting that the plea of the award ſhould not ſtand in the way of the plaintiff's having a general account, if he could effectually impeach it from extrinſic circumſtances.[1]

In a ſubſequent caſe,[2] reported by the ſame reporter, from whom the two caſes immediately preceding are taken, the nature of the bill is not ſtated; it is ſimply alleged that the defendant pleaded an award.

The Lord Chancellor ſays, "a plea of an award is "not only good to the merits of the caſe but to the "diſcovery; for a defendant to the bill is not obliged "to ſet out the whole account between him and the "plaintiff, after an award in his favour, in relation to "that very account, for that is concluſive to all the "parties, till an error is ſhewn in taking the account, "or partiality and improper behaviour in the arbitra-"tors; and if any particular error is pretended, the "plaintiff ought to charge it with all its circumſtances, "nor is he precluded from moving it now if he has "evidence that will amount to it."

[1] Lingood v. Eade. 2 Atk. 501, (515.)

[2] Tittenſon v. Peat. 3 Atk. 496, (529.)

To all theſe obſervations, taken as independent propoſitions, I can eaſily aſſent; and if the bill had been merely for an account, without taking any notice of the award, I think they would have been properly uſed in ſupport of the plea: but Lord Hardwicke's obſervations in another part of the caſe, with reſpect to the grounds on which an award may be impeached, ſhew that the bill was to ſet aſide an award as well as for an account.

On the ſuppoſition that an award *may* be pleaded to a bill filed for the purpoſe of having it ſet aſide, it has been queſtioned how far ſuch a plea is proper without containing averments, denying the charges in the bill, of circumſtances extrinſic to the award.

In a caſe at the Rolls, June 1786,[3] it appeared, that to ſet aſide an award on the ground of colluſion, and want of notice to the plaintiff to attend at the making of the award, the defendant pleaded the award, and that the plaintiff had full notice; that an agent from him attended, and there was a full diſcuſſion before the award was made. There was alſo an anſwer containing ſimilar averments of the fairneſs of the tranſactions. It was objected that it was improper theſe averments ſhould be both in the anſwer and plea; but his Honour overruled the objection, obſerving that an award nakedly pleaded would be "exceptio ejuſdem rei cujus petitur diſſolutio," and is no full bar to the demand without denial of colluſion and partiality.

A BILL filed to open an account for fraud ſtated particular inſtances of error and fraud in the account, and

3 Butcher v. Cole, before Sir Lloyd Kenyon, cited 1 Anſtr. Rep. in the Exchequer. 99.

that there had been a reference and an award, but charged that there would not have been ſuch an award if papers had been produced which had been withheld by the defendant.

To this bill the defendant pleaded the award, and in the plea alſo ſtated a releaſe of the matters contained in the bill.

THE Lord Chancellor[4] allowed the plea.[5]

A BILL filed in the Exchequer for an accouut ſet forth an award, and charged that it was obtained corruptly, ſpecifying the corrupt tranſaction. The defendant pleaded the award, denying corruption and all the particular inſtances ſpecially, by way of averment; and alſo put in an anſwer to the ſame points, as the ſpecial averments in the plea.

AN objection was taken by the Lord Chief Baron,[6] that the anſwer overruled the plea. It was argued, that it was neceſſary that the plea ſhould be a complete bar, and alſo that it ſhould be ſupported by an anſwer denying the ſpecial charge of corruption; and at all events, if theſe averments in the plea were not neceſſary, they were to be rejected as ſurpluſage.

To this the court obſerved, that the meaning of a a plea is to let the party ſtand upon a ſingle point, which bars the whole demand, without going into an anſwer as to the reſt of the bill; but that this intent would be totally defeated if the plea were allowed to contain averments denying the whole charges of the bill, tending to impeach the award.[7]

[4] Lord Thurlow.

[5] Burton v. Ellerton. 3 Brown Cha. Rep. 196. 16 Jan. 1791.

[6] Eyre. [7] Pope v. Buſh. 1 Anſtr. 59.

I APPREHEND this to be the correct deſcription of a plea; but the true conſequence ſeems to be, not that an award pleaded nakedly is a proper plea to ſuch a bill, but that the award ought not in any ſhape to be pleaded to a bill filed to ſet it aſide.

A BILL filed to ſet aſide an award, and open tranſactions, ſtated many circumſtances of improper conduct in the arbitrators. The defendant pleaded the award, and in his plea denied colluſion, and all the charges of miſconduct. To this plea there was joined an anſwer denying ſpecifically all the ſame charges, and ſtating the ſame things contained in the averments in the plea.

IN objection to this plea, the caſe immediately preceding was cited as an authority; and in favour of it the counſel for the defendant relied on the caſe at the Rolls.

THE court conſidered themſelves bound by their own deciſion to hold that the award muſt be pleaded nakedly, but declared they did not mean to extend this rule beyond the caſe of awards; and thinking it would be too much to overrule a plea on this objection, therefore gave the defendant leave to amend, if the plaintiff ſhould inſiſt upon it, otherwiſe to be good by conſent.[3]

A BILL was filed to ſet aſide an agreement and releaſe, ſtating circumſtances of impoſition and equitable dureſs in obtaining them. The defendant pleaded to the whole, the agreement and releaſe: there was no anſwer, nor was the fraud or dureſs denied in the plea.

[3] Edmunſon v. Hartley. 1 Anſtr. 97.

THE court overruled the plea, and leave being prayed to amend they refuſed it, ſaying it was a practice not be encouraged.[9]

THE defendant put in a new plea, of the releaſe alone, to ſo much of the bill as ſought diſcovery of *tranſactions prior* to the agreement, and to the whole relief ſought, accompanied by an anſwer denying the whole equity charged as to the manner of obtaining the agreement and releaſe.[1]

HERE it may be remarked, that in the firſt caſe the court, by overruling the plea, ſeem to have acted completely on the maxim "haud competit exceptio ejuſdem rei cujus petitur diſſolutio;" and that in the ſecond, the *plea* of the releaſe in bar of the diſcovery of *tranſactions prior* to the agreement did not contradict that maxim, becauſe it was not pleaded as a reaſon why the releaſe itſelf ſhould not be ſet aſide, nor in bar of the diſcovery of the circumſtances under which that and the agreement had been obtained. The court, however, did not enter into the *validity* of the plea: but a motion being made that this ſecond plea and anſwer might be taken off the file, as being irregular, and contrary to the former order of the court in overruling the firſt plea, the Chief Baron expreſſed his approbation of the motion; and the reſt of the court doubting, the caſe ſtood over, and was never mentioned again.

A BILL filed in the Exchequer to ſet aſide an award ſtated that the plaintiff and defendant were partners in

[9] Freeland v. Johnſon. 1 Anſtr. 276.

[1] Caſe between the ſame parties. 2 Anſtr. 405.

trade, and agreed to diſſolve their partnerſhip, and that to ſettle accounts amicably they fixed upon two arbitrators. Their award appointed certain perſons to collect the effects and pay all the debts, and to pay over the ſurplus equally between the plaintiff and the defendant. The bill then ſtated that the receiver had collected the effects, but that there was ſtill a deficiency, the debts not being all diſcharged; and that ſeveral demands had been enforced againſt the plaintiff, for which he called upon the defendant to contribute. "The bill alſo prayed that an account might be taken "of the effects of the partnerſhip and of the debts."

To the bill the defendant pleaded the award.

To this plea it was objected that the award ſuppoſed a balance in *favour* of the partnerſhip, whereas a deficiency had taken place; that the arbitrators had not provided for this contingency, and of courſe the award was not final; and that the plaintiff had been called upon by the creditors, and ought to be reimburſed.

THE court thought that the bill ought to have *ſpecified* the objections to the award, as a final ſettlement of the account: that it ought to have ſet forth the deficiency, and what debts in particular the plaintiff had been called upon to diſcharge; and that, till theſe ſpecific objections were made to the award, it muſt be conſidered as final. The plea was for the preſent allowed, but was ſet down for re-hearing.[2] When it came on to be heard again, in addition to the former ſtatement, it appeared, that by the award the arbitrators directed that the partnerſhip ſhould, as between

[2] Routh v. Peach. 2 Anſtr. 519.

the partners, be conſidered as having ended at a day then paſſed, and that the plaintiff ſhould be at the riſk of all debts incurred ſubſequently to that day.—The bill ſtated that the debts diſcharged by the plaintiff, and for a contribution to which this bill was filed, were incurred by the partnerſhip.

THE court thought that this *might* apply to debts incurred *after* the day fixed by the award, after which the plaintiff was to ſtand to the riſk of debts: from that day, as between the parties, the partnerſhip was conſidered as diſſolved, but as between them and their creditors it ſtill ſubſiſted. The arbitrators had proceeded on a ſuppoſition that the partnerſhip effects were ſufficient to pay all demands up to that time, and the court would preſume that the ſuppoſition was well founded until it was expreſsly negatived. The order for allowing the plea was affirmed.[3]

HERE it may be obſerved that the court decided not on the ground of the propriety of the plea, but on the defect of allegation in the bill, which might have been the foundation of a demurrer.

AN annuity had been granted by A. B. payable out of certain eſtates, part of which came afterwards to the plaintiff and part to the defendant. Diſputes ariſing about the proportions in which the annuity was to be paid, a bill was filed in the Court of Exchequer: in the progreſs of the ſuit the parties ſubmitted to have the matter referred to arbitration, under an order of the court—and an award was made. Another bill was filed, charging that the defendant, in giving in to the

[3] Routh v. Peach. 3 Anſtr. 637.

arbitrator the particulars of the eſtate in his hands, wilfully miſrepreſented its extent and value, by ſuppreſſing ſeveral parcels, the proportion which each was to pay depending on the relative values of the parcels in their hands. The bill further charged that the plaintiff had not till lately diſcovered the fraud, and prayed to have the matter opened.

The defendant pleaded the award alone, and did not put in any anſwer.

The queſtion turned upon the validity of this plea, and caſes were cited on both ſides. On the behalf of the plaintiff it was obſerved, "that it was a mere con-"fuſion of terms to ſuppoſe that an award is a bar to "any inquiry concerning the *mode* in which the award "itſelf was obtained; that it only barred inquiry into "all the matters ſubmitted to the arbitrator, while the "award remained good, but that even if all was fairly "ſubmitted to him, yet groſs and apparent errors in "the award may be ſet right by a court of equity."

The court thought the charge of concealment ought to be anſwered; and Mr. Baron Perryn, in particular, ſaid, that the award could not preclude the inveſtigation of that charge—it was exactly "exceptio ejus-"dem rei cujus petitur diſſolutio." [4]

It ſeems then to be now ſettled, that where a bill is filed to have an award ſet aſide, on the ground of extrinſic circumſtances, the award cannot alone be pleaded in bar of that prayer without denying the charge of thoſe circumſtances, either in the plea or in a diſtinct anſwer; but it does not ſeem now to be conſidered as material whether it be by the one or by the other, or by both.

[4] Gartſide v. Gartſide. 3 Anſtr. 735.

I CAN diſcover nothing in any of the above caſes, or in all of them taken together, which ſhews the neceſſity or the propriety of *pleading* the award at all in bar to a bill filed to have it ſet aſide. The charges on which the award is impeached *muſt* be anſwered, and the denial of them is a *ſufficient* anſwer; the plea, therefore, of the award cannot be *neceſſary*; and I think, if the nature and office of a plea be conſidered, it will be manifeſt that *ſuch* a plea is not *proper*.

" THE form of making defence varies according to " the foundation on which it is made, aad the extent " in which it ſubmits to the judgment of the court.— " If, on the foundation of *new* matter offered, it de- " mands the judgment of the court whether the de- " fendant ſhall be compelled to anſwer further, it is " termed a *plea*."

" A plea is intended to prevent further proceeding " at large, by reſting on ſome point founded on mat- " ter ſtated in the plea; and as it reſts on that point " *merely*, it admits, for the purpoſes of the plea, the " truth of the facts contained in the bill, ſo far as they " are not *controverted* by facts ſtated in the plea."

" THE defence proper for a plea is ſuch as reduces " the cauſe, or ſome part of it, to a ſingle point, and " from thence creates a bar to the ſuit."

" THE end of a plea is to reduce the cauſe, or the " part of it covered by the plea, to a ſingle point, in " order to ſave expence to the parties, or to protect " the defendant from a diſcovery which he ought not " to be compelled to make." [5]

[5] Mitford's Treatiſe on the Pleadings in Equity, 14, 15, 177, 234.

A BILL filed to have an award ſet aſide neceſſarily ſets out at leaſt the *ſubſtance* of the award; to plead the award itſelf, therefore, is not "to demand the judg-"ment of the court, on the foundation of *new* matter "offered:" and as the defendant *muſt* anſwer the *charges* in the bill, on the foundation of which the plaintiff ſeeks to be relieved againſt the award; as the plaintiff may, notwithſtanding the fulleſt denial of thoſe charges by the defendant, ſtill proceed to prove them at the hearing of the cauſe;[6] and as, in caſe he be ſucceſsful, the inevitable conſequence is that the award will be ſet aſide, and the parties put in the ſame ſituation in which they were before the ſubmiſſion to arbitration: "The cauſe is not, by the plea, reduced "to a ſingle point; no expence is ſaved to the parties; "nor is the defendant protected from a diſcovery from "which it was the object of the plea to protect him."

[6] Vid. 2 Atk. 521, (506.)

CHAP. IX.

The EFFECT *of the* AWARD *in precluding the* PARTIES *from ſuing on the original* CAUSE *of* ACTION, *which was the* SUBJECT *of the* REFERENCE.

AS the object of every reference to arbitrators is to have an end put, by the deciſion of a domeſtic tribunal, to all controverſy reſpecting the ſubject referred, no rule is more conſonant to good ſenſe than that which precludes the one party from harraſſing the other with an action on the original ſubject of diſpute. The ancient law, accordingly, provided a remedy by action for him who was ſo harraſſed; for as ſoon as he was ſued on the original cauſe of action he might ſue out a ſpecial writ of treſpaſs on the caſe, which is to be found in the Regiſter,[1] by the name of *Breve de Arbitratione factâ*, on which he might recover damages for the vexation; and it were good, ſays Lord Coke, that ſome one would ſue that writ.[2] The wiſdom of his Lordſhip's obſervation is, however, very queſtionable, as the defendant has a much leſs expenſive, and

[1] Reg. Br. Orig. 111. a. [2] 3 Bulſtr. 63, (66.)

a much more ſpeedy remedy, in the privilege of pleading the award in bar of the plaintiff's action.

To what action an award may be pleaded in bar it is not neceſſary here to point out; that queſtion will be ſufficiently anſwered by a peruſal of the chapter on the ſubject of reference,[3] an award being pleadable in bar to every action brought on a queſtion which may be referred to arbitration.

The queſtion, what award may be pleaded in bar admits in general of an anſwer equally ſhort; it muſt have all the qualities neceſſary to conſtitute a good award, and muſt be ſuch, if it be pleaded without performance, that the plaintiff may have a remedy to compel performance: but, if performance be alleged, a void award may frequently be a good bar. An award, however, which is in itſelf uncertain, and cannot be aſcertained by averment, cannot be pleaded in bar.— To an action of aſſumpſit for work and labour done, the defendant pleaded an award "that the plaintiff ſhould be ſatisfied for the days work and taſk work he had done for the defendant; but no value was put, by the arbitrator, on the work; and that then the plaintiff ſhould pay to the defendant 25l. and give him a general releaſe of all controverſies:" the defendant then averred that the taſk work and days work were worth 12l. 10s. and no more, and that he had paid and ſatisfied the plaintiff that ſum. But the plea was overruled, becauſe the arbitrator himſelf had not valued the work.[4]

[3] Cap. 3. page 50 et ſeq.

[4] Pope v. Brett. 2 Saund. 292. 2 Keb. 736. vid. 1 Keb. 754. Dudley v. Cole.

WHERE an award, it is ſaid, creates a new duty, inſtead of that which was in controverſy, the party has a remedy on the award, and therefore if he reſort to an action on that which was referred, the award is a good bar to that action: but where the award does not create a new duty, but only extinguiſhes the old by releaſe, the award is no bar to an action on the original demand. On this principle, where an action of aſſumpſit was brought on an agreement for the delivery of a certain quantity of hops, and the defendant pleaded a ſubmiſſion to arbitration, and an award that each ſhould give to the other general releaſes, and ſhewing that he had always been ready, and ſtill was, to ſign and ſeal a releaſe; this was held to be no bar, becauſe nothing, it was ſaid, was awarded in ſatisfaction.[5]

ON the ſame principle, it has been ſaid, an award "that all ſuits ſhall ceaſe," though good to make the party forfeit his bond, if he proceed in the ſuit, yet is not a good plea to the original action, becauſe it is a thing always executory and at the will of the parties, and there are no means at law to enforce the performance of it.[6] Both this and the caſe immediately preceding, however, ſeem altogether irreconcileable with good ſenſe. What reaſon can be given, why an award ſhould be conſidered as good, for the purpoſe of making the party forfeit his bond by a breach of it, and yet that he ſhould not be permitted to plead it in bar of an action for the original cauſe? While indeed it was held that no action could be maintained on an award

[5] Freeman v. Bernard. 1 Ld. Raym. 248. 12 Mod. 130 Comb. 440. 1 Salk. 69. [6] Lutw. 56, 57.

to do a collateral thing, unleſs the ſubmiſſion was by bond, it was perfectly conſiſtent with reaſon that ſuch an award ſhould be no bar to the original action, unleſs performance of it were ſhewn on the part of the defendant who pleaded it: the purpoſe of the ſubmiſſion was to decide, whether either of the parties was entitled to complain againſt the other, to give *him* a recompence, to *whom* the arbitrator thought it was due, and by that recompence to put an end to the diſputes ſubmitted: if therefore performance could not be compelled, it was reaſonable, the plaintiff ſhould not be precluded from proſecuting his action for the original complaint. But, after it came to be held that there was a remedy on an award of a collateral thing, though the ſubmiſſion was not by bond, it ſeems altogether inconceivable, why any caſe ſhould be excepted, in which the award ſhould not be a good plea. If the party, on an award that all ſuits ſhall ceaſe, muſt forfeit his bond, by going on with his action, or where it is that he ſhall give a releaſe, by not giving that releaſe accordingly; or if, where the ſubmiſſion is verbal, an action may be maintained on the ſubmiſſion, for a breach in continuing the action, or not giving the releaſe; why ſhould not the award of the one or of the other be a good plea to an action for the original cauſe?

An award, which does not extend to the whole of the thing demanded, is not a good plea to an action on the demand.[7]

To an "indebitatus aſſumpſit," and "quantum meruit" for work done, and goods ſold and delivered,

[7] Farrer v. Bates. Al. 5.

the defendant pleaded an award, by which, it was ordered that the plaintiff, or the work done, ſhould accept a bill of ſale before made, of the eighth part of the ſhip "Fortune," or a like bill of ſale to be made, and that the plaintiff and defendant ſhould give each to the other a general releaſe; among other exceptions to this award as a plea, one was that, nothing being awarded for the goods ſold and delivered, the award did not give a ſatisfaction for the *whole* demand; for that, according to a former caſe, the general releaſe was not of itſelf a ſatisfaction. But had the bill of ſale, it was ſaid, been awarded in full of all demands, then the award would have been a good plea to the whole, becauſe it would have been in ſatisfaction of all demands.[8]

Where the plaintiff lays ſeveral counts in his declaration, and the award, from the terms of it, can only be a bar to one of them; if, in reality, they are all for the ſame cauſe, the beſt way of pleading ſeems to be, to plead the award to that count, to which, in terms, it is an anſwer, and the general iſſue to the reſt. Thus, in the laſt caſe, the award might have been pleaded to the count for work and labour, and the general iſſue to that for the goods ſold and delivered.[9]

In an action of account the plaintiffs declared againſt the defendant, as bailiff, charging him with ſeveral parcels of goods, which he had received for merchandizing: the defendant pleaded that the plaintiffs and he had ſubmitted to arbitrators, with a ſubmiſſion over to an umpire; that the arbitrators made no award;

[8] Clapcott v. Davy. 1 Ld. Raym. 612.
[9] Sem. Ld. Raym. ibid.

but that the umpire had awarded that all ſuits ſhould ceaſe; that the plaintiffs ſhould pay the defendant 30l. and ſhould receive their goods left in the hands of one Warren for their uſe; that if one of the plaintiffs ſhould, within four months after the date of the award, make oath that he had diſcharged two tons freight at 16l. per ton, then the defendant ſhould have no more money than the 30l. unleſs, within ten days after the four months, he ſhould make oath that he took the two tons only at 10l. per ton; and then the plaintiffs, or ſome of them, ſhould pay him 12l. more; and laſtly, that the parties ſhould give mutual releaſes. The plaintiffs demurred, and the defendant joined in demurrer. The Chief Juſtice[1] pronounced judgment in favour of the plaintiffs, but without ſtating his reaſons; but the reporter[2] has thought proper to give us his own argument in favour of the plaintiffs. It was acknowleged, he ſays, that as to the ceaſing of all ſuits, and the giving of mutual releaſes, the award was good to bind the parties to performance; but it was inſiſted, that, had nothing elſe been awarded, the award for theſe would not alone have been a ſufficient plea: it was alſo objected that the part which related to the two tons' freight was apparently abſurd and unreaſonable, and that therefore the award in that particular was void. But the principal objection was to that part which directed the plaintiffs to receive the goods which had been left in the hands of Warren for their uſe: this was evidently meant as an equivalent to them for the payment of the 30l. and if there was

[1] Treby. [2] Lutwyche.

any foundation for what was alleged on this head, that the execution depended on the mere good will of the defendant, becauſe Warren might not deliver the goods without his order, and the law gave no remedy to compel the delivery of them, or to procure ſatisfaction for the non-delivery, undoubtedly the award ought not to have been a bar to the action of account; becauſe, as was juſtly obſerved, all the things awarded to be done in favour of the plaintiffs were but one intire and complete ſatisfaction for their demand: but if, in truth, the award, "that the plaintiff ſhould receive the goods," ought to have been conſtrued that the defendant ſhould deliver them, or procure them to be delivered, and if an action on the award in which the breach might have been aſſigned in the non-delivery, could have been maintained againſt the defendant, there ſeems to have been no good reaſon for the judgment.[3]

A DEFENDANT, to an action of treſpaſs, may ſometimes plead an award made on ſubmiſſion by the plaintiff and a ſtranger. Thus, to an action of treſpaſs for trampling down the plaintiff's graſs with cattle, the defendant pleaded that at the time of the treſpaſs committed, the cattle were in the cuſtody of a ſtranger, and that the plaintiff and that ſtranger had ſubmitted to the award of a certain perſon, who ordered the ſtranger to pay the plaintiff a certain ſum, in ſatisfaction of the treſpaſs, which he had accordingly done; and this was held to be a good bar to the action.[4]

[3] Dighton et al. v. Whiting. Lutw. 51.

[4] 7 H. 4. 31. b. Brooke, 44 b. pl. 48. Rol. Arb. 2 B. 1.

THE defendant may alſo plead that the treſpaſs, of which the plaintiff complains, was committed by the defendant and another; and that the matter was afterwards ſubmitted to arbitration, by the plaintiff, the defendant, and the other treſpaſſer.

THE plaintiff declared in treſpaſs for taking away and detaining his wife for four months againſt his conſent, by which he loſt the comforts of matrimony: the defendant, after imparlance, pleaded, as to the force and arms, not guilty, and as to the reſidue, that the treſpaſs of which the plaintiff complained, was committed as well by the defendant as by one H. Martin, and that after the treſpaſs aforeſaid, and ſince the laſt continuance, particularizing the day, the plaintiff, the defendant, and H. Martin, ſubmitted to the arbitration of three perſons the treſpaſs aforeſaid, between the plaintiff, and the ſame defendant and H. Martin, and divers ſuits then depending between them: that the arbitrators had awarded that the defendant and H. Martin ſhould pay to the plaintiff, or tender to his uſe, 7l. on the third of June, and two intire third parts of all the coſts of the plaintiff, in and about the ſaid ſuit, payable to his attorney, after the bill produced; that they had tendered the 7l. on the third of June, but the plaintiff had refuſed it, and that no bill of the coſts had hitherto been produced. On demurrer, this was held a good plea, though it was objected that the declaration had charged the defendant for a particular fact of his own, namely, the taking away of the plaintiff's wife and the detention of her for four months; that the detainer by the defendant could not be committed by H. Martin, and therefore the ſuit againſt the defendant for that fact could not be a ſuit depending

between the plaintiff and the defendant and H. Martin: but the objection was overruled, for this reason, that the submission was to be construed of all actions between them or any of them.[5]

To an action brought after the submission, and before the award made, the defendant may plead that submission, and that the arbitrators have not yet made any award; provided no day be limited for the making of it: but if a day be limited, then he can only have the benefit of this plea, before that day.[6]

But in order to make an award a good plea, it must appear that the plaintiff and the defendant were equally bound by it. To an action of trespass against C. P. he pleaded that the plaintiff had formerly brought another action against the present defendant and one J. P. on which the plaintiff and the said J. P. had submitted all manner of trespasses and actions between them, and also all other trespasses committed between the plaintiff and the present defendant; that the arbitrators awarded, that as well for the trespass of the present defendant as that of J. P. there should be paid to the plaintiff 100l. which had been paid: it was held that this was not good, pleaded as an award, because there was no submission of the defendant, and therefore he was not bound by it: but it was held that it would have been a bar to the action, if pleaded as an agreement of the plaintiff.[7]

In pleading an award, the defendant, it is said, must shew the place where the submission was made, and

[5] Thomlinson v. Arriskin. Comyns, 328.

[6] 13 R. 2. [7] 20 H. 6. 41. Fhbt. 51. b.

the names of the arbitrators, but that it is not neceſſary, in averring the payment of money in purſuance of an award, to ſtate at what place nor at what time it was paid;[8] nor at what time the award was made.[9] A difference is made in the old books, in the manner of pleading an award in a declaration, and in a plea.—In the firſt caſe, the plaintiff muſt ſhew for what cauſe they ſubmitted, but in the ſecond, it is ſufficient for the defendant to allege the ſubmiſſion generally.[1] But it ſeems at leaſt neceſſary that it ſhould appear by the plea, that the ſubmiſſion comprehended the ſubject on which the action is brought, otherwiſe it can be no plea to that action.

THERE were formerly ſome diſtinctions in the manner of pleading an award, with reſpect to the neceſſity of alleging performance of the things awarded, which, though of importance then, are not now eſſential.

THE moſt general diſtinction, was between the caſe where the party in whoſe favour the award was made, had a remedy to compel performance, and that where he had not. In the former the award itſelf was conſidered as a ſufficient anſwer to an action on the ſubject ſubmitted; but in the latter, it was neceſſary that he ſhould alſo ſhew performance on his part;[2] becauſe it was conſidered that if there was no remedy for the thing awarded, it remained in the power of the defendant whether he would ſatisfy the plaintiff or not.[3]

[8] 8 H. 6. 25. b. 9 H. 6. 5. Brooke, 44. a.

[9] Per Brigges, 21 E. 4. 41. b. ad quod non fuit reſponſum.

[1] Br. 34. cites 5 E. 4. 1.

[2] 43 E. 3. 33. 45 E. 3. 16. b. 13 H. 4. 12. 9 H. 6. 50. b. 19 H. 6. 36. 9 E. 4. 44. Fhbt. 52. b. Br. 45. a. Rol. Arb. X. 3. 6.

[3] 6 Mod. 221.

THERE was, however, one exception from this caſe, which was, that, when the thing, awarded to be done on the part of the defendant, was to follow the performance of ſomething on the part of the plaintiff, it was ſufficient for the defendant to allege a default on the plaintiff's part, and to ſay that on performance by him, he was ready to perform his part.[4]

THIS diſtinction principally prevailed between the caſes of a verbal ſubmiſſion, and a ſubmiſſion by bond. In the latter the plaintiff had always the means of compelling performance of the award, by ſuing for the penalty of the bond: but in the former, unleſs the award was for the payment of money, the plaintiff had no remedy on the award, and, therefore, it was reaſonable that the defendant in pleading the award and ſubmiſſion ſhould ſhew performance.[5]

IN the caſe of an award for the payment of money on a parol ſubmiſſion, there was alſo a difference in the manner of pleading, when the money was ordered to be paid on a particular day, and when there was no time limited for the payment.

IN the latter caſe it was neceſſary for the defendant to allege at leaſt that he always had been, and ſtill was ready to pay; and there are ſome caſes reported, from which it might be concluded that an allegation of actual payment was neceſſary; but that ſeems to have been carrying the point too far, becauſe the plaintiff might at any time have had his remedy on the award.[6]

[4] 20 H. 6. 18, 19. Br. 44. a. 36 H. 6. 15. Brooke Arb. pl. 28

[5] 9 E. 4. 44. Vid. 1 Ld. Raym. 248.

[6] Vid. the places before cited.

WHERE the award was for the payment of money at a certain day; in pleading this award, it was ſufficient to allege that the day was not come.[7] But even in this caſe, if the day was paſt, he muſt have ſhewn that on or before the day he had paid the money, or that he had tendered, but that the plaintiff had refuſed it; for, it was ſaid, though the plaintiff might have debt on the award, yet the defendant could not compel the plaintiff to have recourſe to that action, and be barred of his action for the original cauſe: it was his own default that he had not paid the money at the time appointed.[8]

BUT theſe diſtinctions hardly any longer exiſt; for ſince it has been held that an action will lie on the mere ſubmiſſion, it is in no caſe neceſſary for the defendant, in pleading an award in bar of an action, to allege performance of the thing awarded, unleſs where the award is void, and conſequently the plaintiff could not enforce it.[9]

SUCH is the general Syſtem of the Law of Awards; a ſyſtem which, in many inſtances, with much difficulty purified from the unintelligible jargon of technical argumentation, has been, in modern times, eſtabliſhed

[7] 22 H. 6. 52. b. 5 E. 4. 7. Rol. Arb. Z. 3. 46 E. 3. 17. b. Rol. Arb. X. 5.

[8] 49 E. 3. 3. 21 E. 4. 42. b. Rol. Arb. Z. 1. 1 Keb. 848. —Vid. all theſe diſtinctions pointed out, Lutw. 281, Ruſſel v. Williams.

[9] Vid. 1 Ld. Raym. 122.

on the principles of ſober reaſon and ſound ſenſe; a ſyſtem, which, were the parties ſubmitting always certain of appealing to a judge of perfect wiſdom and incorruptible integrity, would be highly beneficial to the ſociety: but which, from the weakneſs and depravity of men, frequently becomes the inſtrument of the moſt flagrant injuſtice, and the moſt ſerious oppreſſion. From the manner in which arbitrations are often conducted, the parties, inſtead of obtaining a ſpeedy determination to their diſputes at an eaſy expence, are frequently altogether diſappointed, by having no determination at all, and frequently involved in a moſt expenſive and tedious litigation, which might have been avoided, had they choſen at firſt to have recourſe to the ordinary tribunals of the country. The only ſubjects, which are proper for arbitration, ſeem to be long and intricate accounts; diſputes of ſo trifling a nature, that it is of little importance to the parties in whoſe favour the deciſion may be given, provided, at all events, there be a deciſion; and queſtions on which the evidence is ſo uncertain, that it is much better to have a deciſion, whether right or wrong, than that the parties ſhould be involved in continued litigation.

APPENDIX.

SINCE the greater part of the preceding work was printed I have ſeen a munuſcript report of a caſe in the Common Pleas, in the time of Lord C. J. Willes, in which it was determined, on the authority of ſeveral old caſes, that in the caſe of a ſubmiſſion by bond the arbitrators cannot award the coſts of reference unleſs power be expreſsly given to them for that purpoſe.

JOHN Chandler v. John Fuller, Hil. 11 G. 2.—If this be ſtill conſidered to be the law, then what is ſaid in pages 152, 153, muſt be conſidered as erroneous.—Wiſhing to aſcertain what is generally underſtood on this ſubject, I have looked for deciſions of a more modern date. I have found none, where the ſubmiſſion has been by bond; but I have found two where the reference has been by rule of court or under the order of a judge, The firſt is the caſe of Brown v. Marſden and others in the Common Pleas, May 18, 1789. 1 H. Black. 223. The cauſe being at iſſue, the parties ſubmitted to arbitration. The arbitrator awarded to the plaintiff 24l. damages, and the "*coſts by him ſuſtained in the ſaid action*, to be taxed by the proper officer."—The prothonotary refuſed to allow any other coſts than thoſe of the

action as between party and party; an application was made to the court for a rule to ſhew cauſe, why the prothonotary ſhould not be directed to tax and allow the coſts of the *reference*, together with the coſts of the action, as between attorney and client.—But the court ſaid there was no precedent for the coſts of the reference being included in an *award* of coſts of the action, and on examining the award, finding the words to be as above ſtated, held they were *confined* to the coſts of the action, and therefore refuſed the rule.

Here it is to be obſerved, that it does not appear in the report, whether, by the rule of reference, any power was expreſſly given to the arbitrator over the coſts of the reference, or whether having been expreſſly given, he had not uſed it: if the former was the caſe, this deciſion is almoſt an authority that the arbitrator has impliedly a power over ſuch coſts; for the court made no queſtion as to the exiſtence of that power, but inquired merely whether he had exerciſed it.

The ſecond is the caſe of Bradley v. Tunſtow, May 20, 1797, reported in Puller and Boſanquet's Term Rep. of the Common Pleas, p. 34.—By an order of the Chief Juſtice, made with the conſent of the parties, it was ordered, "that the debt for which the action was "brought ſhould be referred to F. C. Eſq. to ſettle and "determine how much, or whether any and what ſum "was due to the plaintiff from the defendant, and that "for what ſum he ſhould find due, the plaintiff ſhould "be at liberty to enter up his judgment, and *ſue out* "*execution* for ſuch ſum ſo found due, together with "*his coſts*, provided the ſaid debt ſo to be ſettled and "aſcertained ſhould amount to 40s."

THE arbitrator awarded 40l. 14s. for the debt, and *coſts* to be taxed by the prothonotary. His taxation included the coſts of the *reference*; the plaintiff entered up judgment on this *allocatur*; the plaintiff applied to the prothonotary to ſtrike out the coſts of the *reference*, who, on reconſidering the matter, accordingly diſallowed them.—On the part of the defendant, an application was made to the court, to have the judgment ſet aſide as irregular, in conſequence of this diſallowance.—To this application, it was anſwered, that where a cauſe was referred to arbitration, the coſts of the cauſe to abide the event, and nothing ſaid in the rule about the coſts of the reference, theſe became part of the coſts of the cauſe, and that ſuch was underſtood to be the practice of the court of King's Bench.

THE C. Juſtice [1] ſaid the whole difficulty aroſe from the *ſuppoſed* practice of that court. If that court had ſanctioned the practice of including the coſts of reference under a condition in the rule, relating to coſts generally, he did not feel himſelf at liberty to ſpeculate upon the point: it appeared however to him, that a reference being made for the convenience of *both* parties, the expences *ought* to be ſuſtained by both. A proviſion for the coſts of reference being generally made in the rules, but omitted in the preſent inſtance, was a ſtrong argument to ſhew that they were not here intended to abide the *event* of the arbitration.

BULLER J. obſerved that the general practice in drawing up theſe rules was to diſtinguiſh between the coſts of the *reference* and the coſts of the *cauſe*; that the

[1] Eyre.

latter uſually abided the event of the arbitration, the former not. Here that diſtinction was omitted; it was referred to the arbitrators to determine the ſum due between the parties, and the *coſts* were to follow the event of his award: he was inclined to think the practice of the court of King's Bench as ſuggeſted, was right. Did the term *coſts* mean *all* coſts? He did not ſee how to diſtinguiſh between the coſts of the *cauſe* and thoſe which aroſe in the *progreſs* of the cauſe.—But as theſe coſts of reference amounted ſometimes to very hard ſums, it might perhaps not be foreign to the purpoſe to ſuppoſe, that they were purpoſely omittted in this rule to avoid the poſſibility of ſuch expence; if there were any authorities on the ſubject, he thought the court muſt be bound by them.

The prothonotary being deſired to inquire concerning the practice of the King's Bench, afterwards reported that he had been informed by the Maſter that though no caſe had occurred within his knowlege, where this queſtion had ariſen under the order of a judge; yet it was generally underſtood that an arbitrator had *no power* to give the coſts of the award, unleſs under a proviſion inſerted in the order of *niſi prius*.

In conſequence of this report, the court directed that the plaintiff ſhould move to reform his judgment by conſent, and reduce it to the proper amount.

Here again it may be remarked, that the *real* queſtion ariſing out of the caſe was not *on the power of the arbitrator over the coſts of the reference, when nothing on that ſubject was ſaid in the rule*, for *he* had in fact exerciſed no juriſdiction on the queſtion: but whether, when the rule mentioned coſts generaly, without diſ-

tinguiſhing between the coſts of the cauſe and the coſts of the reference, the latter were neceſſarily included as well as the former; and it might have been decided that they were *not*, without prejudice to the power of the arbitrator over them, if he choſe, to exerciſe it: but, if what the prothonotary reported from the Maſter of the King's Bench be correctly ſtated, he went beyond the queſtion ſubmitted to him: and if he be right, the neceſſary concluſion is, that the arbitrator cannot give the coſts to either party unleſs a power be expreſſly given him for that purpoſe in the rule.

PRECEDENTS.

Common Bond *of* Arbitration.

KNOW all men by theſe preſents that I A. B. of C. in the pariſh of, &c. in the county of, &c. gentleman, am held and firmly bound to E. F. of G. in the city of London, merchant, in the ſum of 500l. of good and lawful money of Great Britain, to be paid to the ſaid E. F. or to his certain attorney, executors, adminiſtrators, or aſſigns, for which payment, to be well and faithfully made, I bind myſelf, my heirs, executors, and adminiſtrators firmly by theſe preſents, ſealed with my ſeal, dated the day of in the year of the

reign of our Sovereign Lord George the Third, by the grace of God of Great Britain, France, and Ireland, King, Defender of the Faith; and in the year of our Lord one thouſand ſeven hundred and ninety-nine.

THE condition of this obligation is ſuch, that if the above bounden A. B. his heirs, executors, and adminiſtrators, on his or their parts and behalfs, ſhall and do in all things well and truly ſtand to, obey, abide by, perform, fulfil, and keep the award, order, arbitrament, and final determination of M. N. of, &c. and P. Q. of, &c. arbitrators, indifferently elected and named, as well on the part and behalf of the above bounden A. B. as of the above named E. F. to arbitrate, award, order, judge, and determine of and concerning all and all manner of action and actions, cauſe and cauſes of action, ſuits, bills, bonds, ſpecialties, judgments, executions, extents, quarrels, controverſies, treſpaſſes, damages, and demands whatſoever, at any time heretofore had, made, moved, brought, commenced, ſued, proſecuted, done, ſuffered, committed, or depending by and between the ſaid parties, ſo as the ſaid award be made in writing, under the hands of the ſaid M. N. and P. Q. and ready to be delivered to the ſaid parties in difference, or ſuch of them as ſhall deſire the ſame, on or before the day of then this obligation to be void, or elſe to remain in full force.

Sealed and delivered, being firſt
duly ſtamped, in the preſence of

CONDITION *of an* ARBITRATION BOND *for ſettling the accounts of executors*; *obligation to be from* E. *the executor of* B. *to* D. *widow of* A. *and to* A. *the ſon of* A. *and* D. *in* 2000*l.*

WHEREAS the above named A. the father, deceaſed, by his laſt will and teſtament in writing duly executed, bearing date on or about —— did, among other things, make and appoint the above named B. together with C. Eſquire, executors and truſtees of his ſaid will, during the minority of the above named A. his ſon, for the intent, and purpoſes therein mentioned and expreſſed, as by the ſaid will by them the ſaid executors may appear; by virtue of which will and executorſhip they the ſaid B. and C. ſeverally poſſeſſed themſelves of great part of the perſonal eſtate late of the ſaid A. the father, and alſo received great part of the rents of his real eſtates, and have ſince reſpectively paid, applied, and diſpoſed of great part of the ſaid eſtate ſo by them received, upon the truſts of and according to his ſaid will. AND WHEREAS the ſaid A. the ſon, having attained his age of 21 years, an account of what was by him the ſaid C. received, and which remained in his hands of the real and perſonal eſtates late of the ſaid A. the teſtator, having been then ſtated, ſettled, and allowed by and between them the above named D. A. her ſon, and the ſaid C. and he the ſaid C. having accounted for and paid what was by him ſo received and remaining in his hands to them the ſaid D. and A. according to the true intent of the ſaid will, they the ſaid D. and A. her ſon, have given a full releaſe and diſcharge to the ſaid C. of all their demands, relating to his acting in the ſaid executorſhip and truſts, by the

ſaid will in him repoſed: AND WHEREAS the ſaid B. ſometime ſince departed this life, having firſt made and duly executed his laſt will and teſtament in writing, and thereof appointed the above bound E. executor, as by the ſame will by him duly proved may appear: AND WHEREAS the ſaid B. in his life time, as being the other executor of the ſaid A. the father, did receive, pay, and apply ſome part of the real and perſonal eſtate of the ſaid A. the father, purſuant to the truſts in the ſaid will contained; but he the ſaid B. dying in the minority of the ſaid A. the ſon, and no account having been made and ſettled as to what was by him the ſaid B. ſo received and paid out of the ſaid eſtates; and he the ſaid E. as executor and repreſentative of the ſaid B. being now liable to make up ſuch account, and to anſwer and pay the balance thereof, unto them the ſaid D. and A. her ſon (if any ſuch ſhall appear due), and ſuch account having been by him the ſaid E. delivered to them the ſaid D. and A. her ſon, and ſome diſputes and differences having ariſen between them, touching ſome articles and vouchers in the ſaid account mentioned and contained: they the ſaid E. and the ſaid D. and A. her ſon, for the ending and preventing of all further and future diſputes, controverſies, actions, and ſuits, touching the ſame account, have mutually agreed to refer the ſame to the arbitrament and determination of F. of, &c. (a perſon choſen by, for, and on the behalf of the ſaid E.) and to G. of, &c. (a perſon choſen by, for, and on the behalf of them the ſaid D. and A. her ſon); and in caſe the ſaid arbitrators cannot determine the ſame, that then the ſame ſhall be fully ended and determined by a third perſon, to be by them choſen as an umpire, in ſuch manner as hereinafter is

in that behalf mentioned and expreſſed: NOW THE CONDITION, &c. that if the ſaid E. his heirs, executors, and adminiſtrators, and every of them, ſhall and do, for and on his and their parts, in all things ſtand to, obey, abide by, perform, fulfil, and keep the award, arbitrament, order, determination, and judgment, which ſhall by them the ſaid F. and G. be made of and concerning the ſaid account of him the ſaid E. ſo delivered as aforeſaid, and of and for all and every the articles, vouchers, and things therein contained, and of all diſputes, differences, actions, ſuits, claims, and demands whatſoever, touching or concerning the ſame, ſo as ſuch award, arbitrament, determination, and judgment of the ſaid arbitrators, of and in the ſame premiſes, be by them made in writing under their hands and ſeals, ready to be delivered to all the parties in controverſy within one month next enſuing the date hereof: AND if they the ſaid arbitrators cannot agree, and determine the ſame premiſes within the ſaid one month, that then if the ſaid E. his heirs, executors, and adminiſtrators, and every of them, ſhall and do, for and on his and their parts, in and by all things, ſtand to, obey, abide by, perform, fulfil, and keep the award, arbitrament, and umpirage of ſuch third perſon and umpire, as they the ſaid arbitrators ſhall indifferently name, elect, and chooſe for the ending and determining of the ſame premiſes, ſo as ſuch award, umpirage, and judgment of the ſaid umpire of and in the ſame be by him ſo made in writing under his hand and ſeal, ready to be delivered to each of the ſaid parties in controverſy within — days next after the end of the ſaid one month, the ſaid obligation ſhall be void and of no effect; otherwiſe the ſame ſhall remain in full force and virtue. WOOD.

BOND *from* J. H.—J. M. *and* JANE *his Wife*, J. S. *and* C. H. *Spinſter, to* T. H. *Yeoman, in the Penal Sum of* 1000*l.*

CONDITION.

WHEREAS divers differences, diſputes, and controverſies have ariſen between the above-bounden J. H.—J. M. and Jane his wife, J. S. and C. H. and the above named T. H. as to their ſeveral and reſpective claims and intereſts under the ſeveral and reſpective wills of T. T. late of, &c. deceaſed, G. H. late of, &c. deceaſed, and Joſeph H. late of, &c. deceaſed, and they have ſeverally and reſpectively agreed to ſubmit the ſame to the arbitrament and final determination of R. G. of, &c. D. R. M. of, &c. and P. S. of, &c. and that their award, or the award of any two of them, ſhall be final and concluſive both at law and in equity, as well on the part and behalf of the above bounden J. H.—J. M. and Jane his wife, J. H. and C. H. their heirs, executors, and adminiſtrators, as on the part and behalf of the above named T. H. his heirs, executors, and adminiſtrators: NOW THE CONDITION of the above written obligation is ſuch, that if the above bounden J. H.—J. M. and Jane his wife, J. S. and C. H. their executors and adminiſtrators reſpectively do and ſhall, on his, her, and their ſeveral and reſpective parts and behalfs, in all things well and truly ſtand to, abide by, obſerve, perform, fulfil, and keep the award, order, arbitrament, and final determination of the ſaid R. G. D. R. M. and P. S. or of any two of them, arbitrators, indifferently choſen, elected, and named, as well by and on the part and behalf of the ſaid J. H.—J. M. and Jane his wife, J. S. and C. H. as on the behalf of the

above named T. H. to arbitrate, award, judge, and finally determine concerning all and all manner of claim and claims, which they, or any, or either of them, have, or pretend to have, by, from, or under the above-mentioned wills, or any or either of them, ſo as the award of the ſaid arbitrators, or of any two of them, be made in writing, indented under their hands and ſeals, or under the hands and ſeals of any two of them, ready to be delivered to the ſaid parties in difference, on or before the firſt day of March now next enſuing, vnleſs they, or ſome or one of them, ſhall be prevented from ſo doing by ſickneſs or ſome other unavoidable event; but if the ſaid arbitrators, or any or either of them, ſhall be prevented, by ſickneſs or any other unavoidable event, from mäking ſuch their award by the time aforeſaid, then, if the above bounden J. H. J. M. and Jane his wife, J. S. and C. H. their heirs, executors, and adminiſtrators, ſhall reſpectively well and truly ſtand to, abide by, obey, perform, fulfil, and keep the award, arbitrament, and final determination of the ſaid R. G.—D. R. M. and P. S. or of any two of them, of and concerning the premiſes, ſo as they the ſaid arbitrators, or any two of them, make their award in writing, indented under their hands and ſeals, ready to be delivered to the ſaid parties in difference within the time or ſpace of two calendar months from the ſaid firſt day of March, then the above-written bond or obligation to be void, otherwiſe to be and remain in full force and virtue. And it is hereby agreed, by and between all the ſaid parties in difference, that theſe preſents, and this ſubmiſſion hereby made of the ſaid matters in controverſy, ſhall be made a rule of his Majeſty's Court of King's Bench, to the end that the

ſaid parties in difference may be finally concluded by the ſaid arbitration by theſe preſents intended, purſuant to the ſtatute in ſuch caſe made and provided.—IN WITNESS, &c.

TIME *enlarged by* ENDORSEMENT.

KNOW all men by theſe preſents, that we the within named J. M.—Jane M.—J. S.—C. H. and T. H. have, for ourſelves ſeparately, ſeverally, and reſpectively, and for our heirs, executors, and adminiſtrators reſpectively, mutually given and granted, and by theſe preſents DO, for ourſelves ſeparately, ſeverally, and reſpectively, and for our reſpective heirs, executors, and adminiſtrators, mutually give and grant unto the within named R. G. D. R. M. and P. S. the arbitrators within named, further time for making their award of and concerning the ſeveral matters within referred to them until the 8th day of November now next enſuing, ſo that they, or two of them, make their award in writing, under their hands and ſeals reſpectively, ready to be delivered to the parties in difference on or before the ſaid 8th day of November now next enſuing: and we do hereby further agree that theſe preſents, as well as the within-written bond, and the ſubmiſſion thereby and hereby made of the matters in controverſy, ſhall be made a rule of his Majeſty's Court of King's Bench, &c. IN WITNESS, &c.

AWARD *made on the foregoing* SUBMISSION.

TO ALL TO WHOM theſe preſents ſhall come, We, R. G. of, &c. in the county of, &c. Eſq. D. R. M. of, &c. in the county of, &c. Eſq. and P. S. of, &c. Eſq. SEND GREETING: WHEREAS J. H. of, &c. in the county of, &c. cooper, J. M. of, &c. in the ſaid county of, &c. bookſeller, claiming in right of his wife, J. M. late J. H. ſpinſter; the Rev. J. S. of, &c. in the county of, &c. clerk, claiming in right of his late wife, C. S. formerly C. H. ſpinſter, now deceaſed, and C. H. of, &c. aforeſaid, ſpinſter, by a certain bond or obligation, bearing date the day of in the year became bound to T. H. of, &c. in the ſaid county of, &c. yeoman, in the penal ſum of one thouſand pounds, and the ſaid T. H. by another bond or obligation, bearing even date therewith, became bound to the ſaid J. H.—J. M. and Jane his wife, J. S. and C. H. in the like penal ſum, with conditions written under the ſaid ſeveral bonds, that they the ſaid J. H.—J. M. and Jane his wife, J. S. and C. H. and the ſaid T. H. reſpectively, ſhould ſtand to, obey, abide by, obſerve, perform, fulfil, and keep the award, order, arbitrament, final end, and determination of us the ſaid R. G.—D. R. M. and P. S. arbitrators, indifferently choſen, elected, and named, as well by and on the part and behalf of the ſaid J. H. J. M. and Jane his wife, J. S. and C. H. as on the part and behalf of the ſaid T. H. to arbitrate, award, judge, determine, and agree for, upon, touching and

concerning all and all manner of claim and claims, which they, or any, or either of them, had or pretended to have by, from, or under the ſeveral wills of T. T. long ſince deceaſed, G. H. deceaſed, and J. H. alſo deceaſed, reſpectively; AND WHEREAS by endorſement in writing on the back of each of the ſaid ſeveral bonds, under the hands and ſeals of the ſaid J. H.—J. M. and Jane his wife, J. S. and C. H. and of the ſaid T. H. bearing date reſpectively the day of in the year the time for us the ſaid arbitrators, making our award in manner aforeſaid, is enlarged until the eighth day of November then next enſuing: NOW KNOW YE that we the ſaid R. G.—D. R. M. and P. S. having taken upon ourſelves the burthen of the ſaid arbitration, and having heard, and duly and maturely weighed and conſidered the ſeveral allegations, vouchers, and proofs brought before us by and on behalf of the ſaid parties in difference reſpectively, and having fully examined into their ſeveral alleged claims and intereſts under the ſeveral and reſpective wills of the ſaid T. T.—G. H. and J. H. deceaſed, DO FIND that the ſaid T. T. by his ſaid will, among other ſpecific legacies, gave and bequeathed to his nephew J. T. who is yet living, the yearly intereſt of two hundred pounds, at the rate of four pounds ten ſhillings for one hundred pounds for a year, for and during the term of his natural life, and that after the deceaſe of the ſaid J. T. the ſaid teſtator gave and bequeathed the ſaid principal ſum of two hundred pounds, unto and amongſt all and every the child and children of his ſaid nephew J. T. that ſhould be living at the time of the deceaſe of the ſaid teſtator, to be equally divided between them, ſhare and ſhare

alike, and that the ſaid T. T. by his ſaid will, gave, deviſed, and bequeathed all the reſt and reſidue of his eſtate, both real and perſonal, ſubject nevertheleſs to the payment of his debts, legacies, and funeral expences, with which he charged, as well his real, as his perſonal eſtate, to the ſaid G. H. his heirs, executors, and adminiſtrators, whom he appointed ſole executor of his ſaid will. AND WE the ſaid R. G.—D. R. M. and P. S. do further find that the eſtate of the ſaid T. T. which came to the hands and poſſeſſion of the ſaid G. H. deceaſed, was fully ſufficient to ſatisfy and diſcharge all the debts and legacies and funeral expences of the ſaid T. T. and the expences attending the execution of his ſaid will; and that a certain freehold houſe, with a cloſe of land adjoining and thereto belonging, with the appurtenances, ſituate, lying, and being at, &c. in the ſaid county of, &c. now in the poſſeſſion or occupation of the ſaid C. H. was part of the eſtate of the ſaid T. T. charged by him, in and by his ſaid will, with the payment of his debts, legacies, and funeral expences as aforeſaid, and remains ſubject to and chargeable with the bequeſt, hereinbefore mentioned, to the ſaid J. T. and his children; AND FURTHER that the ſaid T. H. as ſurviving executor of the will of the ſaid G. H. is entitled to the ſum of one hundred pounds, ſecured by mortgage on a certain freehold houſe, with the appurtenances, ſituate at, &c. aforeſaid, and known by the ſign of the White Lion, in the tenure or occupation of W. E. AND WE DO further find that all claim, intereſt, and demand, which the ſaid J. H. Jane M. or the ſaid J. M. in her right, and the ſaid J. S. in right of his ſaid late wife, or either of them,

ever had in or upon the eſtate or effects, or under or by virtue of the wills of the ſaid T. T.—G. H. and J. H. or of either of them, have been fully ſatisfied and diſcharged: AND WE the ſaid R. G.—D. R. M. and P. S. do hereby award, order, and adjudge that the ſaid *C. H. her heirs, executors, or adminiſtrators*, ſhall, within one calendar month from the day of the date hereof, deliver into the hands of the ſaid T. H. or of his certain attorney, his executors, or adminiſtrators, all deeds and other writings in her cuſtody, poſſeſſion, or power, relating to or in any way affecting the ſaid freehold houſe, with the appurtenances, known by the ſign of the White Lion, and *ſhall*, alſo, *within one month from the day of the date hereof, convey by good and ſufficient conveyance and aſſurance in the law*, and deliver poſſeſſion of the ſaid freehold houſe and cloſe, with the appurtenances, ſituate at, &c. aforeſaid, and all deeds and other writings relating to or in any way affecting the ſame, or the title thereof, to the ſaid T. H. or his certain attorney, or his heirs: AND WE DO further award that the ſaid C. H. ſhall retain for her own uſe and benefit all other the effects which came or which may hereafter come to her hands or poſſeſſion, as executrix of the laſt will and teſtament of the ſaid J. H. *(ſave and except any rents which ſhe may have received ſince the deceaſe of the ſaid J. H. for or on account of the ſaid eſtate at, &c. aforeſaid)*, in full ſatisfaction of all claim, intereſt, and demand which ſhe has or ever had in or upon the eſtate and effects, or under or by virtue of the ſaid ſeveral wills of the ſaid T. T.—G. H. and J. H. or of either of them: AND WE DO hereby further award that the ſaid T. H. ſhall, out of the ſaid mortgage on the ſaid houſe, with

the appurtenances, at, &c. called the White Lion, and out of the ſaid freehold houſe and cloſe at, &c. pay, ſatisfy, and diſcharge the bequeſt to the ſaid J. T. and his children, according to the direction of the ſaid will of the ſaid T. T. AND WE DO further award and order that *the ſaid C. H. ſhall account for and pay to the ſaid T. H. his executors, or adminiſtrators, within one month from the date hereof, all rents which ſhe may have received, for or on account of either of the eſtates at, &c. and, &c. aforeſaid, ſince the deceaſe of her ſaid brother J. H.* AND WE DO alſo award and order that the ſaid T. H. ſhall pay and refund to the ſaid C. H. her executors, or adminiſtrators, all ſum and ſums of money which ſhe may have advanced or paid the ſaid J. T. for and on account of the intereſt of the ſaid ſum of two hundred pounds mentioned in the will of the ſaid T. T. ſince the deceaſe of her ſaid brother J. H. AND WE DO likewiſe award, order, and direct that the ſaid T. H. ſhall, within one month from the date hereof, pay or cauſe to be paid to the ſaid C. H. the ſum of twelve pounds twelve ſhillings for and in full conſideration of all expences which ſhe has been at in the repairs of the ſaid houſes at, &c. and, &c. aforeſaid, or otherwiſe howſoever: AND WE DO further award that the ſaid C. H. ſhall ſeal and execute to the ſaid T. H. a releaſe of all demands, for or on account of any claim or intereſt in or upon the eſtate and effects, or under or by virtue of the wills of the ſaid T. T.—G. H. and J. H. or of either of them: And further that the ſaid C. H. do and ſhall, within one calendar month from the date hereof, deliver unto the ſaid T. H. his executors, or adminiſtrators, all books, accompts, diſcharges, releaſes, and writings whatſoever,

reſpecting only the eſtates of the ſaid T. T. and G. H. deceaſed, or either of them, and which are now in her cuſtody, poſſeſſion, or power; and that when the ſaid C. H. ſhall have fully complied with this our award, in all things hereby ordered to be done by her, then the ſaid T. H. ſhall ſeal and execute to her a ſimilar releaſe; and that the ſaid J. H. and J. M. in right of his ſaid wife, and the ſaid J. S. in right of his ſaid late wife, ſhall ſeal and execute ſimilar releaſes to the ſaid T. H. and C. H. AND WE DO alſo award and order that the ſaid T. H. do and ſhall execute to the ſaid C. H. a bond in the penal ſum of eight hundred pounds, under a condition to indemnify her the ſaid C. H. againſt all demands of the ſaid J. T. and his children who were living at the time of the deceaſe of the ſaid T. T. or any perſon or perſons claiming through them, and alſo againſt all and every other perſon or perſons whomſoever claiming under the will and wills of the ſaid T. T. and G. H. deceaſed, or either of them: AND LASTLY, we do hereby award and order that the ſaid T. H. ſhall pay or cauſe to be paid all charges and expences attending the preſent arbitration. IN WITNESS whereof we the ſaid R. G. D. R. M. and P. S. have hereunto ſet our hands and ſeals reſpectively, the day of in the year of our Lord

(Signed) R. G. *L. S.*
D. R. M. *L. S.*
P. S. *L. S.*

Signed, ſealed, and delivered, (being firſt duly ſtamped) in the preſence of

(Signed) R. R. *Not. Pub.*

BOND *from* J. S. *to* R. S. *in the Penal Sum of* 1000*l.*

THE CONDITION of this obligation is ſuch that if the above bounden J. S. his heirs, executors, and adminiſtrators, for and on his and their parts and behalves, do in all things well and truly ſtand to, obey, abide, perform, fulfil, and keep the award, order, arbitrament, final end, and determination of E. H. of, &c. in the county of, &c. gentleman, and W. A. of, &c. in the ſaid county, gentleman, arbitrators, indifferently named, elected, and choſen, as well on the part and behalf of the above-bounden J. S. as of the above-named R. S. to arbitrate, award, judge, and determine, of and concerning all and all manner of action and actions, cauſe and cauſes of action, ſuits, bills, bonds, deeds, ſpecialties, judgments, executions, extents, quarrels, controverſies, treſpaſſes, damages, and demands whatſoever, at any time or times heretofore had, made, moved, brought, commenced, ſued, proſecuted, done, ſuffered, committed, or depending, by or between the ſaid parties, or either of them, ſo as the ſame award be made in writing, under the hands and ſeals of the ſaid arbitrators, on or before the day of next enſuing: But if the ſaid arbitrators do not make ſuch their award of and concerning the premiſes by the time aforeſaid, then, if the ſaid J. S. his heirs, executors, and adminiſtrators, for and on his and their parts and behalves, do in all things well and truly ſtand to, obey, abide, perform, fulfil, and keep the award, order, arbitrament, umpirage, final end, and determination of ſuch perſon as the ſaid arbitrators ſhall appoint as an

umpire between the ſaid parties of and concerning the premiſes, ſo as the ſaid umpire do make his award or umpirage, of and concerning the premiſes, on or before the day of next enſuing, then this obligation to be void, or elſe to remain in full force: And the ſaid J. S. doth conſent and agree that his ſubmiſſion to the award or umpirage above mentioned ſhall and may be made a rule of his Majeſty's Court of King's Bench, at Weſtminſter. And it is hereby further agreed, that the ſaid parties and their witneſſes ſhall be examined upon oath before the ſaid arbitrators and umpire, being firſt duly ſworn for that purpoſe before the Lord Chief Juſtice, or one of the other Judges of his Majeſty's Court of King's Bench, at Weſtminſter: And that nothing herein contained ſhall extend, or be conſtrued to extend, to diſſolve an injunction obtained by the ſaid J. S. in his Majeſty's Court of Chancery, reſtraining the ſaid R. S. from proceeding at law againſt the ſaid J. S. touching the matters in the ſaid injunction mentioned or referred to; but the ſaid arbitrators or umpire are to be at liberty to order the ſaid injunction to be diſſolved if they think proper.

J. S. *L. S.*

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

H. R.

WE the above named E. H. and W. A. do appoint, and the above named J. S. and R. S. do hereby conſent, that S. K. of, &c. Eſq. Barriſter at Law, ſhall be

the umpire between the ſaid arbitrators. Witneſs our hands this day of one thouſand ſeven hundred and

W. H.
Witneſs, E. H.
J. H. J. S.
R. S.

The AWARD.

TO ALL TO WHOM theſe preſents ſhall come, I, S. K. barriſter at law, of, &c. Eſq. ſend greeting: WHEREAS J. S. late of, &c. in the pariſh of, &c. in the county of, &c. but now of, &c. in the ſaid county, Gentleman, being poſſeſſed of a certain farm ſituate in the neighbourhood of, &c. in the county of, &c. by virtue of a certain indenture of leaſe thereof to him granted by A. R. Eſq. for a certain term of years therein mentioned, and being indebted to R. S. of, &c. in the ſaid county of, &c. mercer, did, by a certain indenture of mortgage, bearing date the day of in the year and made between the ſaid J. S. of the one part, and the ſaid R. S. of the other part, convey to the ſaid R. S. the ſaid indenture of leaſe, and the premiſes thereby demiſed, to ſecure to the ſaid R. S. the payment of the ſum of five hundred pounds, with lawful intereſt, from the day of the date of the ſaid indenture of mortgage; in which ſaid indenture of mortgage is contained a proviſo for redemption of the ſaid indenture of leaſe, and the premiſes thereby demiſed, on the payment by the ſaid J. S. his executors, adminiſtrators, or aſſigns, to the

ſaid R. S. his executors, adminiſtrators, or aſſigns, with intereſt therein as aforeſaid, on the day of in the year AND WHEREAS neither the ſaid ſum of five hundred pounds, nor any part thereof, nor any intereſt thereon, was paid on the ſaid day of whereby the ſaid mortgage became abſolute at law; and the ſaid R. S. took poſſeſſion of the ſaid farm on or about the day of in the year and hath ever ſince continued in poſſeſſion thereof, and in receipt of the profits and proceeds thereof: AND WHEREAS various other tranſactions and matters of account have for ſeveral years paſt taken place between the ſaid parties and the ſaid J. S. hath lately filed a bill in the High Court of Chancery againſt the ſaid R. S. and divers diſputes, animoſities, and contentions, have taken place between the ſaid parties; for the appeaſing, pacifying, ordering, and determining whereof, the ſaid R. S. and J. S. have ſubmitted themſelves, and are become bound each to the other by their ſeveral obligations, bearing date the day of in the year of the reign of our Sovereign Lord George the Third, by the grace of God of Great-Britain, France, and Ireland, King, Defender of the Faith, and in the year of our Lord in the penal ſum of one thouſand pounds of good and lawful money of Great-Britain, with conditions thereunder written, to ſtand to, obey, abide by, perform, fulfil, and keep the award of W. A. of in the county of gentleman, and E. H. of in the ſaid county, gentleman, arbitrators, indifferently choſen, as well on the part and behalf of the ſaid R. S. as of the ſaid J. S. to arbitrate, award, order, judge, and determine of and concerning

all and all manner of action and actions, cauſe and cauſes of action, ſuits, bills, bonds, ſpecialties, judgments, executions, extents, quarrels, controverſies, treſpaſſes, damages, and demands whatſoever, at any time or times theretofore had, made, moved, brought, commenced, ſued, proſecuted, done, ſuffered, committed, or depending by or between the ſaid parties, or either of them, ſo as the ſame award were made in writing, under the hands and ſeals of them the ſaid W. A. and E. H. on or before the day of then next enſuing: but if they the ſaid W. A. and E. H. ſhould not make ſuch their award on or before the ſaid day of then that they the ſaid parties ſhould ſtand to, obey, abide by, perform, fulfil, and keep the award, order, arbitrament, umpirage, final end, and determination, of ſuch perſon as the ſaid arbitrators ſhould appoint as an umpire between the ſaid parties, of and concerning the premiſes, ſo as the ſaid umpire ſhould make his award or umpirage, of and concerning the premiſes, on or before the day of then next enſuing: AND WHEREAS the ſaid W. A. and E. H. did, by a note in writing, under their hands, bearing date the day of written under the condition annexed to the ſaid bonds, appoint me the ſaid S. K. to be the umpire between them: AND WHEREAS the ſaid W. A. and E. H. did not make any award of and concerning the premiſes on or before the ſaid day of NOW KNOW YE, that I the ſaid S. K. appointed umpire as aforeſaid, having taken upon myſelf the charge of the ſaid umpirage; and having deliberately, and at large, heard, examined, and conſidered the allegations, witneſſes, and evidences of

both the ſaid parties concerning the premiſes, DO thereupon make this my umpirage and final determination, in writing, between the ſaid parties, of and concerning the premiſes, in manner and form following, that is to ſay, that all proceedings on the ſaid Bill in Chancery ſhall ceaſe and be from hereforth conſidered as null and void, and of no effect, as if the ſaid Bill had been diſmiſſed by an order of the ſaid Court: and I do hereby adjudge, that, after giving the ſaid J. S. credit for the produce of the crop of hay and beans now remaining undiſpoſed of on the ſaid farm, and for the value of the after-graſs up to the day of laſt, there remained due to the ſaid R. S. from the ſaid J. S. on the ſaid day of on the ſaid mortgage, the ſum of two hundred and ſeventy-two pounds ſixteen ſhillings and ſixpence, excluſively of the two ſeveral ſums of one hundred and three pounds twelve ſhillings and ſixpence for the rent of the ſaid farm, and thirteen pounds four ſhillings for tithes, both due on the day of laſt, but which were not paid by the ſaid R. S. on or before the ſaid day of the ſaid month: And I do hereby further adjudge, that the ſaid J. S. was on the ſaid day of further indebted to the ſaid R. S. in the ſum of ſeven hundred and ſixteen pounds fifteen ſhillings and eight-pence, on a general account, independently of the ſaid mortgage, and excluſively of the ſum of one hundred and twenty-ſeven pounds, being the eſtimated value of the ſeveral articles mentioned in a certain inventory, ſigned by the ſaid R. S. and now in the poſſeſſion of the ſaid J. S. which ſeveral articles were left by the ſaid J. S. on the ſaid farm when he quitted the poſſeſſion thereof, for

which I have given the ſaid J. S. credit in taking the ſaid general account, and alſo excluſively of the ſum of one hundred and ſeven pounds, being the eſtimated value of a large quantity of dung now lying on the ſaid farm, but not ſpread thereon, and for which I have not given the ſaid R. S. credit in ſtating the account between the ſaid parties, relative either to the ſaid mortgage or to the ſaid general account: And I do hereby award that the ſaid R. S. ſhall forthwith cauſe the ſaid quantity of dung to be ſpread on the ſaid farm; and if the ſaid J. S. ſhall, on the day of now next enſuing the date of theſe preſents, or at any time before that day, pay to the ſaid R. S. ſuch ſum of money as, on a fair account to be taken between them, ſhall appear to be due to the ſaid R. S. on the ſaid mortgage, and ſhall either pay to the ſaid R. S. the ſaid ſums of one hundred and twenty-ſeven pounds and one hundred and ſeven pounds, with intereſt on the latter ſum from the ſaid day of or ſhall jointly, with two reſponſible perſons, to be approved of as hereafter mentioned, enter into a bond to the ſaid R. S. in the penal ſum of four hundred and ſixty-eight pounds, with a condition to be void on the payment of the ſaid ſeveral ſums of one hundred and twenty-ſeven pounds and one hundred and ſeven pounds to the ſaid R. S. within ſix calendar months from the day of the date of ſuch bond, together with intereſt on the ſaid ſum of one hundred and ſeven pounds from the ſaid day of And ſhall alſo jointly, with the ſaid two reſponſible perſons, execute a warrant of attorney to the ſaid R. S. of even date with the ſaid bond, authorizing him to enter up judgment againſt them in his Majeſty's Court of King's Bench for the ſaid ſum

of four hundred and ſixty-eight pounds, with a defeaſance annexed to the ſaid warrant of attorney that it ſhall be void on payment to the ſaid R. S. of the ſaid ſums of one hundred and twenty-ſeven pounds and one hundred and ſeven pounds, with intereſt on the latter ſum as aforeſaid, within ſix calendar months from the day of the date thereof, then he the ſaid R. S. ſhall deliver up to the ſaid J. S. the poſſeſſion of the ſaid farm, and the ſeveral articles ſpecified in the inventory hereinbefore mentioned: And I do hereby further award and direct, that on the one ſide of the ſaid account ſhall be ſtated as well the ſaid ſum of two hundred and ſeventy two pounds ſixteen ſhillings and ſixpence, together with intereſt thereon from the ſaid day of to the day of the taking the ſaid account, as all rent, tithes, taxes, and other reaſonable and proper charges and expences, including the expences of ſpreading the ſaid dung on the ſaid farm, paid, diſburſed, and incurred by the ſaid R. S. on account of the ſaid farm; and on the other ſide of the ſaid account ſhall be ſtated the profits and proceeds of the ſaid farm, received or enjoyed by the ſaid R. S. from the ſaid day of to the day of ſettling the ſaid account; but the ſaid J. S. ſhall not in any ſhape be charged with the expences of carrying the produce of the ſaid crop now remaining on the ſaid farm undiſpoſed of, nor ſhall he be charged with any expences accrued on account of the garden and orchard adjoining to the houſe, on the ſaid farm, nor have any credit given him on account of the produce of the ſaid garden and orchard, but ſhall be allowed in the ſaid account at the rate of fifteen pounds by the year, in the name of rent, for the ſaid houſe, garden,

and orchard, from the ſaid day of to the time of ſettling the ſaid account, PROVIDED that the ſaid two perſons to be offered by the ſaid J. S. as ſecurities for the payment of the ſaid ſum of two hundred and thirty-four pounds, be approved by the ſaid W. A. and E. H. or in caſe they ſhall not agree in the courſe of one week from the time when the names of the ſaid perſons propoſed as ſecurities ſhall be given in by the ſaid J. S. to the ſaid R. S. then to be approved by me the ſaid S. K.—AND PROVIDED ALSO that the ſaid J. S. ſhall give to the ſaid R. S. ſix weeks notice in writing of his intention to redeem the ſaid mortgage, together with the names of the two perſons he ſhall propoſe as ſecurity for the payment of the ſaid ſeveral ſums of one hundred and twenty-ſeven pounds and one hundred and ſeven pounds, with intereſt on the latter ſum as aforeſaid, if he ſhall propoſe to give ſuch ſecurity inſtead of paying the ſaid ſums: AND I DO hereby further award and determine, that if the ſaid J. S. ſhall not in manner aforeſaid redeem the ſaid mortgaged premiſes on or before the ſaid day of now next enſuing, then he ſhall be for ever foreclоſed of all equity of redemption thereof: AND the ſaid R. S. ſhall become abſolute owner of the ſaid farm, and of the ſaid indenture of leaſe, and of the ſaid ſeveral articles contained in the inventory hereinbefore mentioned, fully, freely, and clearly diſcharged of all claim or demand of the ſaid J. S. and of all and every perſons and perſon claiming by or through him, or in his right, and that in ſuch caſe the ſaid R. S. ſhall take the ſaid farm and indenture of leaſe, in full ſatisfaction for the ſaid ſum of five hundred pounds ſecured by the ſaid mortgage, and all intereſt thereon, and

ſhall take the ſaid ſeveral articles contained in the ſaid inventory as a full and compleat ſatisfaction and diſcharge to the ſaid J. S. for the ſaid ſum of one hundred and twenty-ſeven pounds, for which I have given him credit as aforeſaid in the ſaid general account: AND I DO hereby further order and award, that the ſaid J. S. ſhall, within two days after the date of theſe preſents, notice thereof being immediately given to him, execute to the ſaid R. S. a warrant of attorney authorizing the ſaid R. S. to enter up judgment againſt him for the ſum of one thouſand four hundred and thirty-three pounds eleven ſhillings and four pence, being the amount of the double of the ſaid ſum of ſeven hundred and ſixteen pounds fifteen ſhillings and eight-pence, with a defeaſance thereto annexed, that if the ſaid J. S. ſhall pay to the ſaid R. S. the ſum of one hundred pounds on or before the day of in the year and the ſum of fifty pounds every ſix months afterwards, that is to ſay, on the day of in the year on the day of in the ſaid year, and ſo on till the whole ſum of ſeven hundred and ſixteen pounds fifteen ſhillings and eight-pence ſhall be diſcharged, then the ſaid warrant of attorney ſhall be void, but that the ſaid R. S. ſhall be at liberty to ſue out execution on the ſaid judgment for the whole ſum of ſeven hundred and ſixteen pounds fifteen ſhillings and eight pence, on default of any one payment as aforeſaid, or for ſo much of the ſaid ſum as ſhall remain due and unpaid when ſuch default ſhall be made: AND I DO hereby further award, that the ſaid R. S. ſhall pay the ſum of ten pounds towards the diſcharge of the bill of G. S. for expences incurred in the courſe of this arbitration, at

his houſe called the Old Swan, in, &c. and that the ſaid J. S. ſhall pay to the ſaid G. S. the remainder of his ſaid bill: AND I DO hereby finally order and award that the ſaid R. S. ſhall forthwith execute to the ſaid J. S. a general releaſe of all actions, cauſe and cauſes of actions, judgments, ſuits, controverſies, treſpaſſes, debts, duties, damages, accounts, reckonings, and demands whatſoever, for or by reaſon of any matter, cauſe, or thing whatſoever, from the beginning of the world until the day of the date of the ſaid bonds of arbitration, ſave and except the ſaid warrant of attorney hereinbefore awarded, to be executed by the ſaid J. S. to the ſaid R. S. and that the ſaid J. S. ſhall forthwith execute to the ſaid R. S. a ſimilar releaſe, with the exception only of his right to redeem the ſaid mortgaged premiſes on the terms and in the manner hereinbefore directed and appointed: IN WITNESS whereof, I, the ſaid S. K. to both parts of this preſent award indented, have ſet my hand and ſeal, this day of one thouſand ſeven hundred and

S. K. *L. S.*

Signed, ſealed, and delivered, (being firſt duly ſtamped) in the preſence of }

R. W. H.

The RELEASES *given by each of the* PARTIES *in obedience to the* AWARD.

KNOW ALL MEN by theſe preſents, that I R. S. of, &c. in the county of, &c. mercer, have remiſed, releaſed, and for ever quit claimed; and by theſe preſents do remiſe, releaſe, and for ever quit claim, unto J. S. of, &c. in the ſaid county, gentleman, his heirs, executors, and adminiſtrators, all actions, cauſe and cauſes of action, judgments, ſuits, controverſies, treſpaſſes, debts, duties, damages, accounts, reckonings, and demands whatſoever, for or by reaſon of any matter, cauſe, or thing whatſoever, from the beginning of the world to the day of laſt, ſave and except a certain warrant of attorney, directed to be executed to me by the ſaid J. S. in and by a certain award made this day of in the year by S. K. Barriſter at Law, of, &c. Eſq. on a reference to him of all diſputes between me and the ſaid J. S.

KNOW ALL MEN by theſe preſents, that I J. S. of, &c. in the county of, &c. gentleman, have remiſed, releaſed, and for ever quit claimed; and by theſe preſents do remiſe, releaſe, and for ever quit claim, unto R. S. of, &c. in the ſaid county, mercer, his heirs, executors, and adminiſtrators, all actions, cauſe and cauſes of action, judgments, ſuits, controverſies, treſpaſſes, debts, duties, damages, accounts, reckonings, and demands whatſoever, for or by reaſon of any matter, cauſe, or thing whatſoever from the beginning of

the world to the day of laſt, ſave and except my right to redeem a certain farm now in mortgage to the ſaid R. S, at the time, under the terms and in the manner preſcribed in and by a certain award made the day of in the year by S. K. Barriſter at Law, of, &c. Eſq. on a reference to him of all diſputes between me and the ſaid R. S.— In Witness

Submission *by* Indenture.

THIS INDENTURE TRIPARTITE made, &c. between E. G. of, &c. and J. A. of, &c. executors of the laſt will and teſtament of P. M. late of, &c. deceaſed, of the firſt part; P. M. G. one of the grandchildren of the ſaid P. M. deceaſed, by his daughter, late the wife of the ſaid E. G. now alſo deceaſed, of the ſecond part; the ſaid P. M. G. the ſaid J. A. huſband of E. A. the only ſurviving daughter of the ſaid P. M. deceaſed, J. B. the younger, of, &c. huſband of L. G. granddaughter of the ſaid P. M. deceaſed, E. G. the younger, of, &c. Joſ. G. of, &c. John G. of, &c. P. A. of, &c. and S. A. of, &c. all grandchildren of the ſaid P. M. deceaſed, of the third part:—

Whereas ſome differences and diſputes have ariſen and are ſtill depending between the ſaid E. G. the elder, and J. A. as executors aforeſaid, and the ſaid P. M. G. and alſo between the ſaid executors, and the ſaid J. A. in right of his wife the ſaid E. A. the ſaid

P. M. G. the ſaid J. B. the younger, the ſaid E. G. the younger, the ſaid Joſ. G. the ſaid John G. the ſaid P. A. and S. A. in their reſpective rights and qualities above mentioned, touching the eſtate and effects of the ſaid P. M. deceaſed, and in order to put an end to the ſaid differences and diſputes, and to obtain an amicable adjuſtment thereof, The ſaid parties HAVE, and each and every of them HATH, agreed to refer the ſame to the award, order, arbitrament, and final determination of R. W. of, &c. N. A. of, &c. and Ed. G. of, &c. or any two of them, arbitrators indifferently elected and named to arbitrate, award, order, judge, and determine of and concerning the ſaid differences and diſputes, between the ſaid parties reſpectively: NOW THIS INDENTURE witneſſeth, that they the ſaid E. G. the elder, and J. A. as executors as aforeſaid, and the ſaid P. M. G.—J. B. the younger, E. G. the younger, Joſ. G.—John G.—P. A. and S. A. DO, and each and every of them DOTH, each for himſelf and herſelf ſeverally and reſpectively, and for his and her ſeveral and reſpective heirs, executors, and adminiſtrators, covenant, promiſe, and agree to and with each other, his and her heirs, executors, and adminiſtrators reſpectively, well and truly to ſtand to, obey, abide by, obſerve, perform, fulfil, and keep the award, order, arbitrament, and final determination of the ſaid R. W. N. A. and Ed. G. or any two of them, arbitrators, indifferently elected and named by and on behalf of the ſaid parties reſpectively, to arbitrate, award, order, judge, and determine of and concerning [all and all manner of action and actions, cauſe and cauſes of action, ſuits, bills, bonds, ſpecialties, covenants, contracts, promiſes, accounts, reckonings, ſums of money,

judgments, executions, extents, quarrels, controverſies, treſpaſſes, damages, and demands whatſoever, both in law and equity at any time heretofore, had, made, moved, brought, commenced, ſued, proſecuted, committed, or depending by or between the ſaid parties, or any of them, touching][1] the premiſes, or any thing in any wiſe relating thereto, ſo as the ſaid award of the ſaid arbitrators, or that of any two of them be made in writing under their hands, or under the hands of any two of them. And it is alſo agreed by and between the ſaid parties, that theſe preſents, and the ſubmiſſion hereby made of the ſaid matters in controverſy, ſhall be made a rule of his Majeſty's Court of King's Bench at Weſtminſter, to the end that the ſaid parties reſpectively may be finally concluded by the ſaid arbitration, purſuant to the ſtatute in that caſe made and provided; and the ſaid parties do hereby further agree that none of them ſhall or will proſecute any action or ſuit in any court of law or equity againſt the ſaid arbitrators, any or either of them, or bring or prefer any bill in equity againſt each other, of and concerning the premiſes until the ſaid award be made and delivered, alſo that all coſts and charges attending the preſent arbitration ſhall be in the diſcretion of the ſaid arbitrators or any two of them, and paid and ſatisfied purſuant to their award, and to the full performance of the premiſes, the ſaid parties bind themſelves ſeverally and reſpectively, their ſeveral and reſpective heirs, executors, and adminiſtrators, each to the other of them reſpec-

[1] All between the brackets is not only unneceſſary, but ſeems improper.

tively, in the penal ſum of 5000l. of good and lawful money of Great-Britain, firmly by theſe preſents: IN WITNESS whereof, they have hereunto ſet their hands and ſeals reſpectively, the day and year firſt above written.

Signed, ſealed, and delivered
(being firſt duly ſtamped)
in the preſence of

AWARD *made by the three* ARBITRATORS *on the above* SUBMISSION.

TO ALL to whom theſe preſents ſhall come, We, R. W. of, &c. N. A. of, &c. and Ed. G. of, &c. ſend greeting: WHEREAS in and by a certain Indenture tripartite, bearing date, &c. and made between, &c. [reciting nearly the whole of the indenture] as by the ſaid indenture relation being thereunto had, may more fully and at large appear; NOW KNOW YE that we the ſaid R. W.—N. A. and Ed. G. having taken upon ourſelves the charge of the ſaid award, and having heard, and duly and maturely weighed and conſidered the ſeveral allegations, vouchers, and proofs brought before us, by and on behalf of the ſaid parties reſpectively, are of opinion that the intention of the ſaid P. M. deceaſed, was by his laſt will and teſtament to diſpoſe of, give, deviſe, and bequeath the following legacies and property, namely, unto his widow E. M. the intereſts or dividends ariſing from 4000l. three per cent. conſolidated Bank annuities, and the uſe of the houſehold furniture, plate, and utenſils in and appertaining to the teſtator's houſe at Plaiſtow, &c. wherein

he died, his chariot, a horſe, and cow, (valued together at 642l. 1s. 1d.) during her natural life, and from and after her deceaſe, the ſaid annuities,[1] houſehold furniture, plate, and utenſils, to be the property of, and divided amongſt his ſeven grand-children, the above named P. M. G. &c. by even and equal portions; unto the ſaid P. M. G. all his the teſtator's intereſt or concern in ſhipping, and the benefit to ariſe therefrom, ſhare and ſhare alike to the ſaid P. M. G. &c. to the ſaid P. M. G. the houſe then occupied by his father the ſaid E. G. the elder; to the ſaid L. B. the houſe then occupied by Mrs. F. and to the ſaid E. G. the younger the houſe then occupied by Mr. G. all which houſes are ſituate in or near Broad-ſtreet, in the ſaid pariſh of St. George in the Eaſt; unto the ſaid ſeven grand-children the following ſpecific legacies or ſums of money, that is to ſay, to the ſaid P. M. G. and L. B. the ſum of 2000l. each, to the ſaid E. G. the younger, Joſ. G. John G.—P. A. and S. A. 1000l. each, and to his daughter the ſaid E. A. a ſum of 3000l. alſo the houſe and land ſituate at Plaiſtow aforeſaid, then and now in the occupation of the ſaid J. A. together with his coach and horſes: THEREFORE WE DO hereby appreciate and fix the aforeſaid deviſes, legacies, and bequeſts, made, given, and bequeathed, or intended to be made, given, and bequeathed to the ſaid E. M.—P. M. G.—L. B.—F. G. the younger, Joſ. G. John G. P. A.—S. A. and E. A. reſpectively, in and by the laſt will and teſtament of the ſaid P. M. deceaſed, in

[1] In *fact* the teſtator had made no diſpoſition of the principal after his widow's deceaſe.

manner above mentioned: AND WE DO award and confirm the ſame to the ſaid deviſees and legatees, their HEIRS and ASSIGNS reſpectively; and we do order and direct the ſaid ſeveral deviſees and legatees, and all and every perſons or perſon claiming or to claim for, by, or from or under them or any of them, to be and remain fully ſatisfied and contented with the ſums and proportions of the eſtate, goods, chattels, and credits of the ſaid P. M. deceaſed, here above ſpecified ſo far as relates thereto, or to any part thereof. AND WE DO order and direct that the ſaid E. G. the elder, and J. A. as executors as aforeſaid, do and ſhall well and truly pay, or cauſe to be paid, unto the ſaid P. M. G. at, &c. on, &c. between the hours, &c. the ſum of 1690l. in full of all claims and demands the ſaid P. M. G. or his repreſentatives, can or may have on the eſtate of the ſaid P. M. deceaſed, for balance of account due to him as partner with the ſaid late P. M. at the time of his deceaſe; AND WE DO direct the ſaid P. M. G. to receive the ſaid ſum accordingly: AND WE DO hereby further award and order that one moiety of the book debts due and owing to the ſaid P. M. deceaſed, and the ſaid P. M. G. as partners in trade, and which have been taken by the ſaid P. M. G. at and for the ſum of 1375l. ſhall be the property of the ſaid P. M. G. that the remaining moiety thereof ſhall be the property of and divided among the ſaid ſeven grand-children of the ſaid P. M. deceaſed. WE DO alſo award unto the ſaid E. A. all the houſehold furniture and utenſils that were in the houſe now occupied by the ſaid J. A. at the deceaſe of the ſaid late P. M. together with every article then in, upon, or in any wiſe belonging or appertaining to the ſaid houſe

and premiſes: AND WE DO moreover award and order that all the reſt, reſidue, and remainder of the eſtate, goods, chattels, and credits of the ſaid P. M. deceaſed, ſhall be the property of and divided among his ſaid ſeven grand-children, the ſaid P. M. G.—L. B. E. G. the younger, Joſ. G. John G.—P. A. and S. A. by even and equal portions; AND WE DO likewiſe award, order, and direct, that the ſaid E. G. the elder, and J. A. as executors as aforeſaid, do and ſhall well and truly pay, or cauſe to be paid, unto the ſaid P. M. G. one moiety of the ſaid book debts, and to each of them the ſaid P. M. G.—J. B. the younger, in right of his wife the ſaid L. B.—E. G. the younger, Joſ. G.—John G.—P. A. and S. A. an equal portion of the other moiety of the ſaid book debts, alſo their reſpective proportion, or ſuch part thereof as has not been already paid of the intereſt or concern in ſhipping of the ſaid P. M. deceaſed, purſuant to an agreement entered into between the ſaid E. G. the elder, and J. A. as executors as aforeſaid, and the ſaid P. M. G. amounting as per ſaid agreement to 1575l. and which agreement WE DO direct ſhall be finally confirmed, as alſo of ſuch other part of the ſaid ſhipping, or intereſt therein of the ſaid deceaſed, as has not been included in the ſaid agreement, and likewiſe of the reſt, reſidue, and remainder of his eſtate, goods, chattels, and credits not otherwiſe diſpoſed of, in, or by his laſt will or teſtament, as the ſame ſhall be from time to time collected, gotten in, and received by the ſaid executors to the amount of 140l. or upwards: AND WE DO direct the ſaid deviſees and legatees reſpectively, and every other perſon claiming or to claim by, from, or under them, or any of them, from time to time, when law-

fully required to ſign, ſeal, execute, and deliver good and ſufficient releaſes, acquittances, and diſcharges for all monies paid, or to be paid, to them by the ſaid executors, by virtue of the aforeſaid will, and of theſe preſents; AND WE DO moreover award that the ſaid E. G. the elder, and J. A. as executors as aforeſaid, do and ſhall pay into the hands of ——— and ——— public notaries, the ſum of 12l. 12s. at or before the delivery of this our award, for charges of the preſent reference; and upon performance of this our award, all differences and diſputes in any wiſe ſubſiſting by and between the ſaid parties, or any of them, previous to the day of the date of the ſaid recited indenture, touching the premiſes, ſhall utterly ceaſe and determine. IN WITNESS, &c.[1]

RULE *of* REFERENCE *at* NISI PRIUS, *where a* JUROR *is withdrawn.*

LONDON } TO WIT. } AT the ſitting of Niſi Prius held at Guildhall, in and for the city of London, on, &c. and in the year of the reign of our Sovereign Lord George the Third, now King of Great-Britain, &c. before the Right Honorable Lloyd Lord Kenyon, Chief Juſtice of our Lord the King, aſſigned to hold the Pleas before the King himſelf.

[1] This is the award referred to in p. 351—354.

HORTON } IT is ordered by the Court, by and with
v. } the conſent of the plaintiff and defendant,
BOLT. } their counſel, and attornies, that the laſt juryman ſworn and impannelled in this cauſe, be withdrawn out of the pannel, and that all matters in difference between the ſaid parties in this cauſe be referred to the award, order, arbitrament, final end, and determination of F. C. of the Middle Temple, Eſq. ſo as he ſhall make and publiſh his award in writing of and concerning the premiſes in queſtion, on or before the day of Hilary Term now next enſuing; and that the ſaid parties ſhall and do perform, fulfil, and keep ſuch award, ſo to be made by him the ſaid arbitrator as aforeſaid: And it is alſo ordered, by and with ſuch conſent as aforeſaid, that the coſts of the ſaid cauſe ſhall abide the event and determination of the ſaid award, and that the coſts of the ſaid reference ſhall be in the diſcretion of the ſaid arbitrator, who ſhall direct and award by whom, and to whom, and in what manner the ſame ſhall be paid: And it is likewiſe ordered, by and with ſuch conſent as aforeſaid, that the plaintiff and defendant reſpectively are to be examined upon oath, to be ſworn before the ſaid Lord Chief Juſtice, or ſome other Juſtice of the ſame Court of our Lord the King before the King himſelf, if thought neceſſary by the ſaid arbitrator, and do produce before the ſaid arbitrator all books, papers, and writings touching and relating to the matters in difference between the ſaid parties, as the ſaid arbitrator ſhall think fit, and that the witneſſes of the plaintiff and defendant reſpectively are to be examined upon oath, to be ſworn before the ſaid Lord Chief Juſtice, or ſome other Juſtice of the ſame Court: And it is likewiſe ordered, by and

with ſuch conſent as aforeſaid, that neither the plaintiff or defendant ſhall proſecute, or bring any action or ſuit in any court of law or equity againſt the ſaid arbitrator, or bring or prefer any bill in equity againſt each other, of and concerning the premiſes in queſtion ſo as aforeſaid referred: And it is further ordered, by and with ſuch conſent as aforeſaid, that if either party ſhall, by affected delay or otherwiſe, wilfully prevent the ſaid arbitrator from making an award, he ſhall pay ſuch coſts to the other as the ſaid Court of our ſaid Lord the King, before the King himſelf, ſhall think reaſonable and juſt: And laſtly, it is ordered by the like conſent as aforeſaid, that the ſaid Court of our ſaid Lord the King, before the King himſelf, may be prayed that this order may be made a rule of the ſame court.

By the Court.

T. L.

RULE *of* REFERENCE *at* NISI PRIUS, *where a* VERDICT *is taken for the* PLAINTIFF.

LONDON } TO WIT. } AT the ſitting of Niſi Prius held at Guildhall, in and for the city of London, on, &c. in the year of our Lord and in the year of the reign of our Sovereign Lord George the Third, now King of Great-Britain, &c. before the Right Honorable Lloyd Lord Kenyon, Chief Juſtice of our Lord the King, aſſigned to hold Pleas before the King himſelf.

M——— } IT is ordered by the Court, by and with
v. } the conſent of the plaintiff and defendant,
L——— } their counſel, and attornies, that the jury find a verdict for the plaintiff damages and coſts ſubject to this order and the award to be made purſuant thereto; and that all matters in difference between the ſaid parties be referred to the award, order, arbitrament, final end, and determination of T. C. of, &c. in the county of, &c. Eſq. ſo as he ſhall make and publiſh his award in writing of and concerning the premiſes in queſtion, on or before the day of Trinity Term now next enſuing; and that the ſaid parties ſhall and do perform, fulfil, and keep ſuch award, ſo to be made by him the ſaid arbitrator as aforeſaid: And it is alſo ordered, by and with ſuch conſent as aforeſaid, that the coſts of the ſaid cauſe ſhall abide the event and determination of the ſaid award, and that the coſts of the reference ſhall be in the diſcretion of the ſaid arbitrator, who ſhall direct and award by whom, and to whom, and in what manner the ſame ſhall be paid: And it is likewiſe ordered, by and with ſuch conſent as aforeſaid, that the plaintiff and defendant reſpectively are to be examined upon oath, to be ſworn before the ſaid Lord Chief Juſtice, or ſome other Juſtice of the ſame Court of our Lord the King before the King himſelf, if thought neceſſary by the ſaid arbitrator, and do produce before the ſaid arbitrator all books, papers, and writings touching and relating to the matters in difference between the ſaid parties, as the ſaid arbitrator ſhall think fit, and that the witneſſes of the plaintiff and defendant reſpectively are to be examined upon oath, to be ſworn before the ſaid Lord Chief Juſtice, or ſome other Juſtice

of the ſame Court: And it is likewiſe ordered, by and with ſuch conſent as aforeſaid, that the defendant ſhall not bring any writ of error to reverſe the ſaid judgment, and that neither the plaintiff nor the defendant ſhall proſecute, or bring any action or ſuit in any court of law or equity againſt the ſaid arbitrator, or bring or prefer any bill in equity againſt each other, of and concerning the premiſes in queſtion ſo as aforeſaid referred: And it is further ordered, by and with ſuch conſent as aforeſaid, that if either party ſhall, by affected delay or otherwiſe, wilfully prevent the ſaid arbitrator from making an award, he ſhall pay ſuch coſts to the other as the ſaid Court of our ſaid Lord the King, before the King himſelf, ſhall think reaſonable and juſt: And laſtly, it is ordered, by the like conſent as aforeſaid, that the ſaid Court of our ſaid Lord the King, before the King himſelf, may be prayed that this order may be made a rule of the ſame court.

By the Court.

T. L.

Special Reference *by* Rule *of* Court.

WEDNESDAY next after fifteen days of the Holy Trinity, in the 38th year of King Geo. the 3d.

C. *v.* E. } UPON hearing Mr. P. of counſel for the plaintiff, and Mr. E. of counſel for the defendant, and by their conſent IT IS ORDERED, that the plaintiff be at liberty forthwith to enter up

judgment for the damages mentioned in the declaration in this cauſe and coſts of ſuit, ſuch judgment to be ſubject to the award hereinafter mentioned, and that all matters in diſpute between the plaintiff and defendant ſhall be referred to the final award of S. K. of, &c. and I. E. of, &c. barriſters at law, ſo that their award be made in writing, and *ready to be delivered to the party requiring the ſame*, on or before the firſt day of next, and in caſe the ſaid S. K. and I. E. ſhall not then be prepared to make and publiſh their ſaid award, or cannot agree touching the matters hereby to them referred, then that the ſame ſhall be referred to ſuch third perſon as the ſaid S. K. and I. E. ſhall mutually agree upon and nominate, whoſe name ſhall be indorſed hereon, before the ſaid arbitrators ſhall proceed on the ſaid arbitration, ſo that the ſaid laſt mentioned award or umpirage be made in writing, and ready to be delivered to ſuch of the parties as require the ſame, on or before the firſt day of next: And in caſe the ſaid arbitrators or umpire ſhall not be prepared to make and publiſh their award or umpirage at the reſpective times aforeſaid, then the ſaid parties ſhall from time to time conſent to ſuch enlargement of the time for the making and publiſhing the ſaid award or umpirage as this Court or any of the Judges thereof ſhall deem reaſonable; and that the coſts of this action, and alſo the coſts of a certain action brought by the defendant againſt the plaintiff in the Court of Common Pleas, and alſo the coſts of the reference and the award to be made in purſuance thereof, ſhall abide the event and determination of the ſaid award: And that neither the plaintiff nor defendant ſhall be examined before the ſaid arbitrators or umpire, but that they ſhall produce

before the ſaid arbitrators or umpire all books, papers, and writings in their reſpective cuſtody or power, relating to the ſaid matters in difference, as the ſaid arbitrators or umpire ſhall direct; and that the witneſſes of the plaintiff and defendant reſpectively, (if required by the ſaid arbitrators or umpire), ſhall be examined upon oath to be ſworn in open Court, or before ſome Judge of this Court; and that neither the plaintiff nor defendant ſhall bring or further proſecute any action or ſuit in any court of law or equity againſt the ſaid arbitrators or umpire, or againſt each other, or bring or prefer any bill in equity againſt each other, of and concerning the premiſes in queſtion ſo as aforeſaid referred: And in caſe either party ſhall neglect or refuſe to attend the ſaid arbitrators or umpire, the ſaid arbitrators or umpire ſhall be at liberty to proceed in the ſaid arbitration, and make their or his award ex parte.

By the Court.

We appoint
the day of
at o'clock preciſely,
at

I. E.

S. K.

AWARD *made on the foregoing* SUBMISSION.

TO ALL TO WHOM theſe preſents ſhall come, I. E. of, &c. in the county of, &c. Eſq. and S. K. of, &c. Eſq. barriſters at law, SEND GREETING:— WHEREAS divers ſuits, diſputes, controverſies, and differences having ariſen and being depending between B. C. late fourth mate of the Melville Caſtle Indiaman, and W. E. late third mate of the ſame ſhip, of and concerning divers ſums of money claimed by the ſaid B. C. to be due to him from the ſaid W. E. and alſo of and concerning divers other ſums of money claimed by the ſaid W. E. to be due to him from the ſaid B. C. AND WHEREAS the ſaid B. C. for the recovery of the ſaid ſums of money claimed by him to be due from the ſaid W. E. had commenced an action againſt the ſaid W. E. in his Majeſty's Court of King's Bench; and the ſaid W. E. for the recovery of the ſaid ſums of money claimed by him to be due from the ſaid B. C. had commenced an action againſt the ſaid B. C. in his Majeſty's Court of Common Pleas; and the ſaid two actions reſpectively, at the time of making the rule or order of his Majeſty's Court of King's Bench next hereinafter mentioned, were depending and undetermined: AND WHEREAS by a rule or order of his Majeſty's Court of King's Bench made in the ſaid action, in which the ſaid B. C. was the plaintiff, and the ſaid W. E. was the defendant as aforeſaid, on next after fifteen days of the Holy Trinity, in the year of King George the Third, It was ordered (among other things) that the ſaid B. C. ſhould

be at liberty forthwith to enter up judgment for the damages mentioned in the declaration in the ſaid cauſe then depending in the ſaid Court of King's Bench, and coſts of ſuit, ſubject to the award in the ſaid order mentioned; and that all matters in diſpute between the parties in the ſaid laſt-mentioned cauſe ſhould be referred to the award of us the ſaid I. E. and S. K. ſo that our award ſhould be made in writing, and ready to be delivered to the party requiring the ſame on or before the day of next, after the date of the ſaid order or rule of court; and that the coſts of the ſaid laſt-mentioned action, and alſo the coſts of the ſaid action brought by the ſaid W. E. againſt the ſaid B. C. in the Court of Common Pleas, and alſo the coſts of the reference and of the award to be made in purſuance thereof, ſhould abide the event and determination of the ſaid award: NOW KNOW YE that we the ſaid I. E. and S. K. having, in purſuance of the ſaid rule or order, taken upon ourſelves the burthen of the ſaid arbitration, and having heard and read all the evidence adduced and brought before us for and on the parts and behalf of the ſaid B. C. and W. E. reſpectively touching the matters in difference between them as aforeſaid, and having duly weighed and maturely conſidered the ſame, do make and publiſh our award of and concerning the premiſes in manner following: THAT IS TO SAY, we the ſaid I. E. and S. K. do find that the ſaid B. C. is indebted to the ſaid W. E. in the ſum of of lawful money of Great-Britain; and we do hereby award and order, that the ſaid B. C. ſhall pay to the ſaid W. E. the ſaid ſum of upon demand thereof; and we do further award, order, and determine, that the ſaid

B. C. ſhall execute to the ſaid W. E. a general releaſe of all matters in difference between them up to the date of the ſaid order or rule of court, and that the ſaid W. E. ſhall, on payment of the ſaid ſum of and of the coſts of the ſaid two actions ſo depending as aforeſaid, and alſo the coſts of the reference and of this our award, as directed by the ſaid rule or order, execute to the ſaid B. C. a like releaſe upon demand thereof being reſpectively made. IN WITNESS whereof, we the ſaid I. E. and S. K. have hereunto ſet and ſubſcribed our names to this our award this day of in the year of our Lord one thouſand ſeven hundred and

I. E.
S. K.

Signed and publiſhed as their award by the above-named I. E. and S. K. in the preſence of

R. E.

PLEADINGS ON AWARDS.

INDEBITATUS ASSUMPSIT *on an* AWARD *for the* PAYMENT *of* MONEY.

LONDON } A. B. complains of C. D. being, &c. FOR
TO WIT. } THAT WHEREAS on, &c. at, &c. divers diſputes, differences, and controverſies had ariſen, and were depending, between the ſaid A. B. and the ſaid C. D. and thereupon for putting an end to the ſaid diſputes, differences, and controverſies, the ſaid A. B. and the ſaid C. D. on the ſame day and year aforeſaid, at, &c. agreed to ſubmit, and did ſubmit, themſelves to ſtand to the award, order, and final determination of E. F. of, &c. and G. H. of, &c. arbitrators indifferently named, elected, and choſen, as well on the part and behalf of the ſaid A. B. as of the ſaid C. D. to award, order, and determine of and concerning the ſaid diſputes, differences, and controverſies:[1] AND WHEREAS afterwards, to wit, on, &c. the ſaid E. F. and G. H. in due manner made their award, order, and determination, of and concerning the

[1] This form is on the ſuppoſition that no time is limited in the Submiſſion for making the Award; but if there be a proviſo, limiting the time, it muſt be recited; and in the ſubſequent part it muſt be ſhewn that the award was made within that time.

premiſes,[2] whereby the ſaid E. F. and G. H. amongſt other things, awarded and ordered that the ſaid C. D. his heirs, executors, or adminiſtrators, ſhould, on or before, &c. then next enſuing, well and truly pay, or cauſe to be paid, to the ſaid A. B. his executors, adminiſtrators, or aſſigns, the ſum of one hundred and twenty pounds, and that thereupon the ſaid A. B. ſhould execute to the ſaid C. D. a general releaſe of all actions, ſuits, damages, accounts, reckonings and demands whatſoever, from the beginning of the world to the day of the ſaid ſubmiſſion; and that the ſaid C. D. ſhould then execute to the ſaid A. B. a like general releaſe: of all which ſaid premiſes he the ſaid C. D. afterwards, to wit, on, &c. at, &c. aforeſaid had notice, by reaſon whereof he the ſaid C. D. became liable to pay to the ſaid A. B. the ſaid ſum of one hundred and twenty pounds, in the ſaid award mentioned; and being ſo liable, he the ſaid C. D. in conſideration thereof, afterwards, to wit, on the day and year laſt aforeſaid, at, &c. aforeſaid, undertook and faithfully promiſed the ſaid A. B. to pay him the ſaid ſum of money when he the ſaid A. B. ſhould be thereto afterwards requeſted: nevertheleſs the ſaid C. D. not regarding, &c. to the damage of the ſaid A. B. of two hundred pounds.

[2] This is on the ſuppoſition that there is no proviſo that the award ſhould be made in writing; but if ſuch proviſo be in the ſubmiſſion, then it muſt be recited in the former part of the declaration, and here the award muſt be recited to have been made in writing: If no ſuch proviſo be in the ſubmiſſion, then, whether the ſubmiſſion or the award, or both, be in writing or not, it is not neceſſary to ſhew that the award was in writing, unleſs, perhaps, where the latter is under hand and ſeal.

ASSUMPSIT *on* MUTUAL PROMISES *to* PERFORM *an* AWARD.

MIDDLESEX } A. B. complains of C. D. being, &c.
TO WIT. } FOR THAT WHEREAS on, &c. at, &c. divers diſputes, differences, and controverſies had before that time ariſen, and were then depending, between the ſaid A. B. and the ſaid C. D. and thereupon, for putting an end to the ſaid diſputes, differences, and controverſies, the ſaid A. B. and the ſaid C. D. on the ſame day and year aforeſaid, at, &c. aforeſaid, ſubmitted themſelves, and then and there agreed to ſubmit themſelves, to ſtand to, abide by, obſerve, perform, and fulfil the order, rule, and determination of E. F. of, &c. and G. H. of, &c. indifferently choſen by the ſaid A. B. and the ſaid C. D. to ſettle all and all manner of debts, differences, quarrels, diſputes, reckonings, agreements, and all other dues and demands both at law and in equity, or otherwiſe howſoever, then ſubſiſting between them: And it was then and there further agreed, that the opinion, award, and determination of them the ſaid E. F. and G. H. touching the matters in queſtion, ſhould be final, provided the ſame ſhould be delivered in writing, and ſigned by them, on or before, &c.—but if they the ſaid E. F. and G. H. ſhould not be able to ſettle the aforeſaid diſputes and differences on or before the ſaid, &c. then the ſaid A. B. and the ſaid C. D. did, by their ſaid agreement, empower them the ſaid E. F. and G. H. to chooſe and fix upon ſome other perſon, whoſe determination ſhould be likewiſe final; and the ſaid agreement being ſo made as aforeſaid, afterwards, to wit, on the ſame, &c. in conſideration that the ſaid A. B. at the ſpecial in-

ſtance and requeſt of the ſaid C. D. had then and there undertaken and faithfully promiſed to perform and fulfil the before-mentioned agreement in all things on his part and behalf to be performed and fulfilled, he the ſaid C. D. undertook, and then and there faithfully promiſed the ſaid A. B. that he the ſaid C. D. would perform the ſaid agreement in all things therein contained on his part and behalf to be performed and fulfilled; and the ſaid A. B. in fact ſays, that the ſaid E. F. and G. H. being ſuch arbitrators as aforeſaid, could not agree in opinion ſo as to ſettle the ſaid matters in diſpute between the ſaid A. B. and C. D. and thereupon afterwards, and before the ſaid, &c. [the time limited for the two arbitrators to make their award] to wit, on, &c. the ſaid E. F. and G. H. being ſuch arbitrators as aforeſaid, by virtue of the ſaid power ſo given to them as aforeſaid, and by and with the approbation and conſent of the ſaid A. B. and the ſaid C. D. did nominate and appoint one J. S. to be umpire, to arbitrate, award, order, and finally determine of, in, and concerning all matters in difference between the ſaid A. B. and C. D. as well on the part and behalf of the ſaid A. B. as of the ſaid C. D. ſo that the ſaid J. S. ſhould make and ſet down his award and umpirage in writing, ready to be delivered to the ſaid A. B. and C. D. on or before the, &c. And the ſaid A. B. further ſays, that the ſaid J. S. being ſuch umpire as aforeſaid, and having taken on himſelf the charge or burthen of the ſaid award or umpirage, did afterwards, and within the time in that behalf limited for the making of the ſaid award or umpirage as aforeſaid, to wit, on, &c. at, &c. in due manner make and ſet down his award or umpirage in writing of and concerning the matters in

difference at the time of making of the ſaid agreement, ſo referred to him as aforeſaid, then ready to be delivered to the ſaid A. B. and the ſaid C. D. bearing date the ſame day and year laſt aforeſaid; and thereby he the ſaid J. S. did, among other things, award, order, decree, and determine of and concerning the aforeſaid matters in difference, that, &c. [here ſet forth ſo much of the award as is neceſſary to ſupport the action.] Of all which premiſes the ſaid C. D. afterwards, to wit, on the ſaid, &c. at &c. had notice; by reaſon of which premiſes the ſaid C. D. became liable to pay, &c. to the ſaid A. B. &c. [or became bound to do the ſpecific thing awarded, and in which it is intended that the breach ſhould be aſſigned, as the caſe may be,] according to the form and effect of the ſaid award, and which he the ſaid C. D. ought to have done, according to the form and effect of the ſaid agreement and the ſaid promiſe and undertaking of the ſaid C. D. ſo made as aforeſaid: Yet the ſaid C. D. not regarding the ſaid agreement, nor his ſaid promiſe and undertaking ſo by him in this behalf made, but contriving, &c. hath not yet paid, &c. [or hath not yet done the thing ſpecifically awarded, as the caſe may be,] although he the ſaid C. D. was thereto requeſted by the ſaid A. B. but to pay the ſame &c. [or to do, &c. as the caſe may be] hath hitherto wholly refuſed, and ſtill doth refuſe, contrary to the form and effect of the ſaid agreement, and the ſaid promiſe and undertaking of the ſaid C. D. ſo made as aforeſaid.[3]

[3] Vid. p. 11, 277, et ſeq.—and for more examples of declarations in aſſumpſit on awards, vide Wentworth's Pleader, vol. 1, p. 90—100.

DEBT *on an* AWARD *for the* PAYMENT *of* MONEY.

LONDON } W. G. late of, &c. was ſummoned to
TO WIT. } anſwer to J. A. in a plea that he render to him 500l. which he owes to him and unjuſtly detains from him, &c. and thereupon the the ſaid J. by C. D. his attorney, ſays, that WHEREAS on, &c. at London aforeſaid, &c. divers controverſies and diſputes had ariſen. and were then depending, between the ſaid J. and the ſaid W. for the determining whereof the ſaid J. and the ſaid W. on the ſame, &c. at, &c. ſubmitted themſelves to ſtand to the award and determination of J. B.—J. J. and R. B. or any two of them, arbitrators indifferently named, elected, and choſen by and between the ſaid parties to arbitrate, award, order, judge, and determine of and concerning the ſame controverſies and diſputes, ſo as the ſaid arbitrators, or any two of them, ſhould make and publiſh their award in writing of and concerning the premiſes ſo referred as aforeſaid, on or before, &c. and the ſaid J. in fact, ſays, that the ſaid J. B.—J. J. and R. B. the ſaid arbitrators, having taken upon themſelves the burthen of the ſaid arbitration, they the ſaid J. B.—J. J. and R. B. afterwards, and within the time above limited for making the ſaid award, to wit, on, &c. at, &c. aforeſaid, &c. made their award of and concerning the premiſes ſo referred to them as aforeſaid, in writing under their hands and ſeals, ready to be delivered to the ſaid parties, or either of them who ſhould deſire the ſame, bearing date the ſame day and year laſt aforeſaid; and by the ſaid award they the ſaid J. B.—J. J. and R. B. did award and determine

that the ſaid W. his executors and adminiſtrators, ſome or one of them, ſhould on, &c. enſuing the date of the ſaid award, at, &c. between the hours, &c. well and truly pay, or cauſe to be paid, to the ſaid J. his executors, adminiſtrators, or aſſigns, the ſum of 247l. 9s. 3d. of good, &c.[4] [and further, by the ſaid award, they the ſaid arbitrators did award and determine, that upon payment of the ſaid ſum of two hundred and forty-ſeven pounds nine ſhillings and three-pence by the ſaid W. his executors or adminiſtrators, to the ſaid J. his executors, adminiſtrators, or aſſigns, the ſaid J. and W. their executors and adminiſtrators, ſhould execute general releaſes each to the other of all actions, claims, and demands whatſoever, from the beginning of the world to, &c.] And the ſaid J. avers that the ſaid W. did not on, &c. (the day appointed for the payment of the money,) at, &c. (the place appointed) between the hours, &c. nor at any other time or place whatſoever, hitherto pay, or cauſe to be paid, to the ſaid J. or his aſſigns, the ſaid ſum of 247l. 9s. 3d. of good, &c. which by the ſaid award was to have been paid by the ſaid W. to the ſaid J. on that day, and at the time and place aforeſaid, according to the form and effect of the ſaid award, but therein wholly failed and made default; and the ſame, and every part thereof, is ſtill wholly unpaid to the ſaid J. whereby an action has accrued to

[4] The clauſe between [ ] ſeems to be introduced for the purpoſe of preventing a demurrer for the want of mutuality; but as that is certainly not now conſidered as a requiſite to conſtitute a good award, this clauſe may ſafely be omitted.—Vid. p. 218—228, and vid. p. 288—289.—What is here ſaid is meant to apply to all between [ ] in the ſubſequent precedents.

the ſaid J. to demand and have of the ſaid W. the ſaid 247l. 9s. 3d. parcel of the ſaid ſum of 500l. above demanded. AND WHEREAS the ſaid W. afterwards, to wit, on, &c. at, &c. aforeſaid, borrowed of the ſaid J. 252l. 10s. 9d. to be paid to the ſaid J. when he the ſaid W. ſhould be thereto afterwards requeſted, by means whereof an action has accrued to the ſaid J. to demand and have of and from the ſaid W. the ſaid 252l. 10s. 9d. reſidue of the ſaid ſum of 500l. above demanded: yet the ſaid W. although often requeſted, has not as yet paid the ſaid ſum of 500l. nor any part thereof, to the ſaid J. but has hitherto refuſed, and ſtill does refuſe, to pay the ſame, or any part thereof, to the ſaid J. to the damage of him the ſaid J. of twenty pounds; and therefore the ſaid J. brings ſuit, &c.

DECLARATION *in* DEBT *on an* AWARD *made by an* UMPIRE.

LANCASHIRE, TO WIT. } T. L. complains of J. S. being, &c. in a plea that he render to the ſaid T. 60l. which he owes to and unjuſtly detains from him: FOR THAT WHEREAS on, &c. at, &c. in, &c. divers diſputes, differences, and controverſies had ariſen, and were depending, between the ſaid T. and the ſaid J. and thereupon, for the putting an end to the ſaid differences, diſputes, and controverſies, they the ſaid T. and J. on the ſame, &c. at, &c. ſubmitted themſelves to ſtand to the award, order, and final determi-

nation of C. D. of, &c. and L. B. of, &c. arbitrators indifferently named, elected, and chofen, as well on the part and behalf of the faid J. as of the faid T. to award, order, judge, and determine, of and concerning the premifes, fo as their award fhould be made in writing, under the hands and feals of the faid C. D. and L. B. ready to be delivered to the faid parties on or before, &c. and if the faid C. D. and L. B. fhould not make their award in writing, under their hands and feals, ready to be delivered to the faid parties on or before, &c. then the faid T. and J. fubmitted themfelves to ftand to, abide by, perform, and keep the award and final determination of E. F. of, &c. indifferently elected and chofen by and between the faid parties for finally determining the faid differences, difputes, and controverfies, fo as the faid E. F. fhould make his award in writing, under his hand and feal, ready to be delivered to the faid parties on or before, &c.—and the faid T. in fact fays, that the faid C. D. and L. B. the arbitrators aforefaid, did not make their award in writing concerning the premifes, ready to be delivered to the faid parties, within the time in that behalf limited as aforefaid, but intirely omitted fo to do: And the faid T. further in fact, fays, that afterwards, and within the time in that behalf limited for the aforefaid E. F. to make his award as aforefaid, concerning the premifes, to wit, on, &c. at, &c. he the faid E. F. having taken upon himfelf the burthen of the faid award, in due manner made his award of and concerning the premifes, in writing under his hand and feal, ready to be delivered to the faid parties, or fuch of them who fhould require the fame; and thereby he the faid E. F. did then and there order and award that [all actions,

ſuits, quarrels, and controverſies whatſoever, had, made, moved, ariſen, or depending by or between the ſaid parties at any time before, &c. then laſt paſt, either in law or equity, for any manner or cauſe whatſoever, touching the ſaid differences and diſputes, ſhould ceaſe, determine, and be no further proſecuted or proceeded in; and the ſaid E. F. did, by his ſaid award, further award, order, and determine, that] the ſaid J. his executors or adminiſtrators, ſhould pay, or cauſe to be paid, unto the ſaid T. his executors or adminiſtrators, the ſum of 30l. at, &c. on, &c. then next, between the hours, &c. [And, laſtly, the ſaid E. F. did, by his ſaid award, further order and award, that on payment of the ſaid ſum of 30l. as aforeſaid, each of the ſaid parties ſhould execute to the other a general releaſe of all matters and differences between them, from the beginning of the world until, &c.] of all which premiſes he the ſaid J. afterwards, to wit, on the ſaid, &c. at, &c. aforeſaid, had notice. [And the ſaid T. in fact, further ſays, that all actions, ſuits, quarrels, and controverſies whatſoever, had, made, moved, ariſen, or depending by or between the ſaid parties at any time before, &c. in the ſaid award mentioned, did then and there, on the part of the ſaid T. entirely ceaſe and determine, and have not been any further proſecuted or proceeded in,] yet the ſaid J. did not pay, or cauſe to be paid, to the ſaid T. the ſaid ſum of 30l. ſo awarded to be paid as aforeſaid, or any part thereof, at the ſaid time and place appointed for the payment thereof as aforeſaid, nor at any other time or place whatſoever, but hath therein wholly failed and made default, whereby an action has accrued to the ſaid T. to demand and have of the ſaid J. the ſaid 30l. parcel of the

ſaid 60l. above demanded: and whereas the ſaid J. afterwards, to wit, on, &c. at, &c. borrowed of the ſaid T. 30l. reſidue of the ſaid 60l. above demanded, to be paid to the ſaid T. when he the ſaid J. ſhould be thereto afterwards requeſted; yet the ſaid J. although often requeſted, &c.—Damages 10l.

DEBT *on an* AWARD *by* UMPIRAGE, *againſt* DEFENDANT *and his* SURETY *in the* ARBITRATION BOND.

YORKSHIRE } J. C. complains of W. F. and J. T.
TO WIT. } being, &c. of a plea that they render to him the ſum of 77l. 5s. of lawful, &c. which they owe to and unjuſtly detain from him: FOR THAT WHEREAS before the time of the ſubmiſſion hereafter next mentioned, at B. in the county of Y. certain controverſies and diſputes had ariſen and were depending between the ſaid J. C. and the ſaid W. and thereupon the ſaid J. C. and the ſaid W. for themſelves ſeverally, and the ſaid J. T. as ſurety on behalf of the ſaid W. for the ſettling and determining of the ſaid controverſies and diſputes heretofore, to wit, on, &c. at, &c. aforeſaid, in writing, ſubmitted themſelves to the award, arbitrament, and determination of one W. H. and one Jer. Th. arbitrators indifferently named as well on the part of the ſaid W. F. and J. T. as of the ſaid J. C. to arbitrate, judge, and determine of and concerning all controverſies and demands whatſoever between the ſaid parties, or any of them, ſo as the ſaid

award were made in writing, and ready to be delivered to the parties requeſting the ſame, on or before, &c. but if the ſaid arbitrators ſhould not make ſuch their award by the time aforeſaid, then to the award, arbitrament, umpirage, and determination of ſuch third perſon, as umpire, as they the ſaid arbitrators ſhould name, elect, and chooſe between the ſaid parties, of and concerning the premiſes, ſo as the ſaid umpire ſhould make his award or umpirage of and concerning the ſame, in writing, on or before, &c.—and the ſaid J. C. ſays, that the ſaid W. H. and Jer. Th. the ſaid arbitrators, after the ſaid ſubmiſſion, to wit, on, &c. at B. aforeſaid, duly named, elected, and choſe one J. P. umpire between the ſaid parties, of and concerning the premiſes, according to the form and effect of the ſaid ſubmiſſion; and that the ſaid arbitrators did not make any award of or concerning the ſame within the time to them limited for that purpoſe: and the ſaid J. C. further ſays, that the ſaid J. P. ſo named umpire as aforeſaid, having taken upon himſelf the burthen of the ſaid umpirage, did afterwards, and within the time to him limited for the purpoſe as aforeſaid, to wit, on, &c. at B. aforeſaid, make and publiſh his award and umpirage of and concerning the premiſes, in writing under his hand and ſeal, ready to be delivered to the parties requeſting the ſame (and which the ſaid J. C. now brings here into court) and did thereby award, arbitrate, and determine that the ſaid W. F. and J. T. or one of them, ſhould pay, or cauſe to be paid, unto the ſaid J. C. his executors or adminiſtrators, the ſum of 25l. 15s. of lawful, &c. at, &c. in B. aforeſaid, on, &c. between the hours, &c. and the further ſum of 25l. 15s. of like, &c. at the ſame hour, on, &c. and in default of the firſt-

mentioned ſum of 25l. 15s. upon the day and time for that purpoſe firſt mentioned, then that the ſaid W. F. and J. T. or one of them ſhould pay to the ſaid J. C. his executors or adminiſtrators, the whole ſum of 51l. 10s. on demand; [and that upon the payment of the two ſeveral ſums of 25l. 15s. and 25l. 15s. each party ſhould execute to the other a general releaſe to the day of the date of the ſaid ſubmiſſion,] as by the ſaid umpirage, relation being thereunto had, will more fully appear. And the ſaid J. C. further ſaith, that the ſaid W. F. and J. T. did not, nor did either of them, pay, or cauſe to be paid, unto the ſaid J. C. the ſaid ſum of 25l. 15s. in the ſaid umpirage firſt mentioned, or any part thereof, at the time and place thereby appointed for the payment thereof; but although the ſaid J. C. then and there requeſted them to pay the ſame, therein wholly made default; and that thereupon the ſaid J. C. afterwards, to wit, on, &c. at B. aforeſaid, demanded the whole ſum of 51l. 10s. mentioned in the ſaid umpirage, from the ſaid W. F. and J. T. who then and there wholly refuſed and neglected to pay the ſame, whereby an action has accrued to the ſaid J. C. to demand and have of and from the ſaid W. F. and J. T. the ſaid ſum of 51l. 10s. parcel of the ſaid ſum of 77l. 5s. above demanded: AND WHEREAS before the time of the ſubmiſſion hereafter mentioned, at B. aforeſaid, certain other controverſies and diſputes had ariſen and were depending between the ſaid J. C. and the ſaid W. F. and thereupon the ſaid J. C. and the ſaid W. F. for themſelves ſeverally, and the ſaid J. T. as a ſurety for the ſaid W. F. for the ſettling and determining thereof heretofore, to wit, on the ſaid, &c. at B. aforeſaid, in writing, ſubmitted themſelves to the

award, &c. of the ſaid W. H. and Jer. Th. arbitrators indifferently named, as well on the part of the ſaid W. F. and J. T. as of the ſaid J. C. to arbitrate, &c. ſo as the ſaid award were made in writing, ready to be delivered to the parties requeſting the ſame on or before, &c. but if the ſaid arbitrators ſhould not make ſuch their award by the time aforeſaid, then to the award, arbitrament, &c. of ſuch third perſon, as umpire, as they the ſaid arbitrators ſhould name, &c. between the ſaid parties of and concerning the premiſes laſt aforeſaid, ſo as the ſaid umpire ſhould make his award or umpirage of and concerning the ſame, in writing, on or before, &c.—and the ſaid J. C. ſays, that the ſaid W. H. and Jer. Th. after the ſaid laſt mentioned ſubmiſſion, to wit, on, &c. duly named, &c. the ſaid J. P. umpire between the ſaid parties, of and concerning the premiſes laſt aforeſaid, according to the form and effect of the ſaid laſt mentioned ſubmiſſion, and that the ſaid arbitrators did not make any award of and concerning the ſame within the time to them limited for that purpoſe; and the ſaid J. C. further ſays, that the ſaid umpire ſo named, &c. as laſt aforeſaid, having taken upon himſelf the burthen of the ſaid laſt mentioned umpirage, did afterwards, and within the time to him limited for that purpoſe as aforeſaid, to wit, on, &c. at B. aforeſaid, make and publiſh his award or umpirage of and concerning the ſaid laſt mentioned premiſes, in writing under his hand and ſeal, ready to be delivered to the parties requeſting the ſame (and which the ſaid J. C. now brings here into court,) and did thereby, among other things, award, &c. that the ſaid W. F. and J. T. or one of them, ſhould pay or cauſe to be paid to the ſaid J. C. his executors, or

adminiſtrators, the ſum of 25l. 15s. of lawful, &c. at, &c. on, &c. between the hours, &c. as by the ſaid laſt mentioned umpirage, relation being thereunto had, more fully appears: And the ſaid J. C. further ſays, that the ſaid W. F. and J. T. did not nor did either of them pay or cauſe to be paid unto the ſaid J. C. the ſaid ſum of 25l. 15s. in the ſaid laſt award mentioned, or any part thereof, at the time and place thereby appointed for the payment thereof, but that they and each of them wholly refuſed and neglected to pay the ſame, whereby an action hath accrued to the ſaid J. C. to demand and have of and from the ſaid W. F. and the ſaid J. T. the ſaid laſt mentioned ſum of 25l. 15s. reſidue of the ſaid ſum of 77l. 5s. above demanded: Yet the ſaid W. F. and J. T. although often ſeverally requeſted, &c. have not, nor hath either of them paid the ſaid ſum of 77l. 5s. above demanded, or any part thereof, to the ſaid J. C. but have and each of them hath hitherto wholly refuſed, and refuſe, and each of them refuſes ſo to do, to the damage of the ſaid J. C. of 20l. and therefore he brings ſuit, &c.

DECLARATION *in* DEBT *on an* AWARD *made in purſuance of an* ORDER *of* REFERENCE *at the* ASSIZES *on withdrawing a* JUROR, *and where one of the* ARBITRATORS *refuſed to act.*

CORNWALL } M. W. late of, &c. ſurgeon, was
TO WIT. } ſummoned to anſwer to J. M. and J. P. gentlemen, aſſignees of the eſtate and effects of D. P. a bankrupt, according to the form and effect of the ſtatutes, &c. of a plea, that he render to them 150l. of lawful, &c. which he owes to and unjuſtly detains from them, &c. and thereupon the ſaid J. M. and J. P. aſſignees as aforeſaid, by J. A. their attorney complain; for that WHEREAS on, &c. at, &c. divers differences, &c. had ariſen and were depending, and ſuits at law and in equity were alſo depending between the ſaid J. M. and J. P. aſſignees as aforeſaid, and the ſaid M. W. and WHEREAS at the aſſizes held at, &c. in and for the county of C. aforeſaid, on, &c. a certain cauſe then depending between the ſaid J. M. and J. P. aſſignees in form aforeſaid, and the ſaid M. W. was then and there to have been tried between them; and WHEREAS by an order made at the ſaid aſſizes ſo held at, &c. in and for the county aforeſaid, on, &c. to wit, at, &c. in the ſaid cauſe, wherein the ſaid J. M. and J. P. as aſſignees of the eſtate and effects of the ſaid D. P. were plaintiffs, and the ſaid M. W. was defendant; it was ordered by the court, by and with the conſent of all parties, their counſel and attornies, that the laſt of the jurors impannelled and ſworn to determine the iſſue joined between the ſaid parties in

that cauſe ſhould be withdrawn, and that all matters then in difference between the ſaid parties ſhould be referred to the award, &c. of H. J. D. and D. V. both of, &c. and J. R. of, &c. ſtiled, in the ſaid order, gentlemen, or to any two of them; and that the ſaid parties ſhould perform the award of the ſaid arbitrators, or of any two of them, ſo as they ſhould make and publiſh the ſame of and concerning the premiſes in writing on or before the firſt day of the then next Michaelmas term; and it was alſo ordered, by and with the like conſent, that ſuch witneſs or witneſſes as ſhould be produced by the ſaid parties or any of them before the ſaid arbitrators for examination, ſhould be ſworn before a Commiſſioner of his Majeſty's Court of C. B. and that the bill in equity then depending between the ſaid parties ſhould be diſmiſſed upon making the ſaid award, as the ſaid arbitrators ſhould determine; and that no other bill in equity ſhould be preferred by either or any of the ſaid parties againſt the other for or relating to the matters in diſpute between them; and it was further ordered, by and with the like conſent, that no bill in equity ſhould be preferred by the ſaid parties, or any of them, againſt the ſaid arbitrators, or either of them, for or in reſpect of any award they ſhould make in the ſaid premiſes; and that that order ſhould be made a rule of his Majeſty's Court of C. B. if the Juſtices of that Court ſhould ſo pleaſe, as in and by the ſaid order, relation being thereto had, more fully appears: and the ſaid J. M. and J. P. aſſignees as aforeſaid, in fact ſay, that the ſaid J. M. and J. P. aſſignees as aforeſaid, for themſelves, and the ſaid M. W. for himſelf, did on, &c. ſubmit to ſuch award, and the ſaid H. J. D. and

D. V. two of the arbitrators aforeſaid, having taken upon themſelves the buſineſs and charge of the ſaid award, and having heard at large the allegations and proofs of the ſaid parties, and having examined the witneſſes produced before them on oath, and duly and deliberately weighed and conſidered the whole, did on, &c. being within the time limited as aforeſaid for the making of their award of and concerning the premiſes, at, &c. make and publiſh their award in writing of and concerning the premiſes, under their hands and ſeals, and ready to be delivered to the ſaid parties, or to ſuch of them as ſhould deſire the ſame, on, &c. (the ſaid J. R. after having entered on the buſineſs of the ſaid award with them the ſaid H. J. D. and D. V. refuſing to join with them in the ſaid award.) And by the ſaid award, they the ſaid arbitrators did award, &c. that the ſaid M. W. his executors or adminiſtrators, ſhould, on, &c. between the hours, &c. at, &c. well and truly pay, or cauſe to be paid to the ſaid J. M. and J. P. their executors and adminiſtrators, the full ſum of 150l. of lawful, &c. in full ſatisfaction and diſcharge of the debts, &c. which they the ſaid J. M. and J. P. or either of them had or could have or make upon or againſt the ſaid M. W. for or in reſpect of any matter, cauſe, or thing whatſoever, to the ſaid, &c. [and ſhould within the time and at the place aforeſaid, at his and their own proper coſts and charges, deliver or cauſe to be delivered to the ſaid J. M. and J. P. or their attorney, executors, or adminiſtrators, a general releaſe, &c. (ſetting forth the deſcription of the releaſe in terms of the award): And the ſaid two arbitrators did alſo by their award further award, &c. that upon and immediately after ſuch payment of the aforeſaid

ſum of 150l. and delivery of ſuch releaſe duly executed to the ſaid J. M. and J. P. as aforeſaid, they the ſaid J. M. and J. P. ſhould, at their own proper coſts and charges, deliver, or cauſe to be delivered unto him the ſaid M. W. or his attorney, executors, or adminiſtrators, a general releaſe, &c. (to be ſtated in the terms of the award)]: And the ſaid arbitrators did by their ſaid award further award, &c. that the aforeſaid bill in equity depending between the ſaid parties, and mentioned in the ſaid recited order to be diſmiſſed upon making their award, ſhould be diſmiſſed without coſts, as by the ſaid award, relation being thereto had, will more fully appear; and the ſaid J. M. and J. P. further ſay, that [there was not any other matter or thing whatſoever except between the ſaid J. M. and J. P. as aſſignees as aforeſaid, and the ſaid M. W. depending between the ſaid parties, or any of them, at the time of the ſaid ſubmiſſion, or at the time of the making of the ſaid award, or on the ſaid, &c. and that] the ſaid M. W. did not on, &c. in the ſaid award mentioned, between the hours, &c. at, &c. or at any other time or place hitherto, pay or cauſe to be paid to them the ſaid J. M. and J. P. or to either of them, the ſaid ſum of 150l. in the ſaid award mentioned, or any part thereof; but therein wholly failed and made default, by means whereof an action has accrued, &c. Yet the ſaid M. W. although often requeſted, has not yet rendered the aforeſaid ſum of 150l. above demanded, or any part thereof, to the ſaid J. M. and J. P. aſſignees as aforeſaid, or to either of them, but he to render the ſame, &c. to the damage, &c.[1]

[1] For more examples of Debt on the Award, vid. Wentworth's Pleader, vol. 5, p. 336—356.

DEBT on BOND,

Conditioned for the PERFORMANCE *of an* AWARD; *where* DEFENDANT *prays* OYER *of the* CONDITION, *and pleads* "*No* AWARD, *&c.*"

YORKSHIRE, TO WIT. } J. B. complains againſt J. W. being, &c. of a plea that he render to him the ſaid J. B. 200l. of lawful, &c. which he owes to and unjuſtly detains from him: For that WHEREAS the ſaid J. W. on, &c. in the year, &c. at, &c. in the county of York, by his certain writing obligatory ſealed with the ſeal of the ſaid J. W. and now ſhewn to his Majeſty's Court here, the date whereof is on the day and year aforeſaid, acknowledged himſelf to be held and firmly bound to the ſaid J. B. by the name and deſcription of, &c. in the ſum of 200l. to be paid to the ſaid J. B. when the ſaid J. W. ſhould be thereunto afterwards requeſted: Yet the ſaid J. W. although often requeſted, has not yet paid the ſaid ſum of 200l. above demanded, nor any part thereof, to the ſaid J. B. but to pay the ſame, or any part thereof, to the ſaid J. B. he the ſaid J. W. has hitherto wholly refuſed, and ſtill does refuſe, to the damage of the ſaid J. B. of 10l. and therefore he brings his ſuit, &c. pledges, &c.

AND the ſaid J. W. by C. Owen, his attorney, comes and defends the wrong and injury when, &c. and craves oyer of the ſaid writing obligatory, which is read to him; he alſo craves oyer of the CONDITION of the ſaid writing obligatory, which is read to him in theſe words, to wit, (here ſet out the Condition of the

Bond *verbatim*) which being read and heard, the ſaid J. W. ſays that the ſaid J. B. ought not to have or maintain his aforeſaid action againſt him, becauſe he ſays that the ſaid arbitrators in the ſaid condition of the ſaid writing obligatory named, made no award in writing under their hands within the time limited in the ſaid condition of the ſaid writing obligatory, nor did the ſaid R. W. in the ſaid writing obligatory mentioned as umpire in that event, make any award or umpirage in the premiſes in writing under his hand within the time for that purpoſe, in the ſaid condition of the ſaid writing obligatory expreſſed, nor did the ſaid arbitrators chooſe any other perſon as umpire; and this the ſaid J. W. is ready to verify; wherefore he prays judgment, if the ſaid J. B. ought to have or maintain his aforeſaid action thereof againſt him.

AND the ſaid J. B. as to the plea of the ſaid J. W. by him above pleaded, ſays, that he by reaſon of any thing therein contained ought not to be barred from having and maintaining his aforeſaid action againſt the ſaid J. W. becauſe he ſays, that although true it is that the ſaid S. A. and J. C. the arbitrators in the ſaid condition of the ſaid writing obligatory mentioned, made no award in writing of and concerning the premiſes under their hands within the time for that purpoſe limited in the ſaid condition of the ſaid writing obligatory, as in the ſaid plea is mentioned; nevertheleſs, for replication in this behalf, the ſaid J. B. ſays, that after the expiration of the ſaid time limited for the ſaid S. A. and J. C. the ſaid arbitrators in the ſaid writing obligatory named, making their award, to wit, on, &c. at, &c. the ſaid R. W. the umpire in the ſaid condition of the ſaid writing obligatory named,

having taken upon himſelf the burthen of the ſaid award, and having fully examined and duly conſidered the premiſes ſubmitted and referred as aforeſaid, made his award or umpirage in writing, ſubſcribed with his own hand, in manner following, that is to ſay, (here ſet forth the award): of which ſaid award the ſaid J. W. afterwards, to wit, on, &c. at, &c. had notice; and the ſaid J. B. in fact ſays that (here ſet forth the breach): and this the ſaid J. B. is ready to verify; wherefore he prays judgment and his debt aforeſaid, to be adjudged to him, &c.

If the award as ſet forth in the replication be exceptionable in point of law, or the breach improperly aſſigned, then the defendant may demur: Thus—

AND the ſaid J. W. as to the ſaid plea of the ſaid J. B. by him above pleaded in reply to the ſaid plea of the ſaid J. W. by him above pleaded in bar, ſays that the ſaid plea ſo above pleaded, and the matters therein contained, are not ſufficient in law to maintain the ſaid action of the ſaid J. B. againſt him the ſaid J. W. to which ſaid replication, in manner and form as the ſame is above pleaded and ſet forth, the ſaid J. W. is under no neceſſity, nor is he obliged by the law of the land to anſwer; wherefore, for want of a ſufficient replication in this behalf, the ſaid J. W. as before prays judgment, and that the ſaid J. B. may be precluded from having and maintaining his aforeſaid action againſt him the ſaid J. W.

But if the award be partially ſet forth in the replication, ſo that the part omitted, being connected with the part ſet forth, would render the whole void, then the defendant

may ſupport his plea of " no award," by rejoining that the arbitrators, &c. made " no ſuch award:" Thus—

AND the ſaid J. W. ſays, that the ſaid R. W. did not make any ſuch award of or concerning the premiſes aforeſaid as the ſaid J. B. has above in his replication alleged; and of this he puts himſelf upon the country, &c.

PLEA

To an ACTION *on a* BOND *of* ARBITRATION, *ſetting forth the* AWARD, *and alleging* PERFORMANCE.

AND the ſaid J. W. by C. D. his attorney, comes and defends the wrong and injury, when, &c. and prays oyer of the ſaid writing obligatory, and it is read to him, and he alſo prays oyer of the condition of the ſaid writing obligatory, and it is read to him in theſe words, to wit: (here ſet forth the condition *verbatim*) which being read and heard, the ſaid J. W. ſays that the ſaid J. B. ought not to have or maintain his aforeſaid action againſt him, becauſe he ſays that the ſaid H. B. and H. F. in the ſaid condition of the ſaid writing obligatory named as arbitrators, after the making of the ſaid writing obligatory, and before, &c. to wit, on, &c. at, &c. took upon themſelves the burthen of the execution of the ſaid arbitrament in the ſaid condition mentioned, and then and there did make and publiſh their award in writing under their hands and ſeals, of

and concerning the premiſes ſo to them referred as aforeſaid; by which ſaid award (after reciting, &c.) they the ſaid arbitrators did award and order that, &c. (here ſet forth the award): as by the ſaid award which the ſaid J. W. now brings into court here, fully appears: And the ſaid J. W. in fact ſays that, &c. (here aver performance in terms of the award) in manner and form as in and by the ſaid award is directed, and according to the true intent and meaning thereof, and of the condition of the ſaid writing obligatory, to wit, at, &c. And this he the ſaid J. W. is ready to verify; wherefore he prays judgment if the ſaid J. B. ought to have or maintain his aforeſaid action againſt him.

And the ſaid J. B. as to the ſaid plea of the ſaid J. W. by him above pleaded in bar, ſays, that he by reaſon of any thing therein alleged, ought not to be barred from having and maintaining his aforeſaid action againſt him the ſaid J. W. becauſe he ſays that after the ſaid award and order in the ſaid plea mentioned had been and was ſo made as aforeſaid, and after, &c. (here ſet forth the breach alleged) contrary to the form, tenor, and effect of the ſaid award, whereby the condition of the ſaid writing obligatory became and was broken and forfeited, and the ſaid writing obligatory in full force and virtue; and this he the ſaid J. B. is ready to verify; wherefore he prays judgment, and the debt aforeſaid, together with his damages by him ſuſtained on occaſion of the detaining thereof, to be adjudged to him, &c.[1]

[1] For more examples vid. Wentworth's Pleader, vol. 5, p. 356, and p. 454—465. Vid. ante, p. 290—310.

PLEA OF AN AWARD,

In bar of an ACTION *on the original* CAUSE.[1]

AND the ſaid John, by T. H. his attorney, comes and defends the wrong and injury, when, &c. and ſays that the ſaid Richard ought not to have or maintain his aforeſaid action againſt him, becauſe he ſays that after the ſeveral promiſes and undertakings aforeſaid, above ſuppoſed to have been made by him, and before the day of obtaining the original writ of the ſaid Richard, (or, of exhibiting the bill of the ſaid Richard), to wit, on, &c. at, &c. the ſaid Richard and John ſubmitted themſelves to ſtand to the award, order, and judgment of one Oſmund Fox, as well of and concerning the promiſes and undertakings aforeſaid, above ſuppoſed to have been made, as of all other matters and things then depending in controverſy between them; which arbitrator having taken upon himſelf the burthen of the ſaid award, afterwards, to wit, on, &c. at, &c. awarded, ordered, and adjudged between them the ſaid Richard and John, of and concerning the premiſes ſo referred to him as aforeſaid, in manner and form following, to wit, that the ſaid John ſhould pay to the ſaid Richard 5l. within 10 days thence next following, at, &c. and that all other claims of any other debts or accounts between them the ſaid Richard and John ſhould be null and void; and that upon the

[1] Vid. ante, p. 381 et ſeq.

ſaid payment of the ſaid 5l. the ſaid Richard and John ſhould give each to the other a general releaſe of all matters and things depending between them from the beginning of the world to the time of payment of the ſaid 5l. And the ſaid John further ſays that no cauſe of action has ariſen or grown between them the ſaid Richard and John from the time of the aforeſaid ſubmiſſion to the end of the aforeſaid ten days: And that the ſaid John, within the ſaid ten days, to wit, on, &c. at, &c. offered to pay to the ſaid Richard the aforeſaid 5l. and then and there offered to deliver to the ſaid Richard as his act and deed a certain releaſe in writing by him the ſaid John prepared and ſealed, bearing date the ſame day and year laſt aforeſaid, whereby the ſaid John was expreſſed to have releaſed to the ſaid Richard all matters and things depending between them the ſaid Richard and John from the beginning of the world to the day of the date of the ſaid releaſe, which ſaid 5l. or the ſaid releaſe the ſaid Richard, of the ſaid John to receive on the ſaid, &c. at, &c. altogether refuſed. And this the ſaid John is ready to verify; whereupon he prays judgment if the ſaid Richard ought to have or maintain his aforeſaid action againſt him, &c.

And the ſaid Richard ſays that he by reaſon of any thing by the ſaid John in his ſaid plea above pleaded in bar, alleged, ought not to be barred from having his aforeſaid action againſt the ſaid John; becauſe, proteſting that the ſaid John did not offer to pay to the ſaid Richard the ſaid 5l. nor to deliver to the ſaid Richard any writing of releaſe by the ſaid John prepared and ſealed as the ſaid John has above in his ſaid plea alleged, for replication thereto the ſaid Richard ſays that true it is that they the ſaid Richard and John,

after the ſeveral promiſes and undertakings aforeſaid, above as aforeſaid made, and before the obtaining of the original writ of the ſaid Richard, ſubmitted themſelves to ſtand to the award, order, and judgment of the ſaid Oſmund Fox, as well of and concerning the aforeſaid promiſes and undertakings as of and concerning all other matters and things then depending in controverſy between them; but the ſaid Richard further ſays that the ſaid ſubmiſſion was made under this condition, that the ſaid Oſmund ſhould make his award, order, and judgment of and concerning the premiſes on or before, &c. And that he the ſaid Oſmund did not on or before, &c. make his award, order, and judgment, in manner and form as the ſaid John has above in his ſaid plea alleged, and this he the ſaid Richard is ready to verify; whereupon he prays judgment and his damages on occaſion of the non-performance of the promiſes and undertakings aforeſaid to be adjudged to him.[2]

[2] Vid. Clift's Entries, 195, and Wentworth's Pleader, Vol. 3, p. 144.

BILL

To SET ASIDE *an* AWARD, *the Arbitrators having made improper Allowances to the Party againſt whom the Bill is filed.*

To the Right Honourable Alexander Lord Loughborough, Baron of Loughborough, in the County of Leiceſter, Lord High Chancellor of Great Britain,

HUMBLY complaining, ſheweth unto your Lordſhip your orator W. K. of, &c. upholſterer, that ſome time in or about the month of in the year your orator entered into partnerſhip with R. K. of the ſame place, in the trade or buſineſs of an upholſterer and paperman, and continued to carry on the ſaid trade or buſineſs, in conjunction with the ſaid R. K. without any written articles till the beginning of the month of in the year and your orator further ſheweth unto your Lordſhip, that by indenture, bearing date the day of in the ſaid year and made between the ſaid R. K. and your orator, the ſaid R. K. and your orator agreed to become partners in the ſaid trade or buſineſs for the term of ſeven years, to be computed from the day of but ſubject to be determined on the events and in the manner in the ſaid indenture particularly deſcribed: and it was by the ſaid indenture agreed between the ſaid R. K. and your orator that the ſaid buſineſs ſhould be carried on at the warehouſes belonging to a certain dwelling-

houſe, ſituate No. —, and at a dwelling-houſe and ſhop, ſituate No. —, in, &c. aforeſaid, and alſo at a work-ſhop and packing-houſe, adjoining to certain ſtables in the poſſeſſion of one Mrs. C. ſituate alſo in, &c. aforeſaid, or at ſuch other place or places as the ſaid R. K. and your orator ſhould agree upon, under the names and firm of R. K. and Co. and that the ſaid R. K. ſhould advance four-fifths and your orator ſhould advance, or ſecure to the ſatisfaction of the ſaid R. K. to be advanced, the remaining fifth of ſuch money as ſhould be neceſſary to carry on the ſaid buſineſs; and that the ſaid R. K. and your orator ſhould be intereſted in the ſaid buſineſs, and be intitled to the net profits, and ſubject to the loſſes to ariſe or accrue from the ſaid buſineſs in the proportion of four-fifths to one-fifth reſpectively; and it was thereby agreed that the meſſuage or dwelling-houſe, ſhops, work-ſhops, ware-houſes, ware-rooms, and packing places, with the appurtenances where the ſaid buſineſs ſhould be carried on, ſhould, during the continuance of the ſaid partnerſhip, be held by the ſaid R. K. IN TRUST for the ſaid buſineſs, at the yearly rent of 410l. clear of all taxes and deductions whatſoever, and paid by the ſaid R. K and your orator, in the proportion of their reſpective ſhares in the ſaid buſineſs; and that the ſaid R. K. and your orator ſhould faithfully account the one to the other for all ſuch ſums of money, goods, and effects belonging to the ſaid partnerſhip as ſhould at any time or times come to their hands reſpectively, and that an account of all ſuch ſums of money, goods, chattels, and effects, and of all other the dealings and tranſactions concerning the ſaid partnerſhip, ſhould from time to time be duly entered in proper books of account, to be

kept for that purpoſe, as by the ſaid indenture when produced to this honourable court will, among other things, more fully and at large appear. And your orator further ſheweth unto your Lordſhip that the ſaid R. K. and your orator, for ſome time after the execution of the ſaid indenture, carried on the ſaid buſineſs in copartnerſhip, in the courſe of which they purchaſed or took leaſes of ſeveral houſes, ſituate in, &c. and, &c. in the pariſh of, &c. in the county of, &c. and out of the ſtock of the ſaid joint trade furniſhed with houſehold goods and furniture not only the ſaid ſeveral houſes, but alſo four other houſes, ſituate in, &c. in the ſaid pariſh of, &c. and in, &c. in the pariſh of, &c. in the ſaid county of, &c. the leaſes of which four laſt-mentioned houſes belonged to and were the ſole property of the ſaid R. K. and let out all the ſaid ſeveral houſes ſo furniſhed at conſiderably advanced rents; and the ſaid R. K. and your orator, as partners, alſo furniſhed for and on account of ſundry perſons ſeveral houſes in London, Dublin, and elſewhere; and in the courſe of their dealings in ſuch their joint trades, divers perſons in England and Ireland became indebted to them in ſeveral conſiderable ſums of money; and they alſo themſelves became indebted to divers perſons in ſeveral ſums of money, for ſome of which they gave their notes and acceptances: And your orator further ſheweth unto your Lordſhip that various diſputes and differences having ariſen between the ſaid R. K. and your orator, they mutually agreed ſome time in or about the month of . . in the year to diſſolve and determine the ſaid copartnerſhip, and entered into mutual bonds to each other to ſubmit all matters of difference relative to the

concerns of their ſaid copartnerſhip to the judgment and determination of D. S. of, &c. in the ſaid county of, &c. gentleman, and J. A. of, &c. in the ſaid county, gentleman: And accordingly, BY INDENTURE of three parts bearing date the day of in the year and made between the ſaid R. K. of the firſt part, your orator of the ſecond part, and the ſaid D. S. and J. A. of the third part, the ſaid R. K. and and your orator mutually declared and agreed that the ſaid copartnerſhip ſhould from thenceforth ceaſe, determine, and be utterly void; and the ſaid R. K. and your orator, for the conſiderations therein mentioned, bargained, ſold, aſſigned, transferred, and ſet over unto the ſaid D. S. and J. A. their executors, adminiſtrators, and aſſigns, all thoſe ſeveral leaſehold meſſuages or dwelling-houſes, belonging to the ſaid copartnerſhip, hereinbefore mentioned to be ſituate in, &c. and, &c. aforeſaid; and alſo the houſehold goods, furniture, and effects contained in the ſaid four houſes ſituate in, &c. &c. and, &c. aforeſaid, of which the leaſes are hereinbefore ſet forth to have been the property excluſively of the ſaid R. K. and alſo all the houſehold goods, furniture, and effects of and belonging to them the ſaid R. K. and your orator, at, in, or upon the ſaid ſeveral leaſehold meſſuages and other the premiſes, together with the ſeveral leaſes thereof, and all other deeds and writings in the cuſtody of the ſaid R. K. and your orator relating thereto; and alſo all other the joint ſtock, monies, goods, wares, merchandizes, implements, utenſils, eſtate, and effects whatſoever of or belonging to the ſaid joint trade or copartnerſhip, or to the ſaid R. K. and your orator, on account thereof; and alſo all debts due and owing to the ſaid copartner-

ſhip, or to the ſaid R. K. and your orator, or either of them, in reſpect thereof, with full power to aſk, demand, ſue for, recover, and receive, or compound for all and every the ſame debts, and to give acquittances for the ſame or any part thereof when received; TO HAVE AND TO HOLD the ſaid leaſehold meſſuages, with the appurtenances, unto the ſaid D. S. and J. A. their executors, adminiſtrators, and aſſigns, for the reſidue of the ſeveral terms of years then to come and unexpired therein reſpectively, and to have, hold, receive, take, and enjoy the ſaid houſehold furniture, ſtock in trade, monies, goods, chattels, wares, merchandizes, debts, and effects, UPON the TRUSTS, and to and for the ends, intents, and purpoſes therein declared and expreſſed, and hereinafter mentioned, that is to ſay, UPON TRUST that they the ſaid D. S. and J. A. ſhould, as ſoon as conveniently might be, poſſeſs all and ſingular the ſaid premiſes, and by one or more ſale or ſales, diſpoſe of all and ſingular the ſaid leaſehold meſſuages, houſehold goods, furniture, merchandizes, chattels, eſtate, effects, and other the premiſes, for the moſt money and beſt prices that could be reaſonably had or obtained for the ſame, and to give full and ſufficient receipts, releaſes, and other diſcharges, to the purchaſers or other perſons for the monies ariſing therefrom, and ſhould alſo, as ſoon as conveniently might be, get in, and receive the ſaid debts and ſums of money, UPON TRUST to apply and diſpoſe of all the monies ſo to be poſſeſſed, received, or recovered, and to ariſe by or from ſuch ſale or ſales and diſpoſition as aforeſaid, and the collection of the ſaid debts or otherwiſe, by means of the powers and authorities ſo veſted in them the ſaid D. S. and

J. A. in manner following, that is to ſay, after deducting and retaining thereout ſo much as ſhould be ſufficient to reimburſe themſelves all ſuch ſums as they ſhould diſburſe or be liable to pay in the execution of the ſaid truſts, and for the cauſes in the ſaid indenture now in recital mentioned, UPON TRUST out of the ſaid monies in their hands to pay all the notes and acceptances given by the ſaid R. K. and your orator, for or on account of debts and demands due or owing by or from them or their copartnerſhip, and alſo all other the creditors of the ſaid copartnerſhip, the full amount of their reſpective debts and demands as they ſhould reſpectively become due and payable, and then to transfer, aſſign, and divide all the clear reſidue or ſurplus (if any) unto and between the ſaid R. K. and your orator, in the proportions of four fifths and one fifth reſpectively: And your orator further ſheweth unto your Lordſhip, that after the execution of the ſaid indenture laſt hereinbefore mentioned, the ſaid D. S. and J. A. in purſuance and by virtue of the powers and authorities thereby created and veſted in them, proceeded in the examination of the ſaid partnerſhip concerns, and collected and received ſundry ſums of money on account thereof, but afterwards declined proceeding to a final ſettlement of the ſaid partnerſhip concerns, and a complete execution of the ſaid truſts, and propoſed to the ſaid R. K. and your orator that they ſhould refer the further inveſtigation of the ſaid concerns and execution of the ſaid truſts to other perſons, to which the ſaid R. K. and your orator agreed: And accordingly, by indenture of three parts bearing date the day of in the year of our Lord and made between the ſaid R. K. of

the firſt part, your orator of the ſecond part, and the ſaid D. S. and J. A. of the third part: After reciting, among other things, to the purport and effect hereinbefore ſet forth, and alſo that in the execution of the aforeſaid powers and performance of the ſaid truſts, they the ſaid D. S. and J. A. had found the ſaid partnerſhip concerns of the ſaid R. K. and your orator ſo extenſive, complicated, and deranged, as to render it impoſſible for them the ſaid D. S. and J. A. to proceed to a final arrangement or ſettlement thereof, and that the ſaid D. S. and J. A. had in conſequence thereof propoſed, and the ſaid R. K. and your orator had agreed to ſubmit the further inveſtigation and final arrangement or ſettlement of the ſaid partnerſhip accounts and concerns according to the aforeſaid truſts to J. H. of, &c. in the county of, &c. upholder, J. B. of, &c. in the ſaid county, gent. and J. D. of, &c. in the city of, &c. accountant, in the manner therein and hereinafter mentioned; and that the ſaid R. K. and your orator had alſo agreed to enter into mutual bonds bearing even date with the ſaid indenture now in recital, for the due and punctual performance of all the covenants, clauſes, and agreements in the ſaid indenture contained: IT IS by the ſaid indenture now in recital WITNESSED, that in order to carry into effect the truſts in the ſaid indenture of the of in the year contained, or ſuch of them as then remained unexecuted, and were capable of taking effect, it was agreed and declared by all the parties to the indenture now in recital, and particularly that the ſaid R. K. and your orator, by and with the privity and conſent of the ſaid D. S. and J. A. DID, for themſelves ſeverally and reſpectively, and for their

ſeveral and reſpective heirs, executors, and adminiſtrators, covenant, promiſe, declare, and agree each with the other of them, his executors, and adminiſtrators, that all and every action and actions, cauſe and cauſes of action, ſuits, bills, bonds, ſpecialties, covenants, contracts, accounts, agreements, promiſes, payments, allowances, reckonings, monies, matters, and things whatſoever in any way relating to or concerning the ſaid partnerſhip, or the TRUSTS hereinbefore mentioned, and all and every doubt or doubts, queſtion or queſtions, diſpute and diſputes, touching or in any manner concerning the rights, claims, demands, or pretences, matters, or things relating thereto, of the ſaid R. K. and your orator, or either of them, in or about the ſaid partnerſhip affairs or concerns, ſhould be referred and ſubmitted to the award, order, final end, and determination of the ſaid J. H.—J. B.—and J. D. or any two of them, arbitrators indifferently elected, choſen, and named, as well on the part and behalf of the ſaid R. K. as on the part and behalf of your orator, to arbitrate, award, order, judge, and determine as aforeſaid, ſo as the ſame ſhould not interfere with the arrangement or ſettlement then already made by the ſaid D. S. and J. A. in purſuance of the truſts in the ſaid indenture of the day of in the year contained and hereinbefore ſet forth, unleſs ſome error or miſtake ſhould appear therein, contrary to the true intent and meaning of the ſaid indenture of copartnerſhip and indenture made on the diſſolution of the ſame, and ſo as the ſaid J. H.—J. B. and J. D. or any two of them, ſhould make their award or determination of and concerning the premiſes in writing under their hands and ſeals, ready to be delivered to

the ſaid parties in difference requiring the ſame on or before the day of next enſuing the date of the ſaid indenture now in recital: and it was thereby alſo agreed by and between all the parties thereto that the ſubmiſſion thereby made of the ſaid matters in controverſy ſhould be made a rule of his Majeſty's Court of King's Bench, in purſuance of the ſtatute in ſuch caſe made and provided, as by the ſaid indenture of ſubmiſſion, now in the hands or poſſeſſion of the ſaid D. S.—J. A. and R. K. or of ſome or one of them, or in their, or ſome or one of their, cuſtody or power, when produced to this honourable court, will, among other things, more fully and at large appear. And your orator further ſheweth unto your Lordſhip, that by deed poll, indorſed on the ſaid indenture of ſubmiſſion, bearing date the day of in the year and executed, as well by the ſaid R. K. and your orator as by the ſaid D. S. and J. A. the time for the ſaid arbitrators, or any two of them, making their award in the premiſes is enlarged to the day of then next enſuing; and the ſaid R. K. and your orator, by their ſeveral and reſpective bonds or obligations, each bearing date reſpectively the ſaid day of became bound the one to the other of them in the penal ſum of 1000l. for the due performance and obſervance of all and ſingular the covenants, conditions, and agreements in the ſaid indenture of ſubmiſſion contained: and your orator further ſheweth unto your Lordſhip, that although the ſaid D. S. and J. A. had, by virtue of the powers veſted in them by the ſaid indenture of the day of diſpoſed of all, or the greater part, of the eſtate and effects of the ſaid R. K. and your orator, and received

many ſums of money, to a very large amount in the whole, and were ſubject to account to the ſaid R. K. and your orator for the application thereof; and though they are parties to the ſaid indenture of ſubmiſſion, yet there is no covenant, condition, proviſo, or agreement therein on their part, or on the part of either of them, by which they could be bound to the performance of the award of the ſaid arbitrators; and ſuch award, if made in favour of your orator, againſt the ſaid D. S. and J. A. would have been altogether ineffectual. And your orator further ſheweth unto your Lordſhip, that the ſaid arbitrators met a great many times at the houſe of the ſaid J. H. who is the nephew and ſucceſſor in buſineſs of the ſaid D. S. and where the ſaid D. S. then reſided, for the purpoſe of examining the accounts of the ſaid partnerſhip and the execution of the truſts veſted in the ſaid D. S. and J. A. and the ſaid D. S. attended the ſaid arbitrators daily, and aſſumed a tone of authority over them, and dictated the manner in which the accounts ſhould be taken and ſettled; but he refuſed to be ſworn to the truth of the diſburſements he charged to the account of the ſaid copartnerſhip, and to produce vouchers for the ſame;—nevertheleſs the ſaid J. H. and J. D. made an award, bearing date the day of laſt, by which they ordered that your orator ſhould on the day of then next, pay to them the ſaid D. S. and J. A. the ſum of 630l. 12s. 6½d. and ſhould alſo, on the day of then next, pay to the ſaid R. K. the ſum of 435l. 16s. 3½d. the ſaid J. B. diſſenting from the ſaid award: and your orator further ſheweth unto your Lordſhip, that in taking the accounts between the ſaid R. K. and your orator, as

partners, and the ſaid R. K. and your orator and the ſaid D. S. and J. A. as truſtees as aforeſaid, the ſaid J. H. and J. D. charged to the account of the ſaid partnerſhip ſeveral conſiderable ſums which ought to have been charged to the private account of the ſaid R. K. and gave credit to the ſaid truſtees for ſums which they had never paid, and omitted to charge them with very large ſums which they had received on account of the ſaid partnerſhip, for which they had not given credit thereto, although objection was taken at the time on behalf of your orator to ſuch improper charges and allowances reſpectively: and in particular your orator ſheweth unto your Lordſhip, that the ſaid R. K. having, before the commencement of the ſaid partnerſhip, borrowed of one J. D. the ſum of 3000l. on his own private account, attorned, as tenant to the ſaid J. D. of the premiſes in, &c. where the ſaid buſineſs was carried on, giving him power to diſtrain for the intereſt of the ſaid principal ſum as for rent in arrear; and the ſaid D. S. and J. A. having charged in their truſt accounts the ſum of 109l. 15s. 10d. as paid to the ſaid J. D. the ſaid J. H. and J. D. allowed the ſame as charged to the partnerſhip account, on pretence that the payment thereof was for the benefit of the ſaid partnerſhip, in preventing the partnerſhip effects from being diſtrained, though it was objected on behalf of your orator that the ſaid payment, being in diſcharge of a debt due from the ſaid R. K. ought not to be allowed as a payment by the ſaid truſtees on account of the partnerſhip; And your orator further ſheweth unto your Lordſhip, that though the partnerſhip between your orator and the ſaid R. K. was diſſolved on the day of in the year and your orator

was therefore not liable for the payment of rent for the premiſes on which the ſaid buſineſs was carried on, your orator having quitted them and left them in the occupation of the ſaid R. K. by mutual conſent, yet the ſaid J. A. and J. D. allowed to the ſaid truſtees the ſum of 65l. 12s. 6d. charged to the partnerſhip account, though paid for a quarter's rent for the houſe of the ſaid R. K. in, &c. up to Lady-day and the ſum of l. for a quarter's rent up to the ſame time for the premiſes of the ſaid R. K. in, &c. and the ſum of 30l. 0s. 4d. charged to have been paid to — F. on the day of and the ſum of 23l. 12s. charged as paid to B. C. on the day of and the ſum of 18l. 10s. charged as paid to T. S. Eſq. and the ſum of 21l. 10s. 6d. charged as paid for rent of ſtables belonging to the ſaid R. K. all which ſeveral ſums the ſaid J. H. and J. D. put to the debit of the ſaid partnerſhip, in account with the ſaid truſtees, although it was objected on behalf of your orator, as the truth is, that they were payments made on the private account of the ſaid R. K. And your orator further ſheweth unto your Lordſhip, that the ſaid J. H. and J. D. have put to the debit of the ſaid partnerſhip account the ſeveral ſums of 23l. 18s. charged by the ſaid truſtees as paid to one — D. as the amount of the ſaid R. K.'s note to him for his the ſaid R. K's children's education, the ſum of 9l. 17s. 6d. charged as paid to one — S. for ſadlery furniſhed for the ſaid R. K. on his private account, the ſum of 17l. 1s. 6d. charged as paid to one — E. on the private acceptance of the ſaid R. K. and 17l. 4s. 10d. charged as paid to one — S. a perſon of whom your orator has no knowledge, and of whom he never heard till long after the

time when the ſaid ſum is charged to have been paid to him, and which your orator alleges, if in fact paid by the ſaid truſtees, muſt have been paid by them on account of the ſaid R. K. only, and not on account of the ſaid partnerſhip. And your orator further ſheweth unto your Lordſhip, that the ſaid R. K. having certain bonds of one — B. depoſited the ſame in the hands of R. and Co. as a ſecurity for money to be raiſed on the acceptances of the ſaid R. and Co. and two bills of exchange, accepted by them in favour of your orator and the ſaid R. K. for 100l. and 64l. 18s. 8d. and indorſed by your orator and the ſaid R. K. having been, in conſequence of being diſhonoured by the ſaid R. and Co. paid by the ſaid truſtees, the ſaid J. H. and J. D. have debited the ſaid partnerſhip with the amount thereof in account with the ſaid truſtees, although they have allowed the amount of the ſaid bonds in favour of the ſaid R. K. againſt your orator, and although it was objected on behalf of your orator that ſuch payments ought therefore to have been put to the private account of the ſaid R. K.—And your orator further ſheweth unto your Lordſhip, that the ſaid J. H. and J. D. have allowed to the ſaid D. S. in his truſt account with the ſaid partnerſhip the ſum of 500l. being the amount of a bill accepted by Lord O. or by Lord and Lady O. which the ſaid D. S. pretended he had transferred to one J. C. in ſatisfaction of ſome pretended claims by the ſaid J. C. againſt the ſaid partnerſhip, whereas in truth the ſaid partnerſhip was not at all indebted to the ſaid J. C.—and your orator charges, that if the ſaid bill was in fact transferred to the ſaid J. C. it was ſo transferred by the ſaid D. S. on account of a private debt of the ſaid R. K.—And your orator further

ſheweth unto your Lordſhip, that the ſaid J. H. and J. D. refuſed to charge the ſaid D. S. in his truſt account with the ſaid partnerſhip, with the ſum of 1000l. the amount of a bill accepted by the ſaid Lord O. or by Lord and Lady O. and indorſed by the ſaid R. K. and your orator to the ſaid D. S. although it clearly appeared that the ſaid D. S. had received the ſaid ſum of 1000l. in payment of the ſaid bill: And your orator further ſheweth unto your Lordſhip, that if in taking the ſaid accounts due credit had been given to the ſaid partnerſhip, and proper charges had been made to the debit of the ſaid truſtees, and no improper charges had been made to the debit of the ſaid partnerſhip, your orator would have appeared to be but little, if any thing, indebted to the ſaid R. K. on account of the ſaid partnerſhip, and the ſaid truſtees, inſtead of having any demand againſt the ſaid partnerſhip, would have appeared to be conſiderably indebted to it; and your orator is well aſſured that if the ſaid J. H. and J. D. had followed the ſuggeſtions of their own minds, and had not been influenced by the ſaid D. S. in the manner of making up the ſaid accounts, they would not have made an award ſo much to the prejudice of your orator; and your orator has frequently ſince the making of the ſaid award, by himſelf and others, applied in a friendly manner to the ſaid R. K.—D. S. and J. A. and requeſted them to come to a fair and juſt account with your orator, and to make to your orator all fair and juſt allowances, and to pay to your orator what, if any thing, on the taking of ſuch account, ſhall appear to be due to him; your orator at the ſame time offering to pay to them, or either of them, whatever ſum or ſums ſhould, if any thing ſhould, appear to be

due from your orator to them or either of them: BUT NOW SO IT IS, may it pleaſe your Lordſhip, that the ſaid R. K.—D. S. and J. A. combining and confederating themſelves together, and to and with divers other perſons at preſent unknown to your orator, whoſe names when diſcovered your orator prays may be inſerted in this his bill of complaint, and they made parties hereto, and contriving how to injure your orator in the premiſes, not only refuſe to comply with ſuch reaſonable requeſt, but threaten to put the ſaid bond in ſuit againſt your orator, or to commence an action or actions againſt your orator on the ſaid award, or to apply to the Court of King's Bench for an attachment againſt your orator for non-performance thereof; ſometimes pretending that all fair and juſt allowances have been made to your orator by the ſaid J. H. and J. D. in taking the ſaid accounts, and that all proper charges have been made againſt them the ſaid D. S. and J. A. and that the ſaid partnerſhip has been juſtly and properly charged with the ſaid ſeveral ſums againſt which your orator complains, the contrary of which your orator charges to be true, and that not only the ſaid partnerſhip has been improperly charged with ſuch ſums, and credit given to the ſaid truſt account againſt the ſaid partnerſhip for ſuch ſums, but that no charge has been made in favour of the ſaid partnerſhip againſt the ſaid truſtees for many large ſums actually received and unaccounted for by them; and this the ſaid R. K.—D. S. and J. A. well know to be true, and will ſometimes admit, but then they pretend that the ſaid award is concluſive againſt your orator, and that your orator is thereby barred in equity from having the ſaid accounts opened and reinveſtigated. All which

actings, threatenings, and pretences of the ſaid R. K. D. S. and J. A. are contrary to equity and good conſcience, and tend to the manifeſt injury and oppreſſion of your orator in the premiſes: In tender conſideration whereof, and for as much as your orator cannot be relieved in the premiſes but by the aid and aſſiſtance of a court of equity, where matters of this nature are properly cognizable and relievable: AND to the END that the ſaid R. K.—D. S. and J. A. and the reſt of the confederates when diſcovered, may, upon their ſeveral and reſpective corporal oaths, full, true, and perfect anſwer make to all and ſingular the premiſes, to the beſt and utmoſt of their reſpective knowlege, information, remembrance, and belief, and that as fully and particularly as if the ſame were here again repeated, and they particularly interrogated thereto; and more eſpecially that the ſaid R. K.—D. S. and J. A. may in manner aforeſaid anſwer and ſet forth, Whether ſuch indenture of partnerſhip, bearing ſuch date, and to ſuch purport and effect as hereinbefore in that behalf is ſet forth, or of ſome other and what date, and to ſome other and what ſimilar purport and effect, was not executed by the ſaid R. K. and your orator; and whether your orator and the ſaid R. K. did not for ſome and what time after the execution of the ſaid indenture, carry on the ſaid buſineſs of upholſterers and paper-men in copartnerſhip; and whether in the courſe of carrying on the ſaid buſineſs they did not purchaſe or take leaſes of the ſeveral houſes hereinbefore in that behalf mentioned, or of ſome other and what houſes; and whether the leaſes of the four houſes laſt hereinbefore in that behalf mentioned did not belong excluſively to the ſaid R. K. and whether the

ſaid R. K. did not furniſh with houſehold goods and furniture, as well all the ſaid firſt mentioned as the ſaid four laſt mentioned houſes, and let them out ſo furniſhed at conſiderably advanced rents, or how otherwiſe; and whether the ſaid R. K. and your orator did not alſo, as partners, furniſh for and on account of ſundry perſons ſeveral houſes in London, Dublin, and elſewhere; and whether in the courſe of their dealings, in ſuch their joint trade, divers perſons in England and Ireland did not become indebted to them in ſeveral conſiderable ſums of money; and whether they did not alſo themſelves become indebted to divers perſons in ſeveral ſums of money; and whether they did not for for ſome of ſuch ſums give their notes and acceptances; and whether diſputes and differences did not ariſe between the ſaid R. K. and your orator; and whether they did not, ſome time at or about the time hereinbefore in that behalf mentioned, or at ſome other and what time, agree to diſſolve the ſaid copartnerſhip; and whether they did not enter into mutual bonds to each other to ſubmit all matters in difference between them, relative to the concerns of their ſaid copartnerſhip, to the judgment and determination of the ſaid D. S. and J. A. and whether ſuch indenture of three parts, bearing ſuch date, and to ſuch purport and effect as hereinbefore in that behalf ſet forth, or of ſome other and what date, and to ſome other and what ſimilar purport and effect, was not executed by the ſaid R. K. your orator, and the ſaid D. S. and J. A. and whether the ſaid copartnerſhip between the ſaid R. K. and your orator was not thereby diſſolved; and whether all the copartnerſhip eſtate and effects of the ſaid R. K. and your orator were not thereby conveyed to the ſaid D. S. and J. A. on the truſts hereinbefore

in that behalf ſet forth, or on ſome other and what truſts; and whether the ſaid D. S. and J. A. did not, ſoon after the execution of the ſaid indenture, in purſuance and by virtue of the powers and authorities thereby created and veſted in them, proceed in the examination of the ſaid partnerſhip concerns; and whether they did not diſpoſe of all or the greater part, or ſome conſiderable part, and to what amount, of the eſtate and effects of the ſaid R. K. and your orator and whether they did not receive many or ſeveral ſums of money to a very large or to ſome conſiderable and what amount in the whole, for the application of which they were liable to account to the ſaid R. K. and your orator; and whether they did not afterwards decline proceeding to a final ſettlement of the ſaid partnerſhip concerns, and a complete execution of the ſaid truſts; and whether they did not propoſe to the ſaid R. K. and your orator to refer the further inveſtigation of the ſaid concerns, and execution of the ſaid truſts, to other perſons; and whether the ſaid R. K. and your orator did not conſent to ſuch propoſal, or how otherwiſe; and whether in conſequence of ſuch propoſal and agreement, or how otherwiſe, ſuch indenture of reference, bearing ſuch date, and to ſuch purport and effect as hereinbefore in that behalf ſet forth, or of ſome other and what date, and to ſome other and what purport and effect, was not executed by the ſaid R. K. your orator, and the ſaid D. S. and J. A. and whether the day limited therein for the arbitrators making their award in the premiſes was not enlarged to the ſaid day of in the ſaid year by indorſement on the ſaid indenture; and whether the ſaid R. K. and your orator did not execute to each other ſuch bonds, bearing ſuch date, and ſubject to ſuch

conditions as hereinbefore in that behalf ſet forth, or ſome other and what bonds of ſome other and what date, and ſubject to ſome other and what ſimilar conditions; and whether there be any covenant, condition, proviſo, or agreement in the ſaid indenture of reference or ſubmiſſion, on the part of the ſaid D. S. and J. A. or of either of them, by which they, or either of them, could be bound to the performance of the award of the ſaid arbitrators; and whether, if ſuch award had been made in favour of your orator againſt the ſaid D. S. and J. A. or either of them, it would not have been altogether ineffectual, or whether it could have been enforced againſt them, or either of them; and whether the ſaid arbitrators did not meet a great many times at the houſe of the ſaid J. H. for the purpoſe of examining the ſaid accounts of the ſaid copartnerſhip, and the execution of the truſts veſted in the ſaid D. S. and J. A. and whether the ſaid D. S. did not attend the ſaid arbitrators daily or almoſt every day; and whether he did not dictate to them the manner in which the ſaid accounts ſhould be taken; and whether he did not refuſe to be ſworn to the truth of the diſburſements charged by him to have been made on account of the ſaid copartnerſhip, and to produce vouchers for the ſame, or for ſome of them, and to what amount? and whether the ſaid J. H. and J. D. did not, notwithſtanding, make ſuch award as hereinbefore in that behalf ſet forth, or ſome other and what award; and whether the ſaid J. B. did not refuſe to execute ſuch award; and whether the ſaid J. H. and J. D. would have made ſuch award againſt your orator if they had followed the ſuggeſtions of their own minds, and had not been influenced by the ſaid D. S. in the manner of making up

the ſaid accounts; and whether the ſaid J. H. and J. D. in taking the ſaid accounts between the ſaid R. K. and your orator, as partners, and between the ſaid D. S. and J. A. as truſtees as aforeſaid, did not charge to the account of the ſaid partnerſhip ſeveral conſiderable ſums, and to what amount in the whole, which ought to have been charged to the private account of the ſaid R. K. and that they may ſet forth the particulars of all ſuch ſums; and whether they did not give credit to the ſaid D. S. and J. A. or to one and which of them, and to what amount, for ſums which they had never paid; and whether they did not omit to charge them, or one and which of them, with ſeveral large ſums, or to ſome and what amount, which they or one of them had received on account of the ſaid copartnerſhip, for which they or one of them had given no credit to the ſaid copartnerſhip, and that they may ſet forth an account of all ſuch ſums; and whether they did not in particular make ſuch improper charges and allowances as hereinbefore in that behalf ſet forth, and more particularly whether they did not allow to the ſaid D. S. the ſaid ſeveral ſums of 500l. and 1000l. hereinbefore charged to have been received by him in manner hereinbefore in that behalf ſet forth; and whether the ſaid bill of 500l. was not paid to the ſaid J. C. if at all paid to him, on account of ſome private debt of the ſaid R. K and not on account of any debt due to him from the partnerſhip of the ſaid R. K. and your orator; and whether the ſaid two ſums of 500l. and 1000l. ought not have been charged to the debit of the ſaid D. S. in his account with the ſaid copartnerſhip, or if not, for what reaſon; and whether your orator hath not ſince the making of the

ſaid award applied to the ſaid R. K.—D. S. and J. A. and requeſted them to come to a fair and juſt account with your orator, and to make to your orator all fair and juſt allowances, and whether they have not refuſed ſo to do; and whether they do not pretend that the ſaid award is concluſive againſt your orator, and that your orator is thereby barred in equity from having the ſaid accounts opened and re-inveſtigated? And that the ſaid award may be ſet aſide by a decree of this honourable court, and that the ſaid R. K.—D. S. and J. A. may be decreed to come to a fair and juſt account with your orator, and that in taking ſuch account all fair and juſt allowances may be made to your orator; and that the ſaid partnerſhip may not be debited with ſums paid by the ſaid D. S. and J. A. or either of them, on the private account of the ſaid R. K. or that the ſaid R. K. may be charged as indebted to the ſaid partnerſhip for ſo much; and that the ſaid D. S. and J. A. may be charged with all ſuch ſums as they have reſpectively received of and from the ſaid partnerſhip effects; and that the ſaid R. K.—D. S. and J. A. may be decreed reſpectively to pay to your orator ſuch ſeveral ſums as on taking the ſaid account may appear to be due to him from each of them on account of the ſaid copartnerſhip and truſts reſpectively; and that, in the mean time, the ſaid R. K. D. S. and J. A. may reſpectively be reſtrained by the order or injunction of this honourable court from all proceedings at law or otherwiſe for the recovery of the money ſo awarded to them reſpectively, or in any manner againſt your orator, touching the premiſes aforeſaid, or any of them; and that your orator may have ſuch other and further relief in the premiſes as

ſhall be conformable to equity and good conſcience, and to your Lordſhip ſhall ſeem meet. May it pleaſe your Lordſhip, the premiſes conſidered, to grant unto your orator not only his Majeſty's moſt gracious writ of injunction, to be directed to the ſaid R. K.—D. S. and J. A. to reſtrain them and each of them from proceeding at law againſt your orator to enforce the performance of the ſaid award, but alſo his Majeſty's moſt gracious writ or writs of ſubpœna, &c.

BILL

To ſet aſide an AWARD *for Concealment of eſſential Circumſtances by the* DEFENDANT.

To the Right Honourable William Pitt, Chancellor and Under Treaſurer of his Majeſty's Court of Exchequer, at Weſtminſter, the Right Honourable Sir Archibald Macdonald, Knight, Lord Chief Baron of the ſame Court, and the reſt of the Barons there.

HUMBLY complaining, ſheweth unto your honors, your orator T. G. of, &c. that J. M. late of, &c. in the county of, &c. Eſq. deceaſed, being ſeiſed and poſſeſſed of a conſiderable real and perſonal eſtate, duly made and publiſhed his laſt will and teſtament in writing, executed and atteſted as is by law required for the paſſing and charging of real eſtates by will, whereby he gave and bequeathed divers legacies to various perſons, and particularly the ſum of 1000l. and twenty guineas to your orator, payable out of the rents and profits of his real eſtates; and he directed, that in caſe his perſonal eſtate ſhould be inſufficient to pay his funeral expences and debts, the truſtees in his will named ſhould, by and out of the rents and profits, or by ſale or mortgage of his real eſtate, ſituate in, &c. raiſe money ſufficient to make up ſuch deficiency; and after deviſing ſome parts of his real eſtates by expreſs

name, he gave and deviſed all other his meſſuages, lands, tenements, hereditaments, and real eſtates whatſoever and whereſoever unto the ſame truſtees, upon truſt that they ſhould, in the firſt place, out of the rents and profits thereof, pay and diſcharge certain legacies in the ſaid will mentioned; and from and immediately after payment of ſuch legacies he directed that the ſaid truſtees ſhould have, receive, and take the rents, iſſues, and profits thereof during the natural life of his uncle P. M. and from and after the death of the ſaid P. M. and payment of ſuch legacies, he directed his ſaid truſtees to convey and aſſure all the ſaid meſſuages, lands, hereditaments, and real eſtates unto the firſt and other ſons and daughters of the ſaid P. M. and in default of ſuch iſſue to J. G. one of the defendants hereinafter named; and his aſſigns, for and during the term of his natural life, then to truſtees to preſerve contingent remainders, remainder to the firſt and every other ſon of the body of the ſaid J. G. in tail male, and in default of ſuch iſſue then to and to the uſe of your orator and his heirs; and he appointed the ſeveral perſons named in his will as truſtees alſo his executors: And your orator ſheweth unto your honors, that the ſaid J. M. after the date and execution of his ſaid will, made a mortgage in fee of certain premiſes in and by his ſaid will deviſed, called therein his manor, meſſuages, lands, tenements, and hereditaments, in, &c. for ſecuring the ſum of 4000l. and afterwards intermarried with A. B. having previous to and in conſideration of ſuch his intended marriage conveyed the ſaid manor, meſſuages, lands, tenements, and hereditaments in, &c. aforeſaid, to certain truſtees, in truſt to and for the uſe of him the ſaid J. M. for life, and after his deceaſe to the uſe, intent, and purpoſe

that his ſaid intended wife, in caſe ſhe ſhould ſurvive him, ſhould yearly, during her life, have, receive, and take out of the ſaid manor, meſſuages, and premiſes in, &c. aforeſaid, one clear annuity or yearly rent of 300l. for her jointure, and in lieu and bar of dower, and ſubject thereto and for ſuch uſes as he ſhould, by any act or deed, or by his laſt will and teſtament, in writing, direct, limit, and appoint, and in default of ſuch appointment to the uſe of him the ſaid J. M. his heirs and aſſigns for ever: And your orator further ſheweth, that the ſaid J. M. departed this life without iſſue, and without revoking or altering his ſaid laſt will and teſtament, ſave only ſo far as the ſame related to the ſaid manor, meſſuages, lands, and tenements in, &c. aforeſaid, leaving the ſaid J. G. his heir at law; and the ſaid ſeveral perſons, in his ſaid will named the truſtees and executors thereof, renounced the probate of the ſaid will and declined to act in the truſts thereof; and the ſaid J. G. thereupon poſſeſſed himſelf of the perſonal eſtate and effects of the ſaid J. M. and entered into the poſſeſſion and receipt of the rents and profits of the real eſtates deviſed by the ſaid teſtator for the purpoſes in his ſaid will mentioned; and the ſaid J. G. hath ſince procured adminiſtration of the goods and chattels of the ſaid J. M. with his ſaid will annexed, to be granted to him by the proper eccleſiaſtical court: And your orator further ſheweth, that by indentures of leaſe and releaſe of the and days of in the year the releaſe being made by the ſurviving truſtees and executors named in the ſaid will of the ſaid J. M. of the firſt part, the ſaid J. G. and your orator, T. G. and other legatees, of the ſecond part; G. J. father of M. J. an infant legatee, of the third part;

C. F. of the fourth part; and R. G. father of your orator, of the fifth part; they the ſaid ſurviving truſtees and legatees, for the conſiderations therein mentioned, did, at the requeſt and by the direction of the ſaid J. G. and alſo the ſaid J. G. did aſſign and transfer unto the ſaid C. F. his executors, adminiſtrators, and aſſigns, all and ſingular the ſaid ſeveral legacies bequeathed in and by the ſaid will of the ſaid J. M. to hold the ſame in truſt for the ſaid J. G. to the intent that the ſaid legacies might be paid to the ſaid J. G. his executors, adminiſtrators, and aſſigns, from and out of the ſaid truſt eſtates remaining chargeable with the payment thereof, at ſuch times and in ſuch manner as in the ſaid will is for that purpoſe mentioned; and the ſurviving truſtees did alſo, for the conſiderations aforeſaid, at the requeſt of the ſaid J. G. and of your orator, releaſe and convey unto the ſaid R. G. his heirs and aſſigns, all and ſingular the meſſuages, lands, tenements, and hereditaments, which in and by the ſaid will were deviſed to the truſtees therein named, ſave and except the premiſes in, &c. to hold the ſame in truſt for ſuch perſon and perſons, and for ſuch eſtate and eſtates, and under and ſubject to the like uſes, truſts, charges, and other incumbrances, as were declared concerning the ſame in and by the ſaid will of the ſaid J. M. or ſuch of them as were then exiſting and capable of taking effect; but the ſaid 1021l. in the ſaid indenture of releaſe mentioned to have been paid to your orator, was not in truth paid to your orator, or any part thereof; and the ſaid J. G. afterwards repreſenting himſelf to be ſeiſed in fee of a certain meſſuage or dwelling-houſe ſituate in, &c. in the town of, &c. propoſed to convey and aſſure the ſame unto your

orator and his heirs, in lieu and in ſatisfaction of the ſaid ſum of 1021l. and your orator having agreed to ſuch propoſal, he the ſaid J. G. by indentures of leaſe and releaſe, bearing date the and days of in the year did convey and aſſure to your orator and his heirs the ſaid meſſuage or tenement in, &c. in lieu and in ſatisfaction of the ſaid ſum of 1021l. though he had but a life intereſt therein, with remainder to his iſſue male, remainder to your orator in fee: And your orator further ſheweth unto your honors, that R. G. father of the ſaid J. G. and of your orator, did, by certain indentures of leaſe and releaſe, make chargeable certain real eſtates of him the ſaid R. G. ſituate at, &c. in the county of, &c. with the payment of one annuity or clear yearly rent charge of 200l. to A. his wife, mother of your orator, for the term of her natural life, by way of jointure, and in lieu and in ſatisfaction of dower; and the ſaid R. G. afterwards, and long after his intermarriage with the ſaid A. his wife, duly made and publiſhed his laſt will and teſtament in writing executed as the law requires for the paſſing and charging of real eſtates, whereby he charged his ſaid eſtates at, &c. with the payment of one annuity or yearly rent of 300l. to the ſaid A. his wife for her life if ſhe continued a widow, and after her deceaſe or marriage, he did by his ſaid will, or by a teſtamentary writing to be added thereto, give and deviſe his eſtates at, &c. to your orator and his heirs, and appointed his ſaid wife A. and the ſaid J. G. his eldeſt ſon, his executors, and departed this life without revoking or altering his ſaid will, leaving the ſaid J. G. his eldeſt ſon, his heir at law ſurviving him, and the ſaid J. G. alone proved the will of the ſaid R. G in the

proper eccleſiaſtical court, and poſſeſſed himſelf of all and ſingular his perſonal eſtate, and alſo entered upon all his real eſtates; and the ſaid A. the widow of the ſaid R. G. in or about the year intermarried with R. H. whereby the proviſion made for her by the will of the ſaid R. G. ceaſed and determined, and ſhe from that time became entitled only to the annuity of 200l. per ann. chargeable on the ſaid eſtates at, &c. and your orator became alſo from that time entitled to the ſaid eſtates at, &c. ſubject to the proportion of the ſaid annuity of 200l. which thoſe eſtates ought to ſuſtain: And your orator further ſheweth unto your honors, that by indentures of leaſe and releaſe, bearing date the and days of in the year the releaſe being made between the ſaid J. G. of the firſt part, C. F. and J. T. of the ſecond part, and G. C. W. and ſeveral other perſons therein named, being creditors of the ſaid J. G. and alſo of the ſaid J. M. and of R. G. or of ſome or one of them, of the third part; he the ſaid J. G. releaſed and conveyed to the ſaid C. F. and J. T. all and every his meſſuages, lands, and tenements in reverſion, remainder, or expectancy, and alſo all his perſonal eſtate, in truſt for the payment of the debts of the ſaid J. G. in ſuch manner as thereby directed: And your orator further ſheweth, that ſeveral diſputes and differences having ariſen between the ſaid J. G. and C. F. and J. T. as his truſtees, and your orator, reſpecting the real and perſonal eſtates of the ſaid J. M. and the application thereof by the ſaid J. G. and alſo the effect and conſtruction of the will of the ſaid R. G. and of the ſeveral codicils or teſtamentary papers found therewith, and the proportions in which the ſaid three eſtates at, &c. were and are liable to

contribute towards the payment of the ſaid annuity or yearly rent charge of 200l. to the ſaid A. H. the widow of the ſaid R. G. three ſeveral bills were filed in this honourable court between the ſaid parties with reſpect thereto; and it was upon the motion of the counſel of the ſaid C. F.—J. T. and J. G. and by the conſent of your orator, ordered by this honourable court, that as well the ſeveral matters in diſpute between the parties in the ſaid cauſes as all other matters in diſpute, claims, and demands, depending or being between the ſaid J. G. and your orator, T. G. or the ſaid J. G. and J. T. as the truſtee of his eſtate and effects, and your orator T. G. in any manner or wiſe ſhould be; and the ſame were thereby referred to S. C. C. Eſq. to arbitrate, award, and determine the ſame: and it was further ordered, that as well the ſaid parties as all ſuch perſon or perſons whoſe evidence might be thought neceſſary to be adduced or given to him, ſhould be examined upon interrogatories, or upon oath, in ſuch manner, and by and before ſuch perſon or perſons as he ſhould direct; and that all deeds, books, and papers in the cuſtody or power of any of the parties, relating to the matters in queſtion, ſhould be by them produced before him; and the ſaid S. C. C. took upon himſelf the ſaid arbitration, and he made his award in manner and form, and in the words and figures following, that is to ſay:—Firſt, I find and declare, that the amount of the perſonal eſtate and effects of the ſaid J. M. poſſeſſed or received by the ſaid J. G. did not exceed in the whole the ſum of 2800l.—and I find and declare, that the funeral expences and debts of the ſaid J. M. which were paid and ſatisfied by the ſaid J. G. or the ſaid R. G. on his account, or the ſaid C. F. and J. T. as his

truſtees, (including the ſum of 4000l. ſecured by mortgage of the Little Bolton Eſtate as aforeſaid, amounted together to the principal ſum of 8555l. together with an arrear of intereſt thereon, the particulars of which payments I have ſet forth in the ſchedule annexed to this my award; and I find that the annual rents of the meſſuages, lands, tenements, and hereditaments in Great Bolton, not ſpecifically deviſed by the ſaid J. M. out of which he the ſaid J. M. directed his ſaid truſtees to raiſe and make good the deficiency of his perſonal eſtate, to pay and ſatisfy his funeral expences and debts, did not exceed the ſum of 126l. And that the whole inheritance of the ſaid premiſes in Great Bolton were not at the time of the death of the ſaid J. M. worth to be ſold, ſufficient to make good ſuch deficiency of the perſonal eſtate: And I do therefore declare and award, that the ſaid J. G. and the ſaid J. T. as his truſtees, (the ſaid C. F. having departed this life), by the means aforeſaid, and as ſtanding in the place of ſuch creditors of the ſaid J. M. and by virtue of the ſaid indentures of the and days of became and now are abſolutely intitled to the whole beneficial intereſt in the ſaid Great Bolton Eſtate; and I further declare and award, that the ſaid deviſe in the will of the ſaid J. M. of the manor or lordſhip of Little Bolton, and the advowſon and right of preſentation to Little Bolton Chapel and all his the teſtator's meſſuages, lands, tenements, tithes, and hereditaments in Little Bolton aforeſaid, was revoked by the ſaid indenture of ſettlement of the and days of hereinbefore ſet forth:[1] And I

[1] Vid. the plea; poſt.

further find and declare, that the only real eſtates which paſſed under the words of the reſiduary deviſe in the will of the ſaid J. M. that is to ſay, all other my meſſuages, lands, tenements, hereditaments, and real eſtates whatſoever and whereſoever, were ſuch parts of the ſaid Great Bolton Eſtate, as were not before ſpecifically deviſed, and the ſaid houſe in, &c. which was conveyed by the ſaid J. G. to the ſaid T. G. by the ſaid indenture of the and days of hereinbefore ſet forth: And I therefore declare and award, that the ſaid T. G. hath not any claim or intereſt whatſoever in the real or perſonal eſtate of the ſaid J. M. except in the ſaid houſe in, &c. which I direct and award ſhall be accepted and taken by the ſaid T. G. for ſuch eſtate as the ſaid J. G. had therein at the time of the execution of the ſaid indentures of the and days of in full ſatisfaction of all claims and demands of him the ſaid T. G. in reſpect of the ſaid legacies of 1000l. and 21l. bequeathed to him by the will of the ſaid J. M. and as to the ſeveral matters in difference between the parties, in reſpect of the eſtates of the ſaid R. G. and the effect of his will and the ſeveral codicils or teſtamentary papers found therewith as aforeſaid: I declare and award that the ſeveral lands, tenements, and hereditaments of the ſaid R. G. ſituate in, &c. aforeſaid, (ſubject to their proportion of jointure payable to the ſaid A. H.) were well and ſufficiently deviſed by the ſaid R. G. to the ſaid T. G. in fee ſimple, from the time of the ſecond marriage of the ſaid A. H. and I do further award and direct, that the ſaid J. G. and J. T. ſhall, upon demand for that purpoſe made by the ſaid T. G. or ſome perſon by him thereunto lawfully au-

thorized, deliver up, or cauſe to be delivered up to him the ſaid T. G. or to ſuch perſon, all the title deeds, papers, and writings in the cuſtody or power of them the ſaid J. G. and J. T. reſpectively relating to or concerning the ſaid premiſes in, &c. And I further declare and award, that the lands, tenements, and hereditaments of the ſaid R. G. ſituate in, &c. aforeſaid, were well and ſufficiently deviſed by the ſaid codicils and teſtamentary papers, found with the will of the ſaid R. G. as aforeſaid, or ſome of them, to the ſaid T. G. in fee ſimple, and that by ſuch deviſe the ſaid T. G. upon the ſecond marriage of the ſaid A. H. became intitled to the ſaid premiſes in fee ſimple, ſubject only to their proportion of the ſaid A. H.'s jointure; and I find and declare, that the ſaid J. G. or the ſaid C. F. and J. T. received the rents and profits of the Ardwich Eſtate, (except the[2] ſaid two cloſes let to the ſaid J. H. at the yearly rent of 8l. 8s.) which were received by the ſaid T. G. from the time of the ſecond marriage of the ſaid A. H. until the time when the poſſeſſion thereof was delivered to H. A. Eſq. in purſuance of the agreement hereinafter mentioned, which rents and profits amounted in the whole to the ſum of 560l. And I find that by an agreement dated the day of made between W. T. on behalf of the ſaid C. F. and J. T. as ſuch truſtees as aforeſaid, of the one part, and the ſaid H. A. Eſq. of the other part, the ſaid W. T. agreed for the ſale of certain meſſuages or dwelling-houſes in, &c. and the whole of the ſaid Ardwich Eſtate, to the ſaid H. A.

[2] Vid. the plea; poſt.

for the ſum of 6300l. to be paid on or before the day of then next: And by ſuch agreement it was provided that the venders ſhould have the rents and profits of the ſaid Ardwich Eſtate up to the day of then next, at which time the ſaid H. A. was to enter into the receipts thereof: And I find that ſuch purchaſe hath been ſince completed, but that the rents and profits of the ſaid two cloſes, let to the ſaid J. H. have been received from that time to Chriſtmas by the ſaid T. G. And I find that the proportion of the ſaid ſum of 6300l. which was agreed to be paid for the Ardwich Eſtate, was the ſum of 4200l. And I find and award that the proportion in which the ſaid Preſtwich, Ardwich, and Ruſholme eſtates were liable to contribute to the annual payment of the jointure of the ſaid A. H. from the time of the ſecond marriage, were as follows, (that is to ſay), Preſtwich, 126l. 18s. 8d. Ardwich, 41l. 7s. 8d. and Ruſholme, 31l. 13s. 8d. making together 200l. And I find that all accounts in reſpect of the contribution of the Ruſholme Eſtate to the ſaid jointure, have been ſettled between the ſaid parties up to Chriſtmas from which time the whole of the ſaid jointure hath been paid to the ſaid A. H. up to the day of now laſt paſt, by the ſaid J. G. or the ſaid C. F. and J. T. as his truſtees; and upon conſideration of the matters aforeſaid, I do declare, that the ſaid J. G. and the ſaid J. T. as his truſtees, ought to pay to the ſaid T. G. the ſum of 560l. the amount of the rents of the Ardwich Eſtate received by the ſaid J. G. or his truſtee as aforeſaid, deducting thereout the ſum of 331l. 1s. 4d. the amount of the proportion contributable by the Ardwich Eſtate, to the ſaid jointure, at the rate hereinbefore mentioned,

which reduces the ſaid ſum of 560l. to the ſum of 228l. 18s. 8d. And I do further declare, that the ſaid J. G. and J. T. as his truſtees, ought to pay to the ſaid T. G. the ſum of 4200l. (for which the ſaid Ardwich Eſtate was ſold as aforeſaid), with intereſt for the ſame at the rate of 4l. per cent. per annum, from the day of to the time when the ſame ſhall be paid, deducting thereout the ſum of 289l. 13s. 8d. the amount of the proportion contributable by the ſaid Ardwich Eſtate to the ſaid jointure, from the ſaid day of to the day of and alſo the ſum of 237l. 12s. 6d. the amount of the proportion contributable by the ſaid Ruſholme Eſtate to the ſaid jointure from Chriſtmas to the ſame time; and alſo the ſum of 50l. 8s. the amount of the rents of the ſaid two cloſes let to the ſaid J. H. which have been received by the ſaid T. G. ſince the ſale of the Ardwich Eſtate; and alſo the ſum of 110l. 18s. being the amounts of certain parts of the ſaid effects of the ſaid R. G. poſſeſſed by the ſaid T. G. and ſold by him, to which it now appears he had no title: And I award that the ſaid ſum of 4200l. with ſuch intereſt as aforeſaid, ſhall be accepted and taken by the ſaid T. G. in full ſatisfaction of all claims or demands of him the ſaid T. G. in reſpect of the ſaid Ardwich Eſtate; and with reſpect to the coſts of the ſeveral ſuits hereinbefore mentioned, I am of opinion that the ſaid J. G. and the ſaid J. T. as his truſtees, ought to pay to the ſaid T. G. his coſts of the ſuit inſtituted by the ſaid C. F.—J. T. and J. G. for carrying the truſts of the ſaid J. M.'s will into execution as aforeſaid, to be taxed by the proper officer of the ſaid Court of Exchequer, but that the ſaid parties reſpectively ought to

bear their own coſts of all other ſuits depending between them at the time of the ſaid order of reference: And I do award and direct, that the ſaid J. G. and the ſaid J. T. out of the eſtate and effects of the ſaid J. G. conveyed and aſſigned to the ſaid C. F. and him the ſaid J. T. as aforeſaid, do, on or before the day of next, pay to the ſaid T. G. or ſome perſon by him thereunto lawfully authorized, ſuch ſeveral principal ſums, with intereſt and coſts, as hereinbefore particularly mentioned, after making ſuch further deductions as aforeſaid: And I do further award, that upon payment of ſuch money, he the ſaid T. G. ſhall, (if he ſhall be thereunto required by the ſaid J. T.), execute good and ſufficient releaſes, conveyances, and other aſſurances of all his eſtate, right, title, and intereſt in or to the ſeveral meſſuages, lands, tenements, and hereditaments in, &c. hereinbefore mentioned, to them the ſaid J. G. and J. T. or either of them, or to ſuch other perſon or perſons as they the ſaid J. G. and J. T. ſhall direct and appoint: And I do further award and direct, that they the ſaid parties reſpectively ſhall, upon or at any time after payment of the money hereinbefore directed to be paid, when they ſhall be thereunto required, and at their own reſpective charges, make, execute, and deliver to each other ſufficient mutual releaſes in writing of all actions, covenants, ſuits, and demands, which they the ſaid J. G. and J. T. as his truſtees, and the ſaid T. G. had or claimed to have againſt each other in reſpect of the matters in difference between them at the time of making the ſaid order of reference, as by the ſaid award, reference being thereunto had, will appear: And your orator ſheweth, that the ſaid J. G. who, as

heir at law of the ſaid R. G. had become intitled to and had entered upon the eſtates of the ſaid R. G. ſituate at, &c. aforeſaid, or any one on his behalf, has not ſettled with your orator as to the proportion which the eſtate at, &c. ought to have contributed towards the payment of the ſaid annuity or yearly rent of 200l. to A. the wife of the ſaid R. H. even in the proportion ſet thereon by the ſaid arbitrator himſelf; and your orator hath ſince the award diſcovered that the ſaid J. G. and J. T. or either of them, did not bring into account before the ſaid arbitrators divers premiſes which were part of the eſtates at, &c. and particularly a tenement formerly let to S. H. deceaſed, and now in the occupation of the widow of the ſaid S. H. at the yearly rent of 60l. another let to I. T. at the yearly rent of 20l. another let to W. B. at the yearly rent of 8l. 8s. a tenement let to R. B. at the yearly rent of 1l. 10s. a tenement let to S. C. at the yearly rent of 1l. 10s. a tenement let to C. M. at the yearly rent of 7l. a tenement let to S. T. at the yearly rent of 5l. a tenement let to the widow B. at the yearly rent of 4l. 4s. and another tenement, formerly Wilſon's, late Anderſon's, let at the yearly rent of 40l. whereby your orator is extremely injured by the ſaid award as to the proportions which the ſaid Ardwich and Ruſholme eſtates ſhould contribute to the payment of the ſaid annuity to the ſaid A. H.—And your orator hath alſo, ſince the making of the ſaid award, diſcovered that the ſaid J. G.—C. F. and J. T. or either of them, did not bring into account before the ſaid arbitrators divers real eſtates of which the ſaid J. M. was, at the time of his death, ſeized, poſſeſſed, or intitled unto, that were compriſed under the general deviſe of all other his meſſuages, lands,

tenements, and hereditaments, and particularly of a meſſuage ſituate in the town of, &c. in a ſtreet called, &c. which was ſold by the ſaid J. G. or by ſome perſon in truſt for him, for a large ſum of money, to ſome committee or committees, to enlarge the ſaid ſtreet, by the authority of Parliament; and alſo a meſſuage in or near a ſtreet called, &c. in the town of, &c. formerly let on leaſe to one —— W. and which hath ſome time ſince been ſold by the defendant J. G. to W. T. of, &c. in the county of, &c. who now is the attorney or ſolicitor of the ſaid J. G. and J. T. and alſo of divers ſmall tenements adjoining to or near a certain eſtate of the ſaid J. M. called the, &c. in the town of, &c. and alſo other eſtates and premiſes ſituate in or near a place called, &c. in the county of, &c. of conſiderable yearly value; and alſo other divers premiſes ſituate in the town of, &c. beſides the ſaid meſſuages hereinbefore mentioned, of the yearly value of 83l. and upwards; and alſo certain ground rents iſſuing out of other premiſes in the town of, &c. of the yearly value of 5l. 2s. and alſo a tenement now or lately in the tenure or occupation of J. S.—And your orator ſheweth unto your honors, that he hath alſo, ſince the making of the ſaid award, diſcovered that the ſaid J. G. and J. T. or one of them, received of the rents and profits of the ſaid Ruſholme eſtate, from Chriſtmas to Chriſtmas the ſum of 85l. 14s. 8d. over and above the proportion which the ſaid eſtate ought to contribute towards the payment of the ſaid annuity or yearly rent charge of 200l. to the ſaid A. H. even according to the proportion ſet thereon by the ſaid award: And your orator, upon having made a diſcovery of the ſeveral matters aforeſaid, applied to the ſaid J. G. and

J. T. and each of them, the ſaid C. F. having departed this life before the making of the ſaid award, and requeſted them to come to an account with your orator for the monies, rents, and profits by them or one of them, or by the ſaid C. F. in his life time, received in reſpect of the ſaid eſtates, concealed by them from the ſaid arbitrator, in order that the ſame might be ſettled and adjuſted between them upon the principle adopted by the ſaid arbitrator in the ſaid award, without ſuit, and to pay your orator the ſaid ſum of 85l. 14s. 8d. received by them or one of them as the rents and profits of the Ruſholme Eſtate, over and above the proportion which the ſaid Ruſholme Eſtate ought to have contributed towards the ſaid annuity or yearly rent charge of 200l. to the ſaid A. H. and to convey and aſſure all ſuch real eſtates of the ſaid J. M. to the uſes directed in that reſpect in and by the ſaid laſt mentioned will and teſtament of the ſaid J. M. and your orator well hoped they would have complied with ſuch reaſonable requeſts, as in juſtice and equity they ought to have done: BUT NOW SO IT IS, may it pleaſe your honors, that the ſaid J. G. and J. T. combining and confederating themſelves to and with divers perſons at preſent unknown to your orator, whoſe names when diſcovered he prays he may be at liberty to inſert in his bill of complaint, with apt words and matter to charge them and each of them parties defendants hereto, and contriving how to injure your orator in the premiſes, have not only abſolutely refuſed to comply with your orator's reaſonable requeſts, but are very preſſing upon your orator to execute a general releaſe to them purſuant to the ſaid award, and threaten to compel your orator to execute the ſame to them, by

ſome application to this honorable court, or by ſome other proceeding at law, and to give colour thereto, they give out and pretend that they did lay before the ſaid arbitrator a true and juſt account of all the particulars of the eſtates of the ſaid R. G. at, &c. and the true yearly values thereof, and that they had ſettled with your orator in reſpect to the proportion which the ſaid eſtate at, &c. was to have contributed towards the payment of the ſaid annuity of 200l. to Mrs. A. H. up to Chriſtmas Whereas your orator expreſſly charges that they did not give in a true account of the particulars of the eſtates of the ſaid R. G. at, &c. to the ſaid arbitrator, but they wilfully concealed the particulars hereinbefore mentioned, beſides divers other particulars; and your orator expreſſly charges that the ſaid confederates, or either of them, had not, nor had any other perſon ſettled with your orator for the ſum of money which had been paid by the ſaid eſtate at, &c. towards the annuity of 200l. to Mrs. A. H. over and above its proportion up to Chriſtmas or to any other period, at the time of the making of the ſaid award, or at any time ſince; for your orator, upon his diſcovering the ſame ſome time after the making of the ſaid award, made the ſame known to the ſaid confederates, or to ſome or one of them, and they then acknowleged the ſum of 85l. 14s. 8d. to have been overpaid by your orator in reſpect thereof, and the ſaid W. T. as the agent of the ſaid J. G. and J. T. promiſed that the ſame ſhould be repaid to your orator; and the ſaid confederates alſo pretend that they did lay before the ſaid arbitrator a true and juſt account of the real eſtate of which the ſaid J. M. was at the time of his death ſeiſed, poſſeſſed, intereſted in, or intitled

to, and which were compriſed under the general deviſe of all other his meſſuages, lands, tenements, and hereditaments; and particularly that the ſaid meſſuage in, &c. was claimed by your orator, and brought before the ſaid arbitrator, and that the ſaid arbitrator diſallowed the ſame; whereas your orator admits that he did claim the ſaid meſſuage in, &c. before the ſaid arbitrator, and that the defendants alleged the ſame to have been the property of the ſaid R. G. and of the ſaid J. M. and they did then ſhew before the ſaid arbitrator that the ſaid R. G. had a tenement in, &c. and which was then preſumed to have been the premiſes ſo claimed by your orator; whereas your orator charges that he hath ſince diſcovered that the ſaid meſſuage ſo claimed by him was formerly the property of P. M. who by ſome deed of truſt conveyed and aſſured the ſame to J. M. brother of the ſaid P. M. who granted a leaſe thereof to one T. R. for ſome term of years, and to which premiſes, upon the death of the ſaid J. M. the ſaid J. M. became intitled as his heir at law, and which premiſes had been originally deviſed to P. M. by his father J. M. which ſaid deed of truſt from the ſaid P. M. to J. M. and the counterpart of the leaſe thereof from the ſaid J. M. to T. R. and alſo the laſt will and teſtament of the ſaid J. M. father of P. M. are now in the poſſeſſion or power of the ſaid confederates, or of ſome or one of them, whereby it will appear that the ſaid meſſuage was part of the real eſtate of the ſaid J. M. and which paſſed under the general deviſe in the ſaid will, and was no part of the eſtate of the ſaid R. G.—And your orator charges, that he hath, ſince the making of the ſaid award, diſcovered that the ſaid R.

G. had a tenement in, &c. which was, as aforeſaid, preſumed to be the premiſes ſo claimed by your orator, and that the tenement which ſo belonged to the ſaid R. G. was called or known by the name of, &c. and was a different and diſtinct tenement from the meſſuage ſo claimed by your orator; and alſo a meſſuage, ſituate in or near a ſtreet called, &c. in the town of, &c. which was formerly the property of the ſaid J. M. the hereinbefore named father of the ſaid J. M. and by him demiſed to one — W. for a term of years, and which the ſaid J. M. became intitled to as the heir at law of the ſaid J. M. and which had alſo been originally deviſed to the ſaid P. M. by his father J. M. and which ſaid meſſuage, or ſome rent iſſuing thereout, was ſold by the ſaid confederates, or ſome or one of them, or by ſome perſon in truſt for them or on their account, to Mr. W. T. who now acts as the attorney or ſolicitor of the ſaid confederates, or of ſome or one them; and the ſaid defendants will ſometimes admit, that the ſaid meſſuage in or near a ſtreet called, &c. was formerly the property of the ſaid J. M. but then they pretend that the ſame was ſpecifically deviſed by the ſaid J. M. to one C. W. chargeable with the payment of 400l. to S. R. and that the ſaid R. G. purchaſed the ſame of the ſaid C. W. whereas your orator charges that the premiſes deviſed by the ſaid J. M. to the ſaid C. W. were premiſes which had been purchaſed by him the ſaid J. M. of T. T. father of the defendant J. T. and ſold again by him the ſaid J. M. after the making his ſaid will, unto the ſaid T. T. and that the defendant J. T. or ſome perſon claiming under his ſaid father, now is intereſted therein, and that the ſame are different and other premiſes than thoſe here claimed

by your orator: And your orator expreſsly charges, that the defendant J. G. did not purchaſe the ſame of the ſaid C. W. but became intitled thereto, and poſſeſſed himſelf thereof, under and by virtue of the ſaid general deviſe in the ſaid will of the ſaid J. M. and afterwards ſold the ſame to the ſaid W. T. and alſo two ſmall tenements or cottages, ſituated near, &c. which the ſaid J. M. became intitled to as heir at law of his father J. M. brother to the ſaid P. M. which ſaid two ſeveral tenements were purchaſed by P. M. from one R. T. late of, &c. in the county of, &c. and conveyed by the ſaid deed of truſt, made by the ſaid P. M. to J. M. father of the ſaid J. M. and alſo ſeveral other tenements and premiſes, ſituate at, &c. in the county of, &c. and elſewhere, to all which ſaid ſeveral premiſes your orator is intitled, in fee-ſimple, upon the death of the ſaid J. G. without iſſue male; and the ſaid J. G. now is of the age of 47 years, and hath no iſſue whatſoever: And your orator expreſsly charges, that the ſeveral premiſes hereinbefore mentioned were part of the eſtates of the ſaid J. M. which paſſed under the ſaid general deviſe in his ſaid will, and that no part thereof was the property of the ſaid R. G. and that it will ſo appear by the ſaid deed of truſt from the ſaid P. M. to the ſaid J. M. and by an attendant leaſe therewith, and by the laſt will and teſtament of the ſaid J. M. father of the ſaid P. M. and by a certain deed made and executed by E. M. the widow of the ſaid J. M. the elder, bearing date ſome time in the year whereby ſhe gave certain benefits therein mentioned to one T. M. and by the counterparts of certain leaſes to T. R. and — W. when produced to this honorable court: And your orator charges, that it ap-

pears by a rental of the eſtates late of the ſaid J. M. delivered to the ſaid defendants, or one of them, by T. D. the receiver thereof, that there were, in the year divers tenements in the town of, &c. the property of the late J. M. of the yearly value of 84l. 2s. 8d. and alſo ground of the yearly value of 5l. 2s. and a tenement in the tenure of J. S. for which he the ſaid T. D. accounted to the ſaid J. G. no part whereof was brought before the ſaid arbitrator, all which ſeveral deeds and wills, together with the ſaid rental, and divers other deeds, wills, papers, and writings, your orator charges now are, or lately were, in the cuſtody or power of the ſaid confederates, or ſome or one of them, whereby it will manifeſtly appear that the ſeveral premiſes hereinbefore mentioned to have been omitted by the ſaid confederates, were part of the real eſtate of the ſaid J. M. and they ſet up many other pretences equally groundleſs and unjuſt, all which, &c.

PRAYER OF THE BILL.

THAT they may ſet forth the dates, parties names, and ſhort and material contents of all and every of ſuch deed and deeds, will and wills, and other writings, and may depoſit the ſame in the hands of their clerk in court in this cauſe; and that plaintiff, and thoſe concerned for him, may be at liberty to inſpect the ſame, and take copies of, or extracts from them, as he may be adviſed to be material and neceſſary for

him; and that the ſaid confederates may ſet forth whether the ſaid J. M. was not at his death ſeiſed, poſſeſſed of, or intereſted in, or entitled to, divers premiſes, or ſome and which premiſes in particular, and in whoſe tenure or occupation, and of what yearly value, ſituate near a place near, &c. in the county of, &c. which they alſo omitted to inſert in the account of the real eſtate of the ſaid J. M. laid by them before the ſaid arbitrator, or whether the account thereof, laid before the ſaid arbitrator by them, then was and now is, to the beſt of their knowlege, information, or belief, a true and juſt account, and in no reſpect erroneous; and if the ſaid confederates ſhall now pretend that the ſaid ſeveral premiſes before-mentioned, and charged to have been part of the eſtate of the ſaid J. M. or any or either of them, were, or was in fact, part of the real eſtate of the ſaid R. G. then, and in that caſe, that they may ſet forth how, and in what manner, and by what deed or deeds, will or wills, or other inſtrument or inſtruments in the law, the ſaid R. G. became intitled to the ſame, or any of them reſpectively; and that they may ſet forth the date or dates of all and every of ſuch deed or deeds, will or wills, or other inſtrument or inſtruments in the law, and parties names, and ſhort and material contents thereof, and may depoſit the ſame in the hands of their clerk in court in this cauſe; and that the plaintiff, and thoſe concerned for him, may be at liberty to inſpect the ſame, and take copies of, or extracts from them, as he may be adviſed; and whether the plaintiff hath not made the application and requeſts beforementioned to the ſaid confederates, or to one, and which, of them; and whether they have not refuſed to comply there-

with; and whether they have not ſet up the ſeveral pretences before in that behalf mentioned, or ſome, and which, of them, or ſome other, and what, pretences; and that the ſaid confederates, and each of them, may fully anſwer all and ſingular the matters and things before charged; *and that the ſaid award of the ſaid S. C. C. ſo far as the ſame declares that the real eſtate of the ſaid J. M. which paſſed by the words of the reſiduary clauſe in the will of the ſaid J. M. conſiſted only of ſuch parts of the Great Bolton Eſtate as were not before ſpecifically deviſed, and the ſaid houſe in Smithy-Door, which was conveyed by the ſaid J. G. to the plaintiff, may be ſet aſide, and declared not to be binding on the plaintiff; and alſo ſo far as the ſame declares and aſcertains the proportions in which the eſtates, late of the ſaid R. G. at, &c. ought to have contributed towards the payment of the ſaid annuity of* 200*l. to the ſaid A. H.*—and alſo ſo far as the ſame declares that the plaintiff had ſettled with the ſaid J. G. or any other perſon, up to Chriſtmas with reſpect to the proportion in which the Ruſholme Eſtate ought to have contributed towards payment of the ſaid annuity of 200l. to the ſaid A. H. the ſaid award in the ſeveral particulars above mentioned, having been occaſioned by concealment of the ſaid confederates as to the ſeveral matters before charged; and that the ſaid confederates may ſet forth fully and particularly all and every part of the real eſtate which the ſaid J. M. was at his death ſeiſed, poſſeſſed of, intereſted in, or entitled unto, which were not ſpecifically deviſed by the ſaid will of the ſaid J. M. ſave and except the Little Bolton Eſtate, and the true yearly values thereof, and of every part thereof; and that it may be referred to the Deputy Remembrancer of the

Court to aſcertain the intereſt of the plaintiff therein and thereto, and that the ſaid confederates may convey and aſſure all ſuch real eſtates to the uſes directed in and by the ſaid will of the ſaid J. M. and that all proper parties may join in ſuch conveyance and aſſurance, and that the ſaid confederates may alſo ſet forth *a full and true account of the real eſtate of the ſaid R. G. ſituate at, &c. and the particulars whereof the ſame conſiſted, and the yearly values thereof, and alſo a true and juſt account of what they or either of them, or any one in truſt for them or either of them, or on their or either of their accounts, have or hath received out of or in reſpect of the ſaid eſtate at, &c.* towards the payment of the ſaid annuity of 200l. to the ſaid A. H. and that it may be referred to the Deputy Remembrancer of the Court to fix and aſcertain the proportion in which the ſaid ſeveral eſtates at, &c. ought to have contributed, and ought now to contribute towards the payment of the ſaid annuity of 200l. to the ſaid A. H. and alſo to take an account of what the ſaid confederates or either of them, or any one in truſt for them, or on their or either of their account, have or hath received out of or in reſpect of the ſaid Ruſholme Eſtate, towards the payment of the ſaid annuity of 200l. to the ſaid A. H. over and above the proportion he ſhall aſcertain which the ſaid eſtate at, &c. ought to have contributed towards the ſaid annuity; and that the ſaid confederates or one of them may be decreed forthwith to repay unto the plaintiff what ſhall appear to be ſo over-paid, and that the ſaid confederates may in the mean time be reſtrained by the order of the court from proceeding upon the ſaid award againſt the plaintiff.—And for relief, &c. &c.

PLEA

Of the Defendant J. G. *ſworn day of*

SAITH, that by a certain deed poll dated day of under the hand and ſeal of and duly executed by S. C. C. of, &c. Eſq. reciting that J. M. late of, &c. in the county of, &c. Eſq. by his laſt will and teſtament in writing bearing date the day of after deviſing ſeveral real eſtates, and bequeathing ſeveral legacies in manner therein mentioned, gave the following legacies, (that is to ſay), To W. D —W. B.—H. F. C. W.—W. S.—and W. H. the ſum of 50l. each; to the defendant and the plaintiff, and A. G. children of the teſtator's kinſman R. G. 1000l. a piece, and 20 guineas a piece for mourning rings; unto S. J. and M. J. the daughters of G. J. of, &c. 600l. a piece; and unto each and every of the children of W. W. and J. his wife 100l. all which ſaid legacies or ſums of money the ſaid teſtator thereby ordered and directed to be paid by and out of the rents and profits of his eſtates therein after mentioned, and in ſuch manner as therein after mentioned; and as for and concerning all that the ſaid teſtator's manor or lordſhip of Little Bolton, with the appurtenances, in the county of, &c. and the perpetual advowſon of Little Bolton Chapel, and all his meſſuages, lands, tenements, rents, tythes, and hereditaments, ariſing and being in Little Bolton aforeſaid, and all other his the ſaid teſtator's lands, tenements, hereditaments, and real eſtate whatſoever and wherefoever,

he gave and deviſed the ſame to the ſaid W. D.—W. B. H. F.—C. W.—W. S. and W. H. and their heirs and aſſigns, for ever, UPON TRUST that they the ſaid truſtees and their heirs ſhould in the firſt place out of the rents and profits thereof pay a certain annuity in the ſaid will mentioned, and ſubject to ſuch annuity ſaid teſtator ordered and directed his ſaid truſtees and their heirs to pay and apply the reſidue of the rents and profits thereof, from time to time, as the ſame ſhould be got in and received, in the payment of the ſeveral legacies therein before by him given to them the ſaid truſtees, the defendant, the plaintiff, and A. G. the ſaid S. and M. J. and the children of the ſaid W. and M. W. in manner therein mentioned; and after payment of the ſaid ſeveral legacies, the ſaid teſtator directed that his truſtees and their heirs ſhould receive and take the rents and profits of the ſaid manor and premiſes to their own uſe during the life of the ſaid teſtator's uncle P. M. and after the death of the ſaid P. M. and payment of all the before-mentioned legacies, the ſaid teſtator directed his ſaid truſtees and their heirs to convey all the ſaid manors, meſſuages, lands, tenements, and real eſtate, unto the firſt and other ſons and the daughters of the ſaid P. M. who ſhould be capable of purchaſing and holding lands of inheritance in England, in manner therein mentioned; and for default of ſuch iſſue of the ſaid P. M. then to and to the uſe of the defendant for life, he taking upon himſelf and uſing the name of M. remainder to truſtees to preſerve contingent remainders, remainder to the firſt and every other ſon of the body of the defendant, (taking upon them and uſing the name of M.) in tail male; and in default of ſuch iſſue, then to and to the

uſe of the ſaid plaintiff and his heirs, he and they taking upon them and uſing the name of M. and the ſaid teſtator (after bequeathing ſome further legacies) gave all the reſidue of his perſonal eſtate, after payment of his debts and funeral expences, to his ſaid truſtees, to diſpoſe of as they ſhould think proper; but in caſe his perſonal eſtate ſhould fall ſhort of paying and ſatisfying his funeral expences and debts, then the ſaid teſtator directed his ſaid truſtees and their heirs, by and out of the rents and profits, or by ſale or mortgage of any part of his meſſuages, lands, tenements, and hereditaments in, &c. aforeſaid, and not by him before particularly mentioned, to raiſe money ſufficient to make good ſuch deficiency, and the ſaid J. M. appointed the ſaid W. D.—W. B.—H. F.—C. W. W. S. and W. H. executors of his ſaid will, and further reciting that the ſaid J. M. after the date and execution of the ſaid will, made a mortgage in fee of the ſaid Little Bolton Eſtate, for ſecuring the ſum of 4000l. and further reciting certain indentures of leaſe and releaſe, dated the and days of being a ſettlement made previous to and in conſideration of a marriage which was intended to be, and was ſoon afterwards had and ſolemnized between the ſaid J. M. and A. B. and further reciting that the ſaid J. M. died on or about the day of without having had any iſſue, leaving the ſaid A. his widow him ſurviving; and further reciting that the ſaid W. D.—W. B.—H. F. C. W.—W. S. and W. H. renounced the probate of the ſaid will, and declined to act in the truſts thereof, and thereupon the defendant poſſeſſed himſelf of the perſonal eſtate and effects of the ſaid J. M. or ſo much thereof as he was able, and entered into poſſeſſion and

receipt of the rents and profits of the real eſtates deviſed by the ſaid teſtator to his truſtees for the purpoſes before mentioned, and the defendant had ſince obtained letters of adminiſtration of the perſonal eſtate and effects of the ſaid J. M. with his ſaid will annexed; and further reciting that by indentures of leaſe and releaſe, dated the and days of the releaſe made between the ſaid W. B.—H. F.—C. W. and W. H. being the ſurviving truſtees under the ſaid will, of the firſt part, defendant, plaintiff, J. T. another defendant to plaintiff's bill, and A. his wife (late A. G.) —— E.—J. H. and E. H. who were the aſſignees of the eſtate and effects of the ſaid H. F. under a commiſſion of bankrupt, N. S. the executor of the ſaid W. S.—W. W.—S. W.—J. W. and C. W. of Jamaica, the four ſons and only children of the ſaid W. W. and J. his wife living at the time of the death of the ſaid J. M. of the ſecond part, G. J. Eſq. the father of M. J. one of the legatees, who was then an infant, under the age of twenty-one years, of the third part, C. F. of the fourth part, and the ſaid R. G. of the fifth part: It was witneſſed, that the ſaid W. B. in conſideration of the ſum of 50l. the ſaid —— E.—J. H. and E. H. as aſſignees of the eſtate and effects of the ſaid H. F. in conſideration of the like ſum of 50l. the ſaid C. W. in conſideration of the like ſum of 50l. the ſaid N. S. as executor of the ſaid W. S. in conſideration of the like ſum of 50l. the ſaid W. H. in conſideration of the like ſum of 50l. the plaintiff, in conſideration of 1021l. the ſaid J. T. and A. his wife, in conſideration of the ſum of 1021l. the ſaid W. W.—S. W.—J. W. and C. W. in conſideration of 100l. paid to them reſpectively by the defendant, did, at the requeſt and by the

direction and appointment of the defendant, and alſo the defendant did aſſign and transfer unto the ſaid C. F. his executors, &c. all and ſingular the ſaid legacies, to hold the ſame in truſt for the defendant, to the intent that the ſaid legacies might be paid to the defendant, his executors, &c. from and out of the ſaid truſt eſtates remaining chargeable with the payment thereof, and at ſuch times and in ſuch manner as in the ſaid will is for that purpoſe mentioned; and for the conſideration aforeſaid, the ſurviving deviſees in truſt, at the requeſt of the defendant and plaintiff, did releaſe and convey to the ſaid R. G. his heirs and aſſigns, all and ſingular the meſſuages, lands, tenements, and hereditaments, which in and by the ſaid will were deviſed unto the truſtees therein named, ſave and except the manor of Little Bolton, and the meſſuages, lands, tenements, and hereditaments comprized in the aforeſaid marriage ſettlement, whereby the deviſe thereof was revoked; To hold the ſame to the ſaid R. G. his heirs and aſſigns, upon the truſts declared concerning the ſame, in and by the ſaid will of the ſaid J. M. or ſuch of them as were then exiſting or capable of taking effect; and the ſaid G. J. in conſideration of the ſaid legacy bequeathed to his ſaid daughter, who was then an infant, being paid to him, did thereby covenant, that he would ſtand and be poſſeſſed of the ſame for her benefit, and indemnify the defendant and the ſaid deviſees in truſt for the payment thereof; and further reciting that the ſum of 1021l. in the ſaid indenture mentioned to have been paid to the ſaid plaintiff, was not, nor was any part thereof in fact paid to him, but by indentures of leaſe and releaſe, dated the and days of and made between the defendant of the one part, and the

ſaid plaintiff of the other part, in conſideration of 1000l. in the ſaid indenture of releaſe of the day of mentioned to have been paid to the ſaid plaintiff, the defendant bargained, ſold, aliened, and confirmed to the ſaid plaintiff, his heirs and aſſigns, a certain meſſuage or dwelling-houſe ſituate in, &c. therein particularly deſcribed, to hold the ſame to the ſaid plaintiff, his heirs and aſſigns, for ever; and he the defendant did thereby covenant with the ſaid plaintiff, that he the defendant had an abſolute eſtate of inheritance in fee ſimple in the ſaid meſſuage and premiſes, and had good right and authority to convey the ſame to the ſaid plaintiff, his heirs and aſſigns, in manner aforeſaid; and further reciting that the ſaid plaintiff thereupon entered into the receipt of the rents and profits of the ſaid houſe in, &c. and had ever ſince continued in the receipt thereof; and further reciting that the ſaid J. M. was at the time of his death indebted on mortgage and other ſpecialty, and by ſimple contract, to a very large amount, which debts have been ſince paid by ſuch perſons, and in ſuch manner as therein after mentioned; and further reciting that the ſaid R. G. (the late father of the defendant and the ſaid plaintiff,) duly made and publiſhed his laſt will and teſtament in writing, (and which was atteſted ſo as to paſs freehold eſtate), part of which was in the words or to the effect following, (that is to ſay): "I alſo "give to my ſon T. G. twenty ſhares in the Navigation "of the Rivers Merſey and Irwell; and after my wife's "death, or in caſe ſhe marries, I give to my ſon T. "my lands in, &c. my houſe in, &c. and all the fur-"niture, with all the plate, linen, and china, except "what is found to the contrary on a paper, and laid

" with this; alſo I give to Mr. E. W. during my wife's " life, if ſhe remains unmarried, my lands at, &c. " occupied by E. S. my lands at, &c. occupied by " T. Y. and lands in the pariſh of, &c. known by the " name of Fleams, occupied by J. T. in the county of, " &c. in truſt, nevertheleſs, that he receive the rents, " and pay quarterly after the rate of 300l. each year to " my ſaid wife, if ſhe remains unmarried, and what " remains in his hands, after paying the above ſum, " to divide the balance betwixt my two ſons J. and T. " I alſo will that ſhe has a thouſand pounds paid to " her as mentioned in her ſettlement; I likewiſe give " her the carriage and the two bay horſes; I likewiſe " give her the produce of the field at, &c. I likewiſe " give her my houſe in, &c. which we now inhabit, " and all the furniture, with the plate, linen, and " china, with the ſtable and warehouſe thereto adjoin- " ing; but in caſe ſhe marries, I doubt not but her " own prudence will direct her in the choice of a " perſon who will make her ſatisfaction for the loſs of " the houſe, &c. and the ſaid houſe and furniture ſhall " be directly delivered up to my ſon T. and the eſtate " to go as the ſettlement directs; ſo that if ſhe marries " again, it is my will that the ſettlement which I made " at my marriage be obſerved, and the eſtates therein " mentioned as before in this will diſpoſed of;" and in a ſubſequent part of the ſaid will, the ſaid teſtator deviſed as follows: " And the reſt and reſidue of all " my eſtates real and perſonal I give to my ſon J. G. " excepting what he will find diſpoſed of by codicils " which are lapt up with theſe:" and the ſaid teſtator appointed his wife A. and the defendant executors of his ſaid will; and further reciting that the ſaid R. G.

departed this life in or about the month of and at the time of his death ſeveral codicils or teſtamentary papers were found together with his ſaid will, and that the defendant alone had proved the ſaid will of the ſaid R. G. in the proper Eccleſiaſtical Court; and further reciting that by the marriage ſettlement, to which the will of the ſaid R. G. refers, a rent charge of 200l. per ann. was provided for A. his wife by way of jointure, during her life, out of the ſaid premiſes at, &c. in the ſaid will mentioned; and further reciting certain indentures of leaſe and releaſe dated the and days of whereby the defendant conveyed and aſſigned all his real and perſonal eſtate and effects, (except as therein mentioned), unto the ſaid C. F. and J. T. upon truſt for the payment of the debts of the defendant, in ſuch manner as thereby directed; and further reciting that the ſaid A. the widow of the ſaid R. G. did, in or about the month of intermarry with R. H. whereby the proviſion made for her by the will of the ſaid R. G. ceaſed and determined; and further reciting that ſeveral diſputes and differences had ariſen between the defendant and C. F. and J. T. as his truſtees, and the ſaid plaintiff, reſpecting the real and perſonal eſtate of the ſaid J. M. and the application thereof by the defendant, and alſo reſpecting the effect and conſtruction of the will of the ſaid R. G. and of the ſeveral codicils or teſtamentary papers found therewith as herein before mentioned, and the proportions in which the ſaid three eſtates at, &c. were and are liable to contribute towards payment of the jointure of the ſaid A. H. and further reciting that a bill was filed in the Court of Exchequer by the ſaid C. F. and J. T. and the defendant againſt the ſaid plaintiff, ſtating that

the debts of the ſaid J. M. had been paid and ſatisfie by the defendant and R. G. and by the ſaid C. F. and J. T. to an amount much beyond the perſonal eſtate of the ſaid J. M. poſſeſſed by the defendant, and praying that the truſts of the will of the ſaid J. M. ſo far as the ſame remained unrevoked, might be carried into execution, and that an account might be taken of his perſonal eſtate and effects not ſpecifically bequeathed, which had been poſſeſſed or received by the defendant, and alſo of the ſaid J. M.'s debts and funeral expences, and the ſums paid in diſcharge thereof by the defendant, and in caſe it ſhould appear that ſuch perſonal eſtate and effects were not ſufficient for payment of the ſaid J. M.'s debts and funeral expences, that the deficiency might be raiſed by ſale of the Great Bolton Eſtate, or a ſufficient part thereof; and that the ſaid C. F. and J. T. as aſſignees of the defendant, might be declared to ſtand as creditors on the eſtate of the ſaid J. M. for the amount of the debts paid by the defendant and the ſaid R. G.—C. F. and J. T. as aforeſaid, beyond the amount of the perſonal eſtate of the ſaid J. M. poſſeſſed by the defendant, and that an account might alſo be taken of the legacies of the ſaid J. M. charged upon the rents and profits of the real eſtates before mentioned, and of what had been paid by the defendant in diſcharge of ſuch legacies, and that the ſame might be raiſed by ſale of ſuch eſtates; and further reciting that in or about Eaſter Term a bill was filed in the ſame court by the ſaid plaintiff againſt the defendant, C. F. and J. T. to ſet aſide the ſaid indentures of leaſe and releaſe of the and days of as having been fraudulently obtained, and for payment of the ſaid legacies of 1021l. be-

queathed to the ſaid plaintiff by the ſaid J. M.'s will; and further reciting that another bill was filed in the ſame court by the ſaid C. F.—J. T. and the defendant, againſt the ſaid plaintiff, and againſt J. H.-reſpecting two cloſes of land part of the Ardwicke Eſtate therein before mentioned; and further reciting that by an order made by the ſaid Court of Exchequer in the ſaid three cauſes dated the day of upon the motion of the counſel for the ſaid C. F.—J. T. and the defendant, it was ordered by the ſaid court, by conſent of the ſaid plaintiff then preſent in court, that as well the ſeveral matters in diſpute between the ſaid parties in the ſaid three cauſes, as alſo all other matters in diſpute, claims, and demands depending or being between the defendant and plaintiff, or the defendant and J. T. as the truſtee of his eſtate and effects, and the plaintiff, in any manner or wiſe, ſhould be, and the ſame thereby were referred to him the ſaid S. C. C. to arbitrate and award and determine the ſame, ſo that he ſhould make his award in writing between the ſaid parties touching the ſeveral matters and things thereby referred to him, on or before the day of then next, which ſhould be confirmed and made an order of the ſaid court; and it was further orderd, that as well the ſaid parties, as alſo ſuch perſon or perſons whoſe evidence might be thought neceſſary to be adduced or given to him, ſhould be examined upon interrogatories, or upon oath, in ſuch manner, and by and before ſuch perſon or perſons as he ſhould direct; and that all deeds, books, and papers in the cuſtody or power of any of the parties, relating to the mattters in queſtion, ſhould be by them produced before him; and further reciting that he had taken upon himſelf the

ſaid arbitration, and had conſidered the ſeveral matters in difference between the ſaid parties at the time of making the ſaid order, ſo far as the ſame had been laid before him; and further reciting that the time limited for making his award in the premiſes had been by ſeveral orders of the ſaid court enlarged, he the ſaid S. C. C. did make his award in the premiſes in the words and in manner and form following, (that is to ſay), firſt, I find and declare that the amount of the perſonal eſtate and effects of the ſaid J. M. poſſeſſed or received by the ſaid J. G. did not exceed in the whole the ſum of 2800l. and I find and declare that the funeral expences and debts of the ſaid J. M. which were paid and ſatisfied by the ſaid J. G. or the ſaid R. G. on his account, or the ſaid C. F. and J. T. as his truſtees, (including the ſum of 4000l. ſecured by mortgage of the Little Bolton Eſtate as aforeſaid), amounted together to the principal ſum of 8555l. together with an arrear of intereſt thereon, the particulars of which payments I have ſet forth in the ſchedule annexed to this my award; and I find that the annual rents of the meſſuages, lands, tenements, and hereditaments in Great Bolton, (not ſpecifically deviſed by the ſaid J. M.) out of which he the ſaid J. M. directed his ſaid truſtees to raiſe and make good the deficiency of his perſonal eſtate to pay and ſatisfy his funeral expences and debts, did not exceed the ſum of 126l. that the whole inheritance of the premiſes in Great Bolton were not at the time of the death of the ſaid J. M. or at the time when ſuch funeral expences and debts of the ſaid J. M. were paid and ſatisfied as aforeſaid, worth to be ſold ſufficient to make good ſuch deficiency of the perſonal eſtate; and I do therefore declare and award that the ſaid

J. G. and the ſaid J. T. as his truſtee, (he the ſaid C. F. having departed this life), by the means aforeſaid, and ſtanding in the place of ſuch creditors of the ſaid J. M. and by virtue of the ſaid indentures of the and days of became and now are abſolutely intitled to the whole beneficial intereſt in the ſaid Great Bolton Eſtate; and I further declare and award that the deviſe in the will of the ſaid J. M. of the manor or lordſhip of Little Bolton, and the advowſon and right of preſentation to Little Bolton Chapel, and all his the ſaid teſtator's meſſuages, lands, tenements, tythes, and hereditaments in Little Bolton aforeſaid, was revoked by the ſaid indentures of ſettlement of the and days of herein before ſet forth; and I further find and declare that the only real eſtates which paſſed under the words of the reſiduary deviſe in the will of the ſaid J. M. (that is to ſay) "all other my meſſuages, lands, tenements, hereditaments, and real eſtate whatſoever and whereſoever" were ſuch parts of the ſaid Great Bolton Eſtate as were not before ſpecifically deviſed, and the ſaid houſe in, &c. which was conveyed by the ſaid J. G. to the ſaid T. G. by the ſaid indentures of and days of herein before ſet forth; and I therefore declare and award that the ſaid T. G. hath not any claim or intereſt whatſoever in the real or perſonal eſtate of the ſaid J. M. except in the ſaid houſe in, &c. which I direct and award ſhall be accepted and taken by the ſaid T. G. for ſuch eſtate as the ſaid J. G. had therein at the time of the execution of the ſaid indentures of the and days of in full ſatisfaction of all claims and demands of him the ſaid T. G. in reſpect of the ſaid legacies of 1000l. and 21l. bequeathed to

him by the will of the ſaid J. M. and as to the ſeveral matters in difference between the ſaid parties in reſpect of the eſtates of the ſaid R. G. and the effect of his will, and the ſeveral codicils or teſtamentary writings found therewith as aforeſaid; I declare and award that the ſeveral lands, tenements, and hereditaments of the ſaid R. G. ſituate in Ruſholme aforeſaid, (ſubject to their proportion of the jointure payable to the ſaid A. H.) were well and ſufficiently deviſed by the ſaid R. G. to the ſaid T. G. in fee ſimple, from the time of the ſecond marriage of the ſaid A. H. and I do therefore award and direct that the ſaid J. G. and J. T. ſhall, upon demand for that purpoſe made by the ſaid T. G. or ſome perſon by him thereunto lawfully authorized, deliver up or cauſe to be delivered up to him the ſaid T. G. or unto ſuch other perſon, all the title deeds and papers and writings in the cuſtody or power of them the ſaid J. G. and J. T. reſpectively, relating to or concerning the ſaid premiſes in Ruſholme; and I further declare and award that the lands, tenements, and hereditaments of the ſaid R. G. ſituate in Ardwich aforeſaid, were well and ſufficiently deviſed by the codicils or teſtamentary papers found with the will of the ſaid R. G. as aforeſaid, or ſome of them, to the ſaid T. G. in fee ſimple, and that by ſuch deviſe the ſaid T. G. upon the ſecond marriage of the ſaid A. H. became intitled to the ſaid premiſes in fee ſimple, (ſubject only to their proportion of the ſaid A. H's jointure); and I find that the ſaid J. G. or the ſaid C. F. and J. T. as his truſtees, received the rents and profits of the ſaid Ardwich Eſtate, (except the ſaid two cloſes let to the ſaid J. H. at the yearly rent of 8l. 8s. which were received by the ſaid T. G. from the time

of the ſecond marriage of the ſaid A. H. until the time when the poſſeſſion thereof was alſo delivered up to H. A. Eſq. in purſuance of the agreement herein after mentioned, which rents and profits amounted in the whole to the ſum of 560l. and I find that by an agreement dated the day of made between W. T. on behalf of C. F. and J. T. as ſuch truſtees as aforeſaid, of the one part, and the ſaid H. A. Eſq. of the other part, the ſaid W. T. agreed for the ſale of certain meſſuages or dwelling-houſes in, &c. and the whole of the ſaid Ardwich Eſtate to the ſaid H. A. for the ſum of 6300l. to be paid on or before the day of then next, and by ſuch agreement it was provided that the venders ſhould have the rents and profits of the ſaid Ardwick Eſtate up to the day of then next, at which time the ſaid H. A. was to enter into the receipt thereof; and I find that ſuch purchaſe hath been ſince completed, but that the rents and profits of the ſaid two cloſes let to the ſaid J. H. hath been received from that time to Chriſtmas by the ſaid T. G. and I find that the proportion of the ſaid ſum of 6300l. which was agreed to be paid for the Ardwick Eſtate, was the ſum of 4200l. and I find and award that the proportions in which the ſaid Preſtwich, Ardwich, and Ruſholme Eſtates were liable to contribute to the annual payment of the jointure of the ſaid A. H. from the time of the ſecond marriage, were as follows, (that is to ſay): Preſtwich, 126l. 18s. 8d. Ardwick, 41l. 7s. 8d. Ruſholme, 31l. 13s. 8d. making together 200l. and I find that all accounts in reſpect of the contribution of the Ruſholme Eſtate to the ſaid jointure have been ſettled between the ſaid parties up to Chriſtmas from which time the whole of the

ſaid jointure hath been paid to the ſaid A. H. up to the day of now laſt paſt, by the ſaid J. G. or the ſaid C. F. and J. T. as his truſtees, and upon conſideration of the matters aforeſaid, I do declare that the ſaid J. G. and J. T. as his truſtees, ought to pay to the ſaid T. G. the ſum of 560l. the amount of the rents of the Ardwich Eſtate received by the ſaid J. G. or his truſtee as aforeſaid, deducting thereout the ſum of 331l. 1s. 4d. the amount of the proportions contributable by the Ardwich Eſtate to the ſaid jointure at the rate herein before mentioned, which reduces the ſaid ſum of 560l. to the ſum of 228l. 18s. 8d. and I do further declare that the ſaid J. G. and J. T. as his truſtee, ought to pay to the ſaid T. G. the ſum of 4200l. for which the ſaid Ardwich Eſtate was ſold as aforeſaid, with intereſt for the ſame at the rate of 4l. per cent. per ann. from the day of to the time when the ſame ſhall be paid, deducting thereout the ſum of 289l. 13s. 8d. the amount of the proportion contributable by the Ardwich Eſtate to the ſaid jointure from the ſaid day of to the day of and alſo the ſum of 237l. 12s. 6d. the amount of the proportion contributable by the ſaid Ruſholme Eſtate to the ſaid jointure from Chriſtmas to the ſame time, and alſo the ſum of 50l. 8s. the amount of the rents of the ſaid J. H. which have been received by the ſaid T. G. ſince the ſale of the Ardwich Eſtate, and alſo the ſum of 110l. 18s. being the amount of certain parts of the effects of the ſaid R. G. poſſeſſed by the ſaid T. G. and ſold by him, to which it now appears he had no title; and I award that the ſaid ſum of 4200l. with ſuch intereſt as aforeſaid, ſhall be accepted and taken by the ſaid T. G. in full ſatisfaction of all

claims and demands of him the ſaid T. G. in reſpect of the ſaid Ardwich Eſtate; and with reſpect to the coſts of the ſeveral ſuits herein before mentioned, I am of opinion, that the ſaid J. G. and J. T. his truſtee ought to pay to the ſaid T. G. his coſts of the ſaid ſuit inſtituted by the ſaid C. F.—J. T. and J. G. for carrying the truſts of the ſaid J. M.'s will into execution as aforeſaid, to be taxed by the proper officer of the ſaid Court of Exchequer, but that the ſaid parties reſpectively ought to bear their own coſts of all the ſaid ſuits depending between them at the time of the ſaid order of reference; and I do award and direct that the ſaid J. G. and the ſaid J. T. out of the eſtate and effects of the ſaid J. G. conveyed and aſſigned to the ſaid C. F. and him the ſaid J. T. as aforeſaid, do, on or before the day of next, pay to the ſaid T. G. or ſome perſon by him thereunto lawfully authorized, ſuch ſeveral principal ſums, with ſuch intereſt and coſts as herein before particularly mentioned, after making ſuch deductions as aforeſaid; and I do further award that upon payment of ſuch money, he the ſaid T. G. ſhall, if he ſhall be thereunto required by the ſaid J. G. and J. T. and at the charges and expences of them the ſaid J. G. and J. T. execute good and ſufficient releaſes, conveyances, or other aſſurances of all his eſtate, right, title, intereſt, in or to the ſeveral meſſuages, lands, tenements, and hereditaments in, &c. herein before mentioned to them the ſaid J. G. and J. T. or either of them, or to ſuch other perſon or perſons as they the ſaid J. G. and J. T. ſhall direct and appoint; and I do further award and direct that they the ſaid parties reſpectively ſhall, upon or at the time after payment of the money herein before directed to

be paid, when they ſhall be thereunto required, and at their own reſpective charges, make, execute, and deliver to each other ſufficient mutual releaſes in writing of all actions, covenants, ſuits, and demands, which they the ſaid J. G. and J. T. as his truſtee, and the ſaid T. G. had or claimed to have againſt each other in reſpect of the matters in difference between them at the time of making the ſaid order of reference; and I do further award and direct that the future payments of the ſaid jointure of 200l. per annum ſhall be from time to time kept down and paid by the ſaid parties reſpectively, in the proportions herein before mentioned; and I further award that the ſaid parties reſpectively ſhall bear the coſts of the ſaid reference.

SAITH, that by an order of this court, made in the three ſeveral before-mentioned cauſes, on the day of *upon the motion of the counſel of the ſaid plaintiff*, praying that the aforeſaid award might be confirmed and made an order of this court; and on hearing the counſel for the defendant, and the ſaid J. T. it was ordered that the ſaid award ſhould be, and the ſame was thereby made an order of this court, and that the ſame ſhould be binding upon the ſaid ſeveral parties, and that they ſhould abide by, perform, and fulfil the ſaid award, according to the true intent and meaning thereof, as by the ſaid award and order, relation being thereunto had when produced, will appear, and to which the defendant for his greater certainty refers.[1]

[1] This was the caſe of Gartſide v. Gartſide, mentioned in page 378.

BILL

To SET ASIDE *an* AWARD *for* CORRUPTION *and* PARTIALITY *in the* ARBITRATORS.

To the Right Honourable William Pitt, Chancellor and Under Treaſurer of his Majeſty's Court of Exchequer, at Weſtminſter, Sir James Eyre, Knt. Lord Chief Baron of the ſame Court, and the reſt of the Barons there,

HUMBLY COMPLAINING, ſheweth unto your Honors your orator W. E. of, &c. in the county of, &c. grazier, (debtor and accountant to his Majeſty, as by the records of this honourable court, and otherwiſe, doth or may appear,) that for ſome time previous to the month of your orator had conſiderable dealings and tranſactions, in the way of his buſineſs of a grazier, with J. H. of, &c. in the ſaid county of, &c. and S. T. of, &c. aforeſaid, in the way of their trade or buſineſs of butchers, which they then, and for ſome time before, had carried on in partnerſhip together; and that in the ſaid month of the ſaid T. H. and S. T. as partners as aforeſaid, ſtood indebted to your orator in the ſum of 121l. 13s. 6d. on the balance of accounts between them; and your orator, as was admitted and allowed by them the ſaid J. H. and S. T. upon a ſettlement of ſuch accounts in

that month; and the ſaid J. H. was alſo at that time, as he likewiſe admitted and acknowleged, juſtly indebted to your orator, on his own ſeparate account, in the ſum of 7l. 7s. and the ſaid S. T. was alſo then indebted to your orator, on his own ſeparate account, in the ſum of 65l. 6s. and your orator having made many fruitleſs applications to the ſaid J. H. and S. T. for payment of ſuch debts, he your orator, in the ſaid month of caufed actions at law to be commenced againſt them for recovery of the ſame: And your orator further ſheweth, that ſoon after the commencement of thoſe actions the ſaid S. T. made and executed an aſſignment of all his eſtate and effects to certain truſtees, in truſt for and for the benefit of his creditors, and that the debt originally due from the ſaid J. H. and S. T. as partners as aforeſaid to your orator, having amounted to the ſum of 160l. 13s. 6d. one moiety whereof amounted to the ſum of 80l. 6s. 9d. and the ſaid J. H. having, with his own ſeparate money, paid to your orator the ſum of 39l. on account of ſuch partnerſhip debt (whereby the ſame was reduced to the aforeſaid balance or ſum of 121l. 13s. 6d.) and each of the ſaid co-partners, although clearly and fully underſtood to be liable to your orator for the whole of the ſaid balance, yet being liable, as between themſelves, to pay a moiety of ſuch original debt of 160l. 13s. 6d.—and the ſaid J. H. having, by the ſaid payment, reduced his moiety thereof to the ſum of 41l. 6s. 9d. it was upon the occaſion of the ſaid S. T. making the aforeſaid aſſignment of his eſtate and effects agreed between the ſaid J. H. and your orator, that the ſaid J. H. ſhould forthwith pay (and he accordingly did afterwards pay and ſatisfy) to your orator the re-

mainder of his the ſaid J. H.'s moiety of the ſaid original partnerſhip debt, together with what was ſo due to your orator from him the ſaid J. H. on his own ſeparate account as aforeſaid: and it was alſo agreed, with the privity and approbation of the ſaid S. T. and his creditors, or many of them, that your orator ſhould come in as a creditor under the ſaid S. T.'s ſaid aſſignment of his eſtate and effects, not only for the debt ſo, as aforeſaid, owing to him by the ſaid S. T. on his own ſeparate account, but alſo in reſpect to the ſaid S. T.'s ſaid moiety of the ſaid original partnerſhip debt of 160l. 13s. 6d. and take a dividend out of ſuch eſtate and effects in reſpect thereof, rateably and in proportion with the ſaid S. T.'s other creditors; and it was agreed between your orator and the ſaid J. H. that the ſaid J. H. ſhould give his promiſſory note to your orator for the ſaid ſum of 80l. 6s. 9d. the ſaid S. T.'s moiety of the ſaid original partnerſhip debt, as a ſecurity for ſo much of ſuch moiety as ſhould not be ſatisfied by means of ſuch dividend out of the ſaid S. T.'s eſtate and effects, and that your orator ſhould diſcontinue any further proceedings in the ſaid actions at law: And your orator further ſheweth, that the ſaid J. H. did accordingly, and in purſuance of ſuch agreement, give a promiſſory note under his hand to your orator for payment to your orator of the ſaid ſum of 80l. 6s. 9d. being the amount of the ſaid S. T.'s moiety of the ſaid original joint debt, and which ſaid note is now in your orator's poſſeſſion; and in conſideration thereof, and in purſuance of the ſaid agreement, your orator diſcontinued the ſaid actions at law, and part of your orator's coſts in ſuch actions was ſatisfied by the ſaid S. T. or placed to his account, and the reſidue of

ſuch coſts, amounting to the ſum of 3l. 3s. the ſaid J. H. agreed and undertook to pay to your orator as his the ſaid J. H.'s proportion or ſhare of ſuch coſts: And your orator further ſheweth, that in the month of a dividend of 9s. in the pound was made among the creditors of the ſaid S. T. who took the benefit of the ſaid aſſignment of his eſtate and effects; and your orator received the ſaid dividend upon, or in reſpect of, the ſaid ſum of 80l. 6s. 9d. the ſaid J. T.'s moiety of the aforeſaid partnerſhip debt, and which dividend ſo received by your orator amounted to the ſum of 36l. 3s. and that ſum being deducted from the ſaid ſum of 80l. 6s. 9d. reduced the ſame to the ſum of 44l. 3s. 9d. and that the produce of the ſaid S. T.'s eſtate and effects comprized in the ſaid aſſignment being wholly exhauſted by the payment of the ſaid dividend among his creditors, and the ſaid J. H. having given the ſaid promiſſory note to your orator as a ſecurity for ſo much of the ſaid ſum of 80l. 6s. 9d. therein mentioned as ſhould not be ſatisfied by means of the dividend out of the ſaid S. T.'s eſtate and effects, he your orator, after the receipt of the ſaid dividend, applied to the ſaid J. H. for payment of the ſaid ſum of 44l. 3s. 9d. ſo remaining due on the ſaid promiſſory note, after deducting the ſaid dividend, as alſo for payment of the ſaid ſum of 3l. 3s. and your orator's attorney, at the requeſt of the ſaid J. H.'s attorney, ſent to him a letter, containing the particulars of the ſaid demands: And your orator further ſheweth that the ſaid J. H. repeatedly promiſed to pay to your orator the ſaid ſum of 44l. 3s. 9d. and alſo the ſaid ſum of 3l. 3s. on account of the coſts of the ſaid actions; but the ſaid J. H. not performing ſuch his promiſes

your orator at length cauſed another action at law to be commenced againſt the ſaid J. H. in order to recover from him the ſaid ſums of 44l. 3s. 9d. and 3l. 3s. And your orator further ſheweth, that the ſaid laſt-mentioned action having been proceeded in to iſſue, the ſame ſtood for trial at the Lent aſſizes in and for the ſaid county of, &c. in the year but previous to the ſaid action coming on to be tried the ſaid J. H. applied to your orator, and to his ſaid attorney in ſuch action, and earneſtly requeſted that your orator would conſent that the matters in difference between them, in reſpect whereof the ſaid laſt-mentioned action had been brought, ſhould be referred to the arbitration of J. S. of, &c. in the ſaid county of, &c. Gent. and E. M. of, &c. in the ſame county, Gent. and your orator having conſented thereto, they, your orator and the ſaid J. H. thereupon ſubſcribed their names to an agreement in writing, dated the day of whereby it was agreed that the ſaid laſt-mentioned action, and the coſts thereof, and of the ſaid reference, as well as all other matters in diſpute between your orator and the ſaid J. H. ſhould be referred to, and that they, your orator and the ſaid J. H. ſhould abide by the award and final determination of the ſaid J. S. and E. M. provided ſuch award ſhould be made in writing, and ready to be delivered on or before the day of then next: And your orator further ſheweth that by another agreement in writing, ſigned by your orator and the ſaid J. H. dated the day of it was agreed that the time for the ſaid arbitrators making their award ſhould be enlarged until the day of then next, but the ſaid arbitrators did not previous to or on

that day make any award touching the matters ſo referred to them, although ſeveral appointments had been made by the ſaid arbitrators, for proceeding upon the ſaid arbitration, and your orator and his attorney had attended at the reſpective times and places ſo appointed, and were prepared and ready to have entered upon the ſaid reference; but although the ſaid J. H. attended at one of the ſaid meetings, he was unprepared to enter upon the ſaid reference; and at the reſt of the ſaid meetings, neither the ſaid J. H. nor any perſon on his behalf, did attend, although the ſaid J. H. had due and proper notices previouſly given to him of ſuch reſpective appointments; and your orator further ſheweth that on the day of the ſaid month of your orator and the ſaid J. H. agreed that T. C. of, &c. aforeſaid, gentleman, ſhould be added as an arbitrator to the ſaid E. M. and J. S. and that the award of any two of them ſhould be binding, and that your orator and the ſaid J. H. ſhould execute, and they did accordingly execute bonds of arbitration to each other, dated the day of and that by the bond ſo executed by your orator, he became bound to the ſaid J. H. in the penal ſum of 100l. with a condition thereunder written, in the words and figures or to the effect following, (that is to ſay): "The condition of this obli- "gation is ſuch, that if the above bounden W. E. his "heirs, executors, or adminiſtrators, or any of them, "on his and their parts and behalfs, ſhall in all "things well and truly ſtand to, obey, and abide by, "perform, fulfil, and keep the award, order, arbitra- "ment, end, and final determination of T. C. of, &c. "in the county of, &c. gentleman, E. M. of the ſame "place, gentleman, and J. S. of, &c. in the ſaid

" county, gentleman, or of any two of them, arbitra-
" tors, indifferently elected and named, as well on the
" part and behalf of the above bounden W. E. as of
" the above named J. H. to arbitrate, award, order,
" judge, and determine of and concerning all and all
" manner of action and actions, cauſe and cauſes of
" action, ſuits, bills, bonds, ſpecialties, judgments,
" ceremonies, extents, quarrels, controverſies, treſ-
" paſſes, damages, and demands whatſoever, at any
" time heretofore had, made, moved, brought, com-
" menced, ſued, proſecuted, done, ſuffered, committed,
" or depending by and between the ſaid parties, or
" either of them, ſo as the ſaid award be made in
" writing, and ready to be delivered to the parties in
" difference, (or ſuch of them as ſhall deſire the ſame)
" on or before the day of next: Then this
" obligation to be void, or elſe to remain in full force."
And the bond executed by the ſaid J. H. as aforeſaid was in the ſame penalty, and with a condition to the ſame effect as the condition to the bond ſo executed by your orator, as by ſuch bonds and the conditions thereof, reference being thereunto reſpectively had, will appear; and your orator further ſheweth, that your orator being very deſirous that the ſaid arbitration ſhould be proceeded in, and an award be made before the expiration of the time limited by the ſaid arbitration bonds, he, your orator, and his attorney, between the ſaid month of and the month of following, made repeated applications to the ſaid J. H. and his attorney, and the ſaid arbitrators named in the ſaid bonds, to appoint a time for proceeding upon the ſaid arbitration, but the ſaid J. H. conſtantly declined appointing any time himſelf for that purpoſe; and although

the ſaid arbitrators, or ſome or one of them, between the ſaid months of and appointed or propoſed different days for proceeding upon the ſaid arbitration, and hearing the reſpective allegations of your orator and the ſaid J. H. and the evidence of their reſpective witneſſes, yet the ſaid J. H. conſtantly pretended that it did not ſuit him, or he could not make it convenient to attend the ſaid arbitrators on the reſpective days ſo appointed, and he did not ſo attend; and after your orator and his ſaid attorney had made various ineffectual attempts to get the ſaid arbitration proceeded in, the ſaid E. M. at length, on the day of wrote and ſent a letter of that date to your orator's attorney, Mr. J. B. adviſing him to write a letter to the ſaid J. H. deſiring him the ſaid J. H. to appoint any day between the ſaid day of and the day of following, for proceeding upon the ſaid arbitration, and accordingly the ſaid Mr. B. on or about the day of the ſaid month of wrote and ſent a letter to the attorney of the ſaid J. H. of that date, deſiring that he the ſaid J. H. or his ſaid attorney, would appoint any day between that time and the ſaid day of for proceeding upon the ſaid arbitration, and they were, or one of them was therein deſired to appoint a day accordingly, but although ſuch letter was received by the ſaid J. H. or his attorney, on the ſame or day of or thereabouts, yet neither of them did return any anſwer thereto, either to your orator or his ſaid attorney; and therefore, on the day of the ſaid month of the ſaid Mr. B.'s clerk applied firſt to the ſaid J. H.'s attorney for an anſwer to the ſaid letter, who referred him to the ſaid J. H. and he accordingly

on that day went to the houſe of the ſaid J. H. and deſired him to fix on a day between that time and following for proceeding on the ſaid arbitration according to the deſire of the ſaid Mr. M. and thereupon the ſaid J. H. declared that he could not make it convenient to attend the ſaid arbitrators on any day previous to or on the ſaid the day of the ſaid month of as propoſed by the ſaid Mr. M. and he the ſaid J. H. at the ſame time declined to mention and did not mention any other day when he would or could make it convenient to attend the ſaid arbitrators; and your orator further ſheweth, that on the day of being upwards of four months after the execution of the ſaid arbitration bonds, the ſaid E. M. and T. C. (two of the arbitrators named in the ſaid bonds), at the preſſing ſolicitation of your orator and his ſaid attorney, ſubſcribed their names to a writing dated the ſaid day of whereby they appointed the day of at the houſe of P. G. in, &c. aforeſaid, to hear the evidence and allegations of the ſaid J. H. and your orator, and otherwiſe to proceed on the ſaid reference, and a copy of which ſaid writing or notice was delivered to the ſaid J. H. and J. S. reſpectively, on the day of by a meſſenger ſent by the ſaid E. M. and T. C. for that purpoſe, and the ſaid J. S. ſaid he would attend accordingly, and notice was on the ſame day given to your orator of ſuch laſt mentioned appointment; and your orator further ſheweth, that on the ſaid day of the ſaid E. M. and T. C. purſuant to their ſaid appointment, attended at the houſe of the ſaid P. G. in, &c. aforeſaid, and the ſaid two arbitrators were then and there attended by your orator and his attorney

the ſaid Mr. B. and your orator's witneſſes, and they the ſaid two arbitrators continued at the ſaid houſe from the morning of the ſaid day of until about eight or nine o'clock in the evening of that day, during which time neither the ſaid J. H. nor any perſon on his behalf, attended the ſaid arbitrators, nor did he ſend any meſſage to them aſſigning any reaſon or excuſe for his non-attendance, nor did the ſaid arbitrator J. S. attend ſuch meeting, or ſend or aſſign any reaſon for his non-attendance; and that about eight or nine o'clock in the evening of the ſaid day of and not earlier than eight o'clock in that evening, the ſaid two arbitrators E. M. and T. C. heard the teſtimony of the ſaid Mr. B. touching the cauſes of the aforeſaid action, in reſpect whereof the ſaid reference had been made, and thereupon the ſaid E. M. and T. C. declared that they were perfectly ſatisfied that your orator had ſufficiently eſtabliſhed his ſaid demands upon the ſaid J. H. for the ſaid ſum of 44l. 3s. 9d. in reſpect of the ſaid promiſſory note, and for the ſaid ſum of 3l. 3s. on account of the ſaid J. H.'s ſhare of the coſts of the ſaid firſt mentioned actions, and that no further teſtimony was neceſſary on your orator's behalf in ſupport of ſuch demands, although they the ſaid E. M. and T. C. were at that time expreſsly told that your orator had other witneſſes whom your orator meant to have examined before the ſaid arbitrators, in caſe they had not ſo declared themſelves ſatisfied with the ſaid Mr. B.'s evidence, or in caſe the ſaid J. H. had made any defence before the ſaid arbitrators which might have rendered it neceſſary to examine ſuch other witneſſes of your orator; and the ſaid Mr. B. did at that time obſerve and ſay to the ſaid E. M. and T. C. that if the

ſaid J. H. ſhould, before they the ſaid arbitrators ſhould make their award, offer any evidence which they the ſaid arbitrators might think material, he the ſaid Mr. B. on behalf of your orator, together with your orator's other witneſſes, ought to have an opportunity of being preſent, and of being heard as to what ſhould be ſo offered by or on the behalf of the ſaid J. H. and of anſwering or replying to or endeavouring to anſwer or reply to the ſame, and the ſaid arbitrators thereupon acquieſced in the propriety thereof, and promiſed your orator ſhould have ſuch opportunity; and before the ſaid arbitrators E. M. and T. C. left the ſaid houſe, they declared and expreſſed to your orator and the ſaid Mr. B. their final and abſolute reſolution to be that they would meet at the houſe of the ſaid Mr. C. at, &c. aforeſaid, on the then next day, to ſettle and prepare inſtructions for their award, which they would employ a Mr. T. an attorney to prepare forthwith accordingly, and that they would not, after the many delays and diſappointments which the ſaid J. H. had occaſioned, give themſelves or the parties concerned any further trouble about the buſineſs, or the ſaid E. M. and T. C. expreſſed themſelves to that effect: and your orator further ſheweth, that from what had paſſed at the ſaid meeting on the ſaid day of your orator and his ſaid attorney concluded that it would not be neceſſary for your orator or his ſaid attorney, or your orator's witneſſes, to attend the ſaid arbitrators again on the buſineſs of the ſaid reference, but that the ſaid E. M. and T. C. would have made an award in your orator's favour; but, as your orator has ſince diſcovered, they the ſaid E. M. and T. C. on Wedneſday the day of the ſaid month of met at the houſe of

the ſaid E. G. and were at ſuch meeting attended by the ſaid J. S. and J. H. and alſo by his the ſaid J. H.'s attorney, and ſeveral perſons as his witneſſes; and in the afternoon of the ſaid day of the ſaid three arbitrators E. M.—T. C. and J. S. made and executed an award in writing of that date, which being afterwards delivered to your orator, he thereupon, to his great ſurpriſe, found that after therein taking notice that they had been duly attended by the attorneys or ſolicitors for the ſaid parties, and had heard and examined the allegations, witneſſes, and evidence of and for the ſaid parties, and had deliberately conſidered the ſame, they they ſaid T. C.—E. M. and J. S. did thereby award and order that all actions, ſuits, quarrels, and controverſies whatſoever, had, moved, ariſen, or depending by or between the ſaid J. H. and your orator, in law or equity, for any manner of cauſe whatſoever, ſhould ceaſe and be no further proceeded in or proſecuted; and that the ſaid promiſſory note of the ſaid J. H. ſhould be delivered up and cancelled, and that your orator ſhould pay, or cauſe to be paid, unto the ſaid J. H. the ſum of 10l. 10s. on the day of then next, for his coſts; and that on payment of the ſaid ſum of 10l. 10s. as aforeſaid, as well your orator as the ſaid J. H. ſhould reſpectively make, ſeal, and execute, each party unto the other, mutual general releaſes of all actions, ſuits, and cauſes of action depending between them; and of all debts, damages, accounts, reckonings, and demands whatſoever, from the beginning of the world to the day of the dates of the ſaid bonds, as by ſuch award, reference being thereunto had, will appear: And your orator further ſheweth, that the ſaid meeting of the ſaid arbitrators on the ſaid

day of was not attended either by your orator or his ſaid attorney, or any perſon on his your orator's behalf, nor was any notice, *previous to that day*, given by the ſaid arbitrators, or any or either of them, to your orator or his ſaid attorney that they intended to meet on that day to hear the allegations, evidence, and witneſſes of or on the part of the ſaid J. H. or reſpecting the ſaid reference; and although it was and is recited in the ſaid award that the ſaid three arbitrators had been duly attended by the attorneys for your orator and the ſaid J. H. and had heard and examined the allegations, witneſſes, and evidence of and for both parties, and had deliberately conſidered the ſame, yet in fact the ſaid J. S. never was attended either by your orator or his attorney upon the buſineſs of the ſaid reference; and the ſaid two other arbitrators, E. M. and T. C. did not hear the teſtimony of all your orator's witneſſes reſpecting the matters of the ſaid reference, although they the ſaid E. M. and T. C. had, as hereinbefore ſtated, been fully apprized and informed that your orator had other witneſſes and evidence to produce touching the ſaid reference, and they ought therefore, and under the circumſtances aforeſaid, as your orator humbly inſiſts, to have deferred making any award unfavourable to your orator until they had heard ſuch other witneſſes and evidence on the part of your orator; and your orator ought, as he alſo humbly inſiſts, to have had reaſonable notice given to him by the ſaid arbitrators, or ſome or one of them, previous to the ſaid day of of their intention to meet on that day upon the ſaid reference, in order that your orator and his attorney and witneſſes might have been prepared to attend ſuch meeting: and

your orator expreſsly avers that the aforeſaid award was the effect of a colluſion between the ſaid arbitrators and the ſaid J. H. or of their partiality for him, or the ſame was obtained by him from them by ſome corrupt, undue, or unfair means, as is evident from the aforeſaid improper conduct of the ſaid arbitrators: and your orator likewiſe humbly inſiſts, that under the circumſtances and for the reaſons aforeſaid, and for that the ſaid arbitrators ſo groſsly miſconducted themſelves as aforeſaid, he your orator ought not to be bound by the ſaid award, and the rather ſo for that your orator's demands againſt the ſaid J. H. in reſpect whereof the ſaid laſt mentioned action was brought againſt him, were founded in reaſon and juſtice, and your orator was well intitled to be ſatisfied the ſame, and in fact your orator's ſaid demand upon the ſaid J. H. for the ſaid ſum of 3l. 3s. on account of the coſts of the ſaid firſt mentioned actions, never was diſputed by the ſaid J. H. and was admitted by him or on his behalf before the ſaid arbitrators at their ſaid laſt mentioned meeting to be a good and juſt demand, and in fact the ſaid arbitrators did, as your orator hath ſince diſcovered, or been informed, allow ſuch your orator's demand of 3l. 3s. on account of the coſts of the ſaid firſt mentioned actions, and that they deducted, or pretended to deduct the ſame from the ſaid J. H.'s coſts of the ſaid laſt mentioned action, and therefore the ſaid award was very unfair and unjuſt, and ought, as your orator humbly inſiſts, to be ſet aſide or declared void: and your orator further ſheweth, that for the reaſons aforeſaid he hath refuſed to abide by the ſaid award, and hath frequently ſince ſuch award was made applied to the ſaid J. H. and requeſted him to pay and ſatisfy

your orator his ſaid demands, in reſpect whereof he commenced the ſaid laſt mentioned action, and your orator hoped that ſuch his requeſts would have been complied with, as in juſtice and equity the ſame ought to have been, and that the ſaid J. H. would not have inſiſted upon your orator's performing the ſaid award: BUT NOW SO IT IS, may it pleaſe your honors, that the ſaid J. H. combining and confederating with divers other perſons, at preſent unknown to your orator, whoſe names when diſcovered your orator craves leave to inſert herein, with apt matter to charge them as parties defendants hereto, and contriving to injure your orator in the premiſes, REFUSES to comply with your orator's ſaid requeſt, and inſiſts upon your orator's abiding by and performing the ſaid award, which he contends is a juſt and proper award, and pretends that no undue means were made uſe of by him to obtain the ſame, and that the ſaid arbitrators in making ſuch award were not influenced by any improper motives, and that due and proper notice was given to your orator previous to the ſaid day of that the ſaid arbitrators would meet on that day to hear the allegations and evidence of and on the part of the ſaid J. H. or that your orator and his ſaid attorney had notice given to them on that day, and previous to the ſaid award being made, that the ſaid arbitrators were met together at, &c. aforeſaid, upon the buſineſs of the ſaid reference: WHEREAS your orator charges that the ſaid arbitrators, or any or either of them, or any other perſon, did not at any time previous to the ſaid day of give your orator or his ſaid attorney Mr. B. any notice that the ſaid arbitrators intended to meet on that day on the buſineſs of the ſaid reference, or to

hear the allegations, witneſſes, and evidence of and on the part of the ſaid J. H. nor was any proper notice on that day given to your orator or the ſaid Mr. B. that the ſaid arbitrators had met together, or were on that day to meet together upon the buſineſs of the ſaid reference, and to hear the allegations and evidence of and on the part of the ſaid J. H. in caſe any ſuch notice had been given to your orator and the ſaid Mr. B. on that day (but which notice your orator expreſsly charges was not given), the ſame was not a proper notice in point of time, and it was unreaſonable to deſire or expect your orator and the ſaid Mr. B. to attend, or to procure his your orator's witneſſes to attend the ſaid arbitrators at, &c. aforeſaid, and in fact it was impoſſible for them to attend in the forenoon on that day, or indeed at any time upon ſo ſhort a notice, your orator's then place of reſidence being at the diſtance of about ten miles from, &c. and the ſaid Mr. B.'s then place of reſidence being at the diſtance of twelve miles from, &c. and the ſaid Mr. B. having been during the morning and latter part of the ſaid day of at, &c. in the ſaid county of, &c. diſtant eighteen miles from, &c. on ſome important buſineſs in the way of his profeſſion, which he could not leave, as the ſaid arbitrators well knew, before they made and executed their ſaid award; and although T. M. who was one of your orator's witneſſes, and who reſided at the diſtance of only about ſix or ſeven miles from, &c. upon hearing on the ſaid day of that the ſaid arbitrators were met together at, &c. upon the buſineſs of the ſaid reference, did attend them there, and was aſked ſome queſtions by them; yet he was not preſent when any other witneſſes were

examined, or the ſaid reference was proceeded upon, but he was deſired to depart from the room where the arbitrators were as ſoon as ſuch queſtions had been aſked him, nor was he upon that occaſion aſked the proper queſtions, or fully or properly examined on your orator's behalf, there being no perſon there preſent on your orator's part to examine the ſaid T. M. or put ſuch queſtions to him as ought to have been put, and as would have diſcloſed the ſeveral material facts within his knowlege touching the matters of the ſaid reference: And your orator further charges, that if the ſaid arbitrators did on the day of hear any witneſſes or evidence on the part of the ſaid J. H. ſuch evidence or the teſtimony of ſuch witneſſes did not warrant them in making their aforeſaid award; and that the ſaid arbitrators, in making their ſaid award, were influenced by partiality for the ſaid J. H. or by ſome undue or improper motives, and were in colluſion with him, or he obtained ſuch award by ſome corrupt, undue, unfair, or improper means; and at other times the ſaid J. H. pretends that when your orator commenced the ſaid laſt mentioned action, he had not any good or juſt demand upon him the ſaid J. H. in reſpect of the ſaid promiſſory note, or on account of the ſaid partnerſhip debt, for that as he the ſaid J. H. pretends your orator took the ſaid promiſſory note merely as a collateral ſecurity for the dividend which your orator was to receive out of the ſaid S. T.'s eſtate and effects, or that when he the ſaid J. H. ſatisfied your orator his the ſaid J. H.'s moiety of the ſaid partnerſhip debt, your orator agreed to relinquiſh any claim upon him the ſaid J. H. in reſpect of the ſaid promiſſory note; and that when your orator commenced the ſaid laſt

mentioned action, he had not any good or juſt demand upon him the ſaid J. H. on account of the coſts of the ſaid firſt mentioned actions: WHEREAS your orator charges that the ſaid promiſſory note was actually given by the ſaid J. H. as a ſecurity for ſo much of the ſaid S. T.'s moiety of the ſaid partnerſhip debt of 160l. 13s. 6d. as the dividend out of his the ſaid S. T.'s eſtate and effects would not extend to pay; and your orator expreſsly charges that neither at the time when the ſaid J. H. ſatisfied his moiety of the ſaid partnerſhip debt, nor at any other time, did your orator in any manner agree to abandon, give up, or relinquiſh the ſaid promiſſory note, or his claim and demand upon the ſaid J. H. for ſo much of the ſaid S. T.'s moiety of the ſaid partnerſhip debt as his ſaid dividend would not extend to pay; and your orator further charges that the ſaid J. H. was not only bound and liable to pay to your orator ſo much of the coſts of the ſaid firſt mentioned actions as ſhould not be ſatisfied by or recovered from the ſaid S. T. but that he the ſaid J. H. did actually promiſe and agree to pay to your orator the ſum of 3l. 3s. on account of ſuch coſts; and your orator alſo charges that the ſaid J. H. never did in any manner diſpute with your orator his the ſaid J. H.'s liability to pay and ſatisfy your orator ſuch ſum of 3l. 3s. on account of the aforeſaid coſts, but on the contrary, the ſaid J. H. at the time he propoſed the ſaid reference to your orator, did admit and acknowlege before the ſaid Mr. B. and ſeveral other perſons, that your orator had a juſt demand upon him the ſaid J. H. for ſuch ſum of 3l. 3s. on account of the ſaid coſts, and ſaid his attorney had had directions from him to pay the ſame, and admitted himſelf then liable to the payment

thereof; and your orator charges that the ſaid J. H. could not and did not diſpute his engagements and liability to pay the ſaid ſum of 3l. 3s. and the ſaid arbitrators therefore ought at leaſt to have awarded the payment of ſuch ſum of 3l. 3s. to your orator, together with your orator's coſts in reſpect of the ſaid laſt mentioned action, and in reſpect of the ſaid reference, as your orator upon eſtabliſhing his demand for ſuch ſum of 3l. 3s. upon the trial of the ſaid laſt mentioned action, would have been intitled to his coſts, though he ſhould have failed in eſtabliſhing his ſaid other demand, but nevertheleſs the ſaid J. H. inſiſts upon your orator performing the ſaid award, and threatens and intends to proceed in ſome manner againſt your orator at law, to enforce a performance of ſuch award; ALL which Actings, &c.

PRAYER OF THE BILL.

And that the ſaid J. H. may be compelled to make a full and complete anſwer to the ſeveral matters aforeſaid, and that the ſaid award may be decreed to be ſet aſide and cancelled, and the ſaid J. H. be decreed to pay to your orator the ſaid ſums of 44l. 3s. 9d. and 3l. 3s. in reſpect whereof your orator commenced the ſaid laſt-mentioned action, together with your orator's coſts attending ſuch action and the ſaid reference; and that the ſaid J. H. may in the mean time be reſtrained by the order and injunction of this honourable court

from proceeding in any manner at law againſt your orator upon the ſaid bond ſo executed by your orator as aforeſaid, and upon the ſaid award, or otherwiſe touching the ſaid bond or award; and that your orator may have ſuch further and other relief in the premiſes as the nature of the caſe may require and to your Honors ſhall ſeem meet. May it pleaſe your Honors, &c. P. J.

The PLEA *of* J. H. *Defendant, to part, and his* ANSWER *to the reſidue, of the* BILL *of* COMPLAINT *of* W. E. *Complainant.*

THIS defendant, by proteſtation not confeſſing or acknowleging all or any of the matters or things in the complainant's ſaid bill alleged and ſet forth to be true, in ſuch manner and form as the ſame are therein ſo ſet forth, to all the relief prayed by the ſaid bill, and to ſo much of the ſaid bill as ſeeks a diſcovery of the ſeveral matters and things which were the ſubject of the reference to the arbitration of T. C. of, &c. in the county of, &c. gentleman, E. M. of the ſame place, gentleman, and J. S. of, &c. in the ſaid county, gentleman, or of any two of them, in the ſaid bill of complaint, and herein after mentioned, this defendant doth plead in bar, and for plea ſaith, that the ſaid complainant did, on the day of duly enter into and execute a certain bond or writing obligatory, bearing date the ſaid day of in the

penal ſum of 100l. payable by him the ſaid complainant, his executors, or adminiſtrators, to this defendant, his executors, or adminiſtrators, on the day of and with a condition thereunder written in the words following; that is to ſay, The condition of this obligation is ſuch, that if the above bounden W. E. his heirs, executors, or adminiſtrators, or any of them, on his and their parts and behalfs, ſhall and do in all things well and truly ſtand to, obey, and abide by, perform, fulfil, and keep the award, order, arbitrament, end, and final determination of T. C. of, &c. in the county of, &c. gentleman, E. M. of the ſame place, gentleman, and J. S. of, &c. in the ſaid county, gentleman, or of any two of them, arbitrators indifferently elected and named, as well on the part and behalf of the above bounden W. E. as of the above named J. H. to arbitrate, award, order, judge, and determine of and concerning all and all manner of action and actions, cauſe and cauſes of action, ſuits, bills, bonds, ſpecialties, judgments, extents, quarrels, controverſies, treſpaſſes, damages, and demands whatſoever, at any time heretofore had, made, moved, brought, commenced, ſued, proſecuted, done, ſuffered, committed, or depending by and between the ſaid parties or either of them, ſo as the ſaid award be made in writing and ready to be delivered to the parties in difference, or ſuch of them as ſhall deſire the ſame, on or before the day of next, then this obligation to be void, or elſe to remain in full force, as by the ſaid bond or writing obligatory, now in the cuſtody of this defendant, reference being thereunto had, may more fully appear; and this defendant for plea further ſaith, that this defendant did, on or about the ſaid

day of duly enter into and execute a certain bond or writing obligatory, bearing date the ſaid day of in the penal ſum of 100l. payable by this defendant, his executors, or adminiſtrators, to the ſaid complainant, his executors, or adminiſtrators, on the day of with a condition thereunder written, for making void the ſame, if this defendant, his executors, and adminiſtrators, ſhould in all things well and truly ſtand to, obey, abide by, perform, fulfil, and keep the award, order, arbitrament, and final determination of the ſaid T. C.—E. M. and J. S. or any two of them, being ſuch arbitrators as hereinbefore is mentioned, ſo to be made as hereinbefore is mentioned, the condition of the ſaid laſt mentioned bond being in the ſame words, with the exception only of the parties' names, as the condition of the ſaid bond firſt hereinbefore mentioned, as by the ſaid laſt mentioned bond, had this defendant the ſame to produce, reference being thereunto had, would more fully appear; and this defendant for plea further ſaith, that the ſaid E. M.—T. C. and J. S. having been duly attended by the ſolicitors or attornies of the ſaid complainant and this defendant, and having heard and examined the allegations, witneſſes, and evidence of the ſaid complainant and this defendant, did, on the day of duly make and execute, and deliver to the ſaid complainant and this defendant, their award in writing of that date, and did thereby award and order that all actions, ſuits, quarrels, and controverſies whatſoever, had, moved, ariſen, or depending by or between the ſaid parties, in law or equity, for any manner of cauſe whatſoever, ſhould ceaſe and be no further proceeded in or proſecuted; and they did alſo

award and order that the promiſſory note of this defendant, mentioned in the pleadings, ſhould be delivered up and cancelled, and that the ſaid complainant, his heirs, executors, or adminiſtrators, ſhould pay or cauſe to be paid unto this defendant, his executors, or adminiſtrators, the ſum of 10l. 10s. of lawful money of Great Britain, on the day of then next, between the hours of two and four in the afternoon, at the houſe of P. G. known by the name or ſign of the Devonſhire Arms, in, &c. aforeſaid, for his coſts; and they did further award and order, that on payment of the ſaid ſum of 10l. and 10s. as aforeſaid, as well the ſaid complainant as this defendant, ſhould reſpectively make, ſeal, and execute, each party unto the other, mutual general releaſes of all actions, ſuits, and cauſes of action depending between them, and of all debts, damages, accounts, reckonings, and demands whatſoever, from the beginning of the world to the day of the dates of the above mentioned bonds or obligations, as by the ſaid award in writing, now in the cuſtody of this defendant, ready to be produced as this honorable court ſhall direct, reference being thereunto had, will more fully appear: ALL which matters and things this defendant doth aver to be true, and is ready to prove the ſame as this honorable court ſhall award, and therefore he doth plead the ſame in bar to ſo much and ſuch part of the ſaid bill as aforeſaid, and humbly prays the judgment of this honorable court, whether he ſhall be compelled to make any further or other anſwer to ſo much and ſuch part of the ſaid bill as is hereby and herein pleaded to as aforeſaid; and this defendant, not waving his ſaid plea, but wholly relying and inſiſting thereon, and in aid and ſupport thereof,

for anſwer to the reſidue of the ſaid complainant's bill not hereinbefore pleaded unto, or to ſo much thereof as this defendant is adviſed is material or neceſſary for him to make anſwer unto, he anſwereth and ſaith, that for any thing he knows to the contrary, it may be true that the complainant was deſirous that the ſaid arbitration ſhould be proceeded in, and an award made before the expiration of the time limited by the ſaid bonds, but whether he was ſo deſirous or no, this defendant doth not know, nor can he ſet forth, nor doth he know, nor can he ſet forth whether the ſaid complainant or his attorney did, between the month of and the month of following, make any or what application or applications to the ſaid arbitrators, or any of them, to appoint a time for proceeding upon the ſaid arbitration, but he admits that the ſaid complainant or his attorney, or the ſaid T. C. or E. M. or ſome or one of them, did, between the ſaid month of and the following, apply to this defendant, and inform him that a time was appointed to proceed upon the ſaid arbitration, or requeſt him to appoint a time for that purpoſe, and that a time was agreed upon or appointed for that purpoſe, and this defendant was ready and willing to have attended at the time ſo appointed, but the ſaid other arbitrator, J. S. was taken very ill, whereby he was unable to attend at the time ſo appointed as aforeſaid, of which this defendant gave notice to the ſaid other arbitrators, whereupon the ſaid intended meeting did not take place; and this defendant denies that any other application or applications was or were made by the ſaid complainant or his attorney, or the ſaid arbitrators, or any of them, to this defendant or his attorney, or either of them, to

appoint a time for proceeding upon the ſaid arbitration, except as is hereinafter mentioned, or that he this defendant, or they the ſaid arbitrators, or any of them, did, at any time or times, except as is hereinbefore and hereinafter mentioned, appoint any time for that purpoſe, or that this defendant did decline to appoint a time of meeting, or refuſe to attend at the time appointed, or pretend that it would be inconvenient to him, or not ſuit him to attend at the time or times appointed, except as hereinbefore and hereinafter mentioned; and this defendant admits that the ſaid E. M. did, at the time in the ſaid bill mentioned, write and ſend a letter, bearing date the day of to Mr. M. the complainant's attorney, to the effect in the ſaid bill ſet forth; and this defendant ſaith he believes it to be true that the ſaid Mr. M. did write a letter to this defendant's attorney, of ſuch date, purport, and effect as is in the ſaid bill ſet forth, and that this defendant's attorney did receive the ſame, and did not return any anſwer thereto, and that the ſaid Mr. B.'s clerk did, at the time in the ſaid bill mentioned, apply to this defendant's attorney for an anſwer to the ſaid letter, and that this defendant's ſaid attorney referred him to this defendant, but this defendant denies that he this defendant ever received any ſuch letter bearing date on or about the day of or the day following, as is in the ſaid bill mentioned; and this defendant ſaith he admits that the ſaid Mr. B.'s clerk did, on or about the day of apply to this defendant and requeſt him to fix a time between that day and the Saturday following (being the of) for proceeding upon the ſaid arbitration; and that this defendant thereupon told the

ſaid clerk, as the truth was, that ſeveral perſons, and among others S. C. who this defendant believed would be very material witneſſes for him, were then from home, and that for that reaſon he could not appoint any time of meeting for proceeding upon the ſaid arbitration, and he therefore did not appoint any day for that purpoſe: And this defendant, further anſwering, ſaith he believes the ſaid E. M. and T. C. did on the day of ſubſcribe their names to ſuch writing as is in the ſaid bill in that behalf mentioned to be dated on that day, and that a copy thereof was delivered to this defendant on the day of and this defendant believes that another copy was delivered on the ſame day to J. S. and that on the ſame day notice of the ſaid appointment was given to the ſaid complainant; and this defendant believes the ſaid E. M. and T. C. did on the day of attend at the houſe of P. G. in the ſaid bill mentioned, for the purpoſe of proceeding upon the ſaid arbitration, and that the ſaid laſt-mentioned arbitrators were there, attended by the complainant and his attorney Mr. B. but whether by any other perſon or perſons as a witneſs or witneſſes this defendant doth not know nor can ſet forth; but this defendant hath heard, and believes, that no witneſs or witneſſes was or were produced to be examined on behalf of the ſaid complainant other than and beſides the ſaid Mr. B.—but this defendant denies that the ſaid laſt-mentioned arbitrators continued at the houſe of the ſaid P. G. from the morning of the ſaid day of till eight or nine o'clock in the evening of the ſame day, for this defendant ſaith he hath heard and believes the ſaid laſt-mentioned arbitrators did not meet till the after-

noon of the ſaid day of and that they left the place appointed for meeting about ſix or ſeven o'clock in the evening; and this defendant admits that he having at the time aforeſaid informed Mr. B.'s clerk that his witneſſes were not at home, neither he nor any perſon on his behalf did attend the ſaid arbitrators, nor ſend them any meſſage or excuſe; and this defendant ſaith he hath heard and believes that the ſaid J. S. did not attend at the ſaid meeting; and this defendant, further anſwering, ſaith that about five o'clock in the evening of the ſaid day of (as he hath heard and believes) and not at or about eight or nine o'clock, as is in the ſaid bill in that behalf alleged, the ſaid E. M. and T. C. did hear the teſtimony of the ſaid Mr. B. on the behalf of the ſaid complainant, touching the matters ſo referred to them and the ſaid J. S. as aforeſaid; and this defendant denies that he hath ever heard, ſave by the ſaid bill, or that he believes, that the ſaid E. M. and T. C. or either of them did expreſs themſelves or himſelf in ſuch or the like manner as is in the ſaid bill mentioned in reſpect of the teſtimony of Mr. B. nor does this defendant know, nor hath he ever heard, whether the ſaid E. M. and T. C. or either of them, were or was informed that the ſaid complainant had other witneſſes whom it was meant or intended to examine before the ſaid arbitrators in caſe they were not ſatisfied with Mr. B.'s evidence, or if this defendant had made any defence before the ſaid arbitrarors which might have rendered it neceſſary to examine them, or to any ſuch or the like effect; but this defendant believes that the ſaid arbitrators did not, nor did either of them, ever give the ſaid complainant or the ſaid Mr. B. his attorney, to underſtand

that they were ſatisfied with his evidence, for on the contrary this defendant hath heard and believes that the ſaid arbitrators declared to the ſaid complainant or his attorney, or that the ſaid complainant or his attorney were or was given to underſtand, and did underſtand, that the ſaid arbitrators intended, at ſome future time, to examine this defendant's witneſſes, but what other obſervation or remark upon the teſtimony of the ſaid Mr. B. the ſaid arbitrators made this defendant doth not know nor can ſet forth; and this defendant ſaith he doth not know nor hath he ever heard, ſave by the ſaid bill, that ſuch obſervation as in the ſaid bill is mentioned, or any obſervation to that or the like effect, was ever made by the ſaid Mr. B. to the ſaid arbitrators; but this defendant ſaith that if any ſuch obſervation was made this defendant believes that the ſaid arbitrators did not, nor did either of them, aſſent thereto, or in any manner acquieſce in the propriety thereof: And this defendant denies that the ſaid E. M. and T. C. or either of them, did, to the knowlege or belief of this defendant, before they left the ſaid houſe, or at any other time, declare or expreſs themſelves to the ſaid complainant, or the ſaid Mr. B. in the manner in the ſaid bill ſet forth, or to that or the like effect, or did in any manner expreſs or declare their final reſolution, or make any declaration, ſave and except as to their intent of examining this defendant's witneſſes at ſome future time, and ſave and except that they might declare that if this defendant did not produce his evidence, they would make an award before the end of the time limited by the ſaid arbitration bonds, without hearing them: And this defendant, further anſwering, ſaith he doth not know, ſave and

except as is hereinbefore and hereinafter ſet forth, what paſſed at the ſaid meeting on the day of nor does he believe that the ſaid E. M. and T. C. at that time came to any other reſolution touching the matters referred to them than ſuch as is hereinbefore ſet forth; and this defendant ſaith he doth not believe that, from what paſſed at the ſaid meeting, the ſaid complainant or his attorney did conclude, or were warranted in concluding, that it would not be neceſſary for the ſaid complainant or his ſaid attorney, or the ſaid complainant's witneſſes (in caſe he had any who were not then examined) to attend the ſaid arbitrators again on the buſineſs of the ſaid reference, or that the ſaid E. M. and T. C. would have made an award in the complainant's favour; for this defendant ſaith, he hath heard and believes that the ſaid laſt-mentioned arbitrators informed the ſaid complainant or his attorney, or the ſaid complainant or his ſaid attorney in ſome manner well underſtood, from the ſaid laſt-mentioned arbitrators, that if this defendant produced his witneſſes at a future time, they would proceed to hear them: And this defendant admits that the ſaid three arbitrators E. M.—T. C. and J. S. did on the day of meet together, at the houſe of the ſaid P. G. at, &c. aforeſaid, and that they were there attended by this defendant and his attorney, and by J. K.—S. C. and J. A. as witneſſes on the part of this defendant; and that the ſaid arbitrators did on the afternoon of the ſaid day of at about eight o'clock, make and execute an award in writing of ſuch date, purport, and effect as is hereinbefore ſet forth; but for his greater certainty he craves leave to refer thereto when it ſhall be produced to this honourable court; and he

admits that the ſaid meeting was not attended by the ſaid complainant or his attorney, but the ſaid meeting was attended by T. M. the ſon-in-law of the ſaid complainant, who, as this defendant hath heard and believes, attended the ſaid meeting on the behalf, and at the requeſt, of the ſaid complainant; and this defendant hath heard and believes that the ſaid T. M. informed the ſaid arbitrators that he attended them by the deſire of the ſaid complainant, and on his behalf: And this defendant, further anſwering, ſaith that he hath heard and believes that on the day of the ſaid E. M. did ſend a meſſage to the ſaid complainant, by a perſon of the name of E. R. to inform him the ſaid complainant that his attendance was required the next day at, &c. as the ſaid arbitrators intended to meet on that day upon the ſaid reference, and that the ſaid E. R. delivered the ſaid meſſage to the ſervant of the ſaid complainant; and that this defendant ſaith he verily believes the ſaid meſſage was duly delivered by the ſaid complainant's ſervant to him the ſaid complainant, and that the ſaid T. M. attended at the ſaid meeting on the behalf of the ſaid complainant in conſequence of ſuch meſſage; and this defendant ſaith he doth not know that any other notice was given to the ſaid complainant of the ſaid laſt-mentioned meeting than as hereinbefore is mentioned; and this defendant ſaith he believes that the ſaid J. S. was never attended by the ſaid complainant or his attorney, and never heard or examined any allegations, evidence, or witneſs on behalf of the ſaid complainant on the ſaid reference except the ſaid T. M. or what he heard from the ſaid other arbitrators, or from the ſaid complainant, in converſation upon former occaſions,

when they were not expreſsly met for the purpoſe of taking the ſaid matter into conſideration as arbitrators, upon which occaſions, or ſome of them, as this defendant hath heard and believes, the ſaid complainant admitted to the ſaid J. S. the juſtice of this defendant's defence againſt his demands; and this defendant ſaith he hath heard and believes that the ſaid Mr. B. at the time when he was examined before the ſaid E. M. and T. C. on the ſaid day of as hereinbefore is mentioned, delivered a paper in writing to the ſaid E. M. and T. C. (wherein the ſaid Mr. B. is alone mentioned as the witneſs for the ſaid complainant), containing the caſe of the ſaid complainant, and the whole of his the ſaid Mr. B.'s evidence which he had ſo given as aforeſaid, and that the ſaid Mr. B. ſo delivered the ſaid paper to the ſaid arbitrators, in order that they might ſhew the ſame to the ſaid J. S. and did, at the ſame time, declare, that he was the only witneſs on the part of the ſaid complainant; and this defendant hath heard and believes that the ſaid E. M. and T. C. did deliver the ſaid paper containing the ſaid caſe and teſtimony of the ſaid Mr. B. to the ſaid J. S. and that the ſame was read and conſidered by the ſaid J. S. before the ſaid award was made by the ſaid arbitrators; and this defendant ſaith he verily believes that the ſaid E. M. and T. C. were on the ſaid day of and that all the ſaid arbitrators were on the ſaid day of ready and deſirous to hear any other witneſſes that the ſaid complainant or his attorney, or the ſaid T. M. ſhould produce on behalf of the ſaid complainant, touching the matter in reference; and this defendant ſaith he hath heard and believes that the ſaid E. M. and T. C. having on the day of

when they informed the ſaid Mr. B. of their intending to hear this defendant's evidence on ſome future day, underſtood from the ſaid Mr. B. that his attendance on any future occaſion could be of no conſequence, the ſaid arbitrators did not conceive that there was any occaſion to defer making their award, and thereupon proceeded to make the ſame; and this defendant denies that the ſaid award was the effect of any colluſion between the ſaid arbitrators, or any of them, and this defendant; or of their, or any of their, partiality for him; or that the ſame was obtained by him from them, or any of them, by any corrupt, undue, or improper means; or that the ſaid arbitrators, or any of them, did, in the buſineſs of the ſaid reference, in any reſpect act improperly or miſconduct themſelves or himſelf: And this defendant ſaith that the ſaid arbitrators, at their ſaid laſt-mentioned meeting, did take into conſideration the ſum of 3l. 3s. in the ſaid bill mentioned, and determined upon the ſame in making their ſaid award; and this defendant denies that the ſaid award is wholly, or in any reſpect, unfair or unjuſt; and this defendant inſiſts that it ought to be performed: And this defendant, further anſwering, ſaith he believes that ſuch notice of the meeting of the ſaid arbitrators on the day of was given to the ſaid complainant on the day of as is hereinbefore in that behalf mentioned, but at what time of the day, or where in particular ſuch notice was given, or what was the ſubſtance of ſuch notice, or what was the name of the ſervant of the ſaid complainant, to whom the ſaid notice was delivered by the ſaid T. R. and who as the ſaid defendant believes delivered the ſame to the ſaid complainant, this defendant doth not

know, nor can ſet forth in any other manner than he hath already ſet forth the ſame, but this defendant believes that no other notice was given to the ſaid complainant, nor was any notice of the ſaid meeting given to the ſaid Mr. B. unleſs the ſame was given to him by the ſaid complainant: And this defendant ſaith he believes the notice was proper in point of time, and that the complainant, his attorney, witneſs, or witneſſes might have attended, and that ſuch notice was not unreaſonable, particularly as the ſaid complainant's witneſſes, or ſuch of them as he choſe to produce, had been already examined, and the ſaid Mr. B. had before declined any further attendance, as is hereinbefore ſet forth; that there was no neceſſity for the attendance of the ſaid Mr. B. or of any witneſſes on the part of the complainant, and ſo the ſaid complainant ſeemed to admit, as the ſaid T. M. who attended on behalf of the ſaid complainant, did not make any objection to the ſaid arbitrators proceeding to make their award, on account of ſuch notice being given; nor does this defendant believe that the ſaid complainant had any witneſs or witneſſes to produce other than and beſides the ſaid Mr. B. and T. M. and this defendant admits that the reſpective places of reſidence of the ſaid complainant and Mr. B. are at ſuch reſpective diſtances from, &c. as are in the ſaid bill ſet forth, and for any thing he knows to the contrary, it may be true that Mr. B. was during ſome part of the day of at, &c. in the ſaid bill mentioned, on ſome buſineſs in the way of his profeſſion, and that, &c. is 18 miles diſtance from, &c. but he doth not know during what part of the day he was there, nor does he believe that the ſaid arbitrators or any of them were apprized that the ſaid

Mr. B. was at or engaged at, &c. as aforeſaid, before they made or executed their award: And this defendant admits that T. M. did attend as is hereinbefore ſet forth, as a witneſs for the complainant, but this defendant believes that the ſaid T. M. was not preſent at the examination of any witneſs or witneſſes, the ſaid arbitrators having agreed that no perſon, except the witneſs who was under examination, ſhould be in the room with them during the examination of any of the witneſſes, and that therefore, after they had aſked the ſaid T. M. ſuch queſtions as they thought proper, they deſired him to depart from the room wherein they then were; and this defendant admits that the ſaid T. M.'s then place of reſidence was about ſix or ſeven miles diſtant from, &c. and that he was aſked ſome queſtions by the ſaid arbitrators, or ſome of them, at their ſaid meeting on the day of and this defendant ſaith he believes that the ſaid T. M. was aſked the proper queſtions, and that he was fully and properly examined on the complainant's behalf, but that no perſon was preſent to examine him on the ſaid complainant's behalf, except the ſaid arbitrators, they having determined that no perſon ſhould be preſent with them except the witneſs, as is hereinbefore mentioned: And this defendant denies that the ſaid T. M. did attend the ſaid arbitrators in conſequence of a requeſt ſent him by the ſaid E. M. as this defendant hath heard and believes that the ſaid T. M. declared that he attended at the requeſt of his father-in-law the complainant: And this defendant, further anſwering, ſaith that the ſaid arbitrators, on the ſaid day of heard on the part of this defendant the evidence of J. K.—S. C. and and J. A. and alſo the teſtimony of

W. F. which had been previouſly taken by the ſaid J. S. and was related by him, and alſo the declaration made by the ſaid complainant to the ſaid J. S.—and that ſuch evidence and teſtimony did warrant the ſaid arbitrators in making their ſaid award; and that neither they, nor any of them, were influenced by partiality for this defendant, nor by any undue or improper motives. And this defendant denies all and all manner of unlawful combination, &c.[1]

S. R.

[1] Theſe are the pleadings in the caſe cited p. 374.

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ERRATA.

Page 11, in the notes, l. 7 in the left hand column, insert the figure of reference 1 before vid.

——————— dele l. 8 and 9.

32, l. 2 and 3 from the bottom, instead of "if a penalty was added to the submission, read "if a penalty was *not* added to the submission."

47, 48, the word "The", at the bottom of p. 47, ought to begin a new paragraph at the top of p. 48.

86, l. 26, for "chuse" read "chose."

89, l. 4 from the bottom, for "been decided" read "arisen."

103, l. 4, for . insert :

122, last l. but one from the bottom, instead of : insert ,

165, l. 6 from the bottom, for "purported" read "purporting."

191, l. 2, for . insert ,

363, l. 16, for "answered, the charge been," read "the charge been answered."

365, l. 7, for "arbitrators" read "parties."

372, between l. 14 and 15, supply "to a bill filed."

l. 3 from the bottom, for "artiality" read "partiality."

In several places, the words "shall" and "should" usurp the place of each other.—There are also other errors both literal and of punctuation; but they are such as do not render the sense obscure: These the candid reader will observe and excuse.

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