A TREATISE ON THE LAW OF AWARDS.

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Fronte exile negotium.—Aggressis labor arduus.
TERENCE.

Multum magnorum virorum judicio credo; aliquod et meo vindico.
SENEC.

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T O

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.

TABLE OF CONTENTS.

CHAP.

CHAP. V.

THE AWARD OR UMPIRAGE.

CHAP. VI.

THE REMEDY TO COMPEL PERFORMANCE, WHEN THE AWARD IS PROPERLY MADE.

CHAP. VII.

THE MEANS OF PROCURING RELIEF AGAINST AN AWARD WHEN IMPROPERLY MADE.

When

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. The ſecurity which each party has for performance by the other, in the firſt mode of ſettlement, 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 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 actions, 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 party's 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 he 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

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 tranſaction, 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 preſided 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 *(a)*, 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 acknowledged 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

(a) Ff. l. 4. t. 8. Cod. l. 2. t. 56.

of our judicial ſyſtem. In the moſt ancient repoſitories *(a)* 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 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

(a) Year books.

called an umpire; the judgment pronounced by an arbitrator, or arbitrators, an award; that by an umpire, an umpirage, or, leſs properly, an award. *(a)*

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.

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 the Reference.

CHAP. I.

THE SUBMISSION.

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. *How it ſhall be.*

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

(a) Domat. 1 vol. 223.

thing *(a)*; 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 was due to him, which was in ſubſtance the ſame thing as a ſubmiſſion under a penalty. *(b)*

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. *(c)* And where the ſubmiſſion was accompanied by an oath to ſtand to the award; or the arbitrator, by the conſent of the parties, bound himſelf by an oath to end the

(a) 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.

(b) 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.

(c) 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.

diſpute

diſpute with all regard to truth, the ſame emperor enacted, that both parties ſhould be bound. *(a)*

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 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. *(b)* 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. *(c)* The next ſtep was to ſupport an action on ſuch an award, where the ſubmiſſion was by mutual promiſes only. *(d)* It was ſomewhat later before the

(a) 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 depoſuerint, quod ſacramentis præſtitis arbiter electus eſt, hoc etiam addito, "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 condictionem ex lege, vel in rem utilem inſtituere actionem, ſecundum quod facti qualitas poſtulaverat. Cod. l. 2, t. 56, ſ. 4.

(b) Per Holt, 1 L. Raymond, 248.

(c) Gouldſborough, 92, pl. 4.

(d) 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.

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.

When the ſubmiſſion is in writing, it is moſt commonly by mutual bonds, given by the parties each to 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: *(a)* 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 *(b)* 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. *(c)*

It is uſual, in articles of copartnerſhip, to inſert a proviſion that all diſputes ariſing between the partners relative to their buſineſs, or to any covenant in the articles, ſhall be referred to arbitration. This proviſion has ſo far the effect of a ſubmiſſion, that one of the partners cannot ſue another either at law or in equity for any matter within the terms or meaning of the proviſo, without having firſt had an actual reference, which has proved ineffectual, or a propoſal by the plaintiff to refer, and refuſal by the defendant.

(a) Vid. 36 H. VI. 8. 22 Ed. IV. 25 a. Owdy v. Gibbons. Comb. 100.

(b) Hayes v. Hayes, Cro. Car. 433.

(c) 2 Mod. 73.

To

(a) 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.

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.

But in a late case, *(b)* where a similar plea was pleaded, the 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, that 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,

(a) Wellington v. Mackintosh. 2 Atk. 585 (569).
(b) Kenyon. Halfhide v. Fenning. 2 Brown, 336.

the

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.

HOWEVER to render the plea valid, it muſt appear clearly that the ſubject of controverſy falls within the meaning of the covenant to refer.—*(a)* 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 alledged 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.

AND parties cannot be precluded from purſuing their right in the ordinary courſe, by any reſtriction laid upon them by another from whom they derive their title to the ſubject in diſpute: *(b)* 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

(a) Parmort v. Griffina. 1 Leon. 37.
(b) Dict. per Powys J. 10 Mod. 59.

of

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 *(a)* was made, reciting, that ' It had ' been found, by experience, that references, made by rule of ' court, had contributed much to the eaſe of the ſubject, in de- ' termining controverſies; becauſe the parties became thereby ' obliged to ſubmit to the award of the arbitrators, under the pe- ' nalty of impriſonment for their contempt, in caſe they refuſed ' ſubmiſſion; and " enacting," ' for promoting trade, and ren- ' dering 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 ac- ' count 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 ſub-* " *miſſion 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 ſub- " mit to the award or umpirage of any perſon or perſons; which " agreement

(a) 9 and 10 W. III. c. 15, ſ. 1.

" agreement being ſo made and inſerted in their *ſubmiſſion* or *pro-*
" *miſe*, or *condition of their reſpective bonds*, ſhall or may, upon
" producing an affidavit thereof, made by the witneſſes there-
" unto, 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 par-
" ties ſhall ſubmit to, and finally be concluded by the arbitration
" or umpirage which ſhall be made concerning them, by the
" arbitrators or umpire, purſuant to ſuch ſubmiſſion; and in caſe
" of diſobedience to ſuch arbitration or umpirage, the party neg-
" lecting 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."

By the words of this ſtatute it is manifeſt, that the ſubmiſſion, and the agreement to make that ſubmiſſion a rule of court, may be merely verbal, though the general practice is to ſubmit by bond.

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

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

(a) Clark v. Elwick. 1 Str. 1, 2. 10 Mod. 332, 333.

the court ſome circumſtance to ſatisfy them of the probability of his being a witneſs; as an affidavit of his having acknowledged 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. *(a)*

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. *(b)*

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. *(c)*

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. *(d)*

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. *(e)*

(a) Vid. Barnes, 58.

(b) Carter v. Manſbridge. Barnes, 55.

(c) Rudd v. Coe. Barnes, 55.

(d) Baily v. Cheeſely. 13 W. III. 1 Salk. 72. Comyns, 114. 1 Lord Raym. 674.

(e) 2 Barnardiſton, K. B. 163. Str. 1178.

IF

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. *(a)*

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. *(b)* 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. *(c)*

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 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. *(d)*

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,

(a) 1 Compton, 263. Impey, 571.
(b) 1 Mod. 24.
(c) 2 Lord Raym. 789.
(d) Domat. 1 vol. 224.

rehearſing

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. *(a)*

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 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, it 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. *(b)*

WHERE the ſubmiſſion was to the award of four men by name, " ſo as the *ſame* 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

(a) 39 H. 6. 9. b. 11. a.
(b) Butler v. Wigge. 2 Keb. 204. 1 Saund. 65.

ſentence,

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. *(a)*

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. *(b)*

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 of an action on the award itſelf; or he may

(a) 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.

(b) Sherry v. Richardſon. Popham, 15, 16.

himſelf

himſelf recover againſt the other, in an action for the original cauſe of diſpute; *(b)*—and, in this reſpect, our law correſponds with the civil law. *(a)* 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. *(b)*

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. *(d)* But if the ſubmiſſion was by deed, ſo alſo muſt the revocation be, *(e)* 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. *(f)*

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 permanent intereſt in her real property, which would be bound by the award, veſts in the huſband. *(g)*

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

(a) Ff. l. 4, t. 8, ſ. 27.
(b) 5 Ed. 4. 3. b. 8 Co. 82. a. Br. Arb. 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.
(d) Barker v. Lees. 2 Keb. 64, 79.
(e) 43 E. 3. 9. Fitzh. 52. b. vid. 8 Co. 80. b.
(f) Unumquodque diſſolvitur eo ligamine quo ligatur.
(g) Wm. Jones, 388. 3 Keb. 9.

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. *(a)*

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. *(b)* 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 bond impoſſible, the bond becomes ſingle, as if no condition had been annexed. *(c)*

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. *(d)* In the other book, 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.

(a) Green v. Taylor. Sir T. Jones, 134.

(b) 5 Ed. 4. 3 b.

(c) Vynior's caſe, 8 Co. 82. a. Brownlow 62. 2d pt. 290.

(d) Newgate v. Degelder, 18 Car. 12. 1 Sid. 281.

(e) 2 Keb. 10, 20, 24.

The

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, that penalty was forfeited; but if no penalty was added to the ſubmiſſion, the oppoſite party ſhould have a remedy ſimilar to our action on the caſe. *(a)*

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. *(b)*

ONE party may alſo revoke with conſent of the other; but conſent after the revocation will not ſave the penalty of the bond. *(c)*

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. *(d)*

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. *(e)*

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 of court, notwithſtanding the oppoſition of the

(a) Si quis litigatorum deſuerit: 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. ſ. 27.

(b) 2 Keb. 10, 20.

(c) Noble v. Harris. 3 Keb. 745.

(d) 3 Keb. 9.

(e) Baldway v. Ouſton. 1 Vent. 71.

parties; and, in both cafes, they will punifh as a contempt, any act by which the arbitrators are difturbed or hindered from making their award. *(a)* Thus where a matter was referred by confent at *nifi prius* to the three foremen of the jury; and before the award was made, one of the parties ferved the arbitrators with a fubpœna 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 fhew caufe why an attachment fhould not go againft him. *(b)*

In the civil law the better opinion feems to have been, that if the party to a fubmiffion, while the matter was before the arbitrator, appealed to the ordinary courts, he forfeited the penalty. *(c)*

CHAP. II.

The PARTIES.

Who may fubmit. IT is a general rule, that every one who is capable of making a difpofition of his property, or a releafe of his right, may make a fubmiffion to an award: but no one can, who is either under a natural or civil incapacity of contracting. *(d)* Therefore a married woman cannot be party to a fubmiffion, whatever may be the fubject of difpute, whether arifing before or after her marriage: but the hufband may fubmit for himfelf and his wife. *(e)*

On the principle that an infant cannot bind himfelf for any thing but neceffaries, it is clear he cannot be party to a fubmif-

(a) Vid. 1 Cromp. Pract. 262.

(b) Davila v. Almanza. 1 Salk. 73.

(c) Si quis rem, de qua compromiffum fit, in judicium deducat: quidam dicunt, prætorem non intervenire ad cogendum arbitrum fententiam dicere: quia jam pœna non poteft effe, atque fi folutum eft compromiffum. Sed fi hoc obtinuerit; futurum eft, ut in poteftate ejus quem pœnitet compromiffe, fit compromiffum eludere. Ergo adverfus eum pœna committenda eft, lite apud judicem fuo ordine peragendâ. Ff. l. 4, t. 8, f. 30.

(d) Com. Dig. Arbitrament. D. 2.

(e) Sti. 351.

fion,

ſion, 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; *(a)* 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 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: *(c)* 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. This, however, 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. It ſeems, indeed, to be carrying the indulgence to an infant by much too far, and to be contrary to the analogy of law in other caſes. 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) 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.
(c) Rudſton v. Yates. March 111, 141.

a man ſhall forfeit his bond, though it be not in his own power to ſave the penalty, by performing the condition. There is, indeed, 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. 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. *(a)*

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. *(b)*

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 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. *(c)*

BUT it was afterwards expreſsly decided, againſt the authority of the caſe *(d)* on which the doubt had at firſt been raiſed,

(a) Vid. Jenk. 116.
(b) Stone v. Knight. Latch 207.
(c) Bowyer v. Blorkſidge, 33. Car. 2. 3 Lev. 17. Gill v. Ruſſell. Hil. 1673. Freem. 62, 139.
(d) Rudſton v. Yates, ante.

that

that the guardian may ſubmit for the infant, and bind himſelf that he ſhall perform the award. *(a)*

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. *(b)*

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, alledged 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: *(c)* 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 who are intereſted in the effects of the teſtator or inteſtate. *(d)* 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: *(e)* and by his ſubmiſſion he precludes himſelf from afterwards pleading to an action on the arbitration bond, that he had fully adminiſtered, and that he had no aſſets of the teſtator or inteſtate at the time of his ſubmiſſion, or ſince that time. *(f)*

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 con- "ſent of the major part in value of the bankrupt's creditors,

(a) Roberts v. Newbold, 6 W. 3. Comb. 318.

(b) Si pupillus ſine tutoris auctoritate compromiſcrit, 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.

(c) Dyer, 216. b. 217. a.

(d) Off. Exr. 229 cited Com. Dig. Adminiſtration (I. 1.)

(e) R. 3 Leon. 53.

(f) Barry v. Ruſh. 1 Term Rep. 691.

" 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 aſ- " ſignee 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 cre- " ditors of the bankrupt." *(a)*

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 meeting on notice for that particular purpoſe, in the London Gazette, to conſider of each particular caſe. *(b)*

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. *(c)*

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. *(d)*

So, in general, a man is bound by an award to which he ſubmits for another *(e)*

(a) 5 G. 2. c. 30. ſ. 34.

(b) Ex parte Whitchurch. 1 Atk. 91.

(c) Strangford v. Green. 2 Mod. 228.

(d) Mudy v. Oſam. Litt. 30.

(e) Alſop v. Senior. 2 Keb. 707, 718.

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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. *(a)*

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 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 libera-

(a) Dyer, 216. b. 217.

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lity 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 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. *(a)*

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, that each was bound to the performance of the whole award; for they had jointly ſubmitted, though by ſeveral obligations. *(b)*

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

(a) Wood et al. v. Thomſon et Clements. M. 24 Car. B. R. Rol. Arb. F. 11.

(b) Hayes v. Hayes. H. 11 Car. B. R. Rol. Arb. E. 9. Cro. Car. 434.

on

on performance of the award by the principal, otherwiſe to be in full force, this ſhall bind the attorney, and not the principal. *(a)*

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 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. *(b)*

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

(a) Bacon v. Dubarry. 1 Lord Raym. 246. 12 Mod. 129. Comb. 439. 1 Salk. 70.

(b) Colwell v. Child. 1 Rep. Ch. 104. 1 Ca. Ch. 86.

of

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. *(a)*

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 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. *(b)*

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. *(c)*

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: *(d)* 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 aſſignees of a bankrupt, ſucceeding only to the right

(a) Dict. 2 El. Rol. Arb. D. 1. with a quere.

(b) 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.

(c) 21 H. 7. 29. 6. cited Bridg. 91. Rol. Arb. D. 3.

(d) Vid. 21 H. 6. 19. and 1 Rol. Rep. 269.

of

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. *(a)*

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. *(b)*

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. *(c)*

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 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.

(a) Bowyer v. Garland. Cr. El. 600.

(b) 2 W and M. Dawney v. Veſey. 2 Ventr. 249. Vid. 1 L. Raym. 248.

(c) 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.

CHAP.

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

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; *(a)* 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. *(b)* Nor of damages recovered by a judgment; *(c)* for in all theſe caſes the demand is aſcertained.

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 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. *(d)*

But an *action* of account may be ſubmitted; for, till the account be taken, the ſum remains uncertain. *(e)* 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,

(a) 10 H. 7. 4. 4 H. 6. 17. Rol. Arb. R. 2. 5. Blake's caſe, 6 Co. 43, 44.

(b) 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.

(c) Gouldſb. 91, 92.

(d) 9 H. 6. 60. Fitzh. 51. a. Rol. Arb. V. 1. A. 6. V. 3.

(e) Rol. Arb. R. 4.

though

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. *(a)*

So, debt ariſing on a ſimple contract; *(b)* a demand of rent for uſe and occupation; *(c)* a complaint of ſlander; *(d)* treſpaſs of every kind, whether perſonal or to the land; *(e)* 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. *(f)*

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. *(g)*

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. *(h)*

(a) Sower v. Bradfield. Cro. El. 422.
(b) 45 Ed. 3. 16. a. b.
(c) 4 H. 6. 17. b. Rol. Arb. V. 8.
(d) 1 Keb. 848.
(e) 13 R. 2.
(f) Vid. infra.
(g) Blake's caſe. 6 Co. 43, 44. Cro. Jac. 99. Rol. Arb. T. 1, 2, 3, 4, 5, 6.
(h) Rol. Arb. S. 2. Vid. ſtatute of labourers, 23 Ed. 3. ſt. 1, and the other old ſtatutes on that ſubject.

Most

MOST of thoſe caſes too, which cannot be ſubmitted by themſelves, may, when joined with other things of an uncertain nature; becauſe then there is an uncertainty in the whole of the diſputes; *(a)* as debt on a bond, whether ſingle or with condition; *(b)* debt for arears of rent aſcertained by a leaſe for years; *(c)* damages recovered by verdict and judgment. *(d)*

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; *(e)* 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. *(f)*

THEREFORE, where A was indebted to B in 20l. 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

(a) 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.

(b) Lumley v. Hutton. M. 13 Jac. B. R. H. 15 Jac. B. R. Rol. Arb. B. 8. Coxal v. Sharp. 1 Keb. 937.

(c) 10 H. 7. 4. Rol. Arb. R. 5.

(d) Gouldſb. 91, 92.

(e) 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.

(f) 3 H. 4. 1. Brooke, 44. a.

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. *(a)*

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, *(b)* 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 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 ſub- "mitted 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." *(c)*

AGAIN, "a man cannot have a remedy to enforce an award "of frank-tenement, unleſs he has a bond for performance." *(d)* "The *right* of freehold cannot be the ſubject of a reference; but "the arbitrator may award, that the one party ſhall infeoff the

(a) Lumley v. Hutton, H. 15 Jac. B. R. M. 13 Jac. B. R. Rol. Arb. B. 8. Coxal v. Sharpe. 1 Keb. 927.

(b) Keilway, 99. b.

(c) 14 H. 4. 18, 19. Brooke, 44. b.

(d) 9 E. 6. 26. Brooke, 53.

"other

" other in ſatisfaction." *(a)* " An award that one ſhall infeoff " another in an acre of land, and immediately after deliver up " the charters, is good." *(b)* 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 *(c)* 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 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, *(d)* " that there cannot be par- " tition 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 cer- " tain 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." *(e)*

(a) Dict. per Moyle, cont. per Littleton. M. 9 E. 4. 44.

(b) 18 Ed. 4. 21, cited Rol. Arb. E. II. 2.

(c) 9 E. 4. 44. 14 H. 4. 19.

(d) 1 Rol. 242. l. 16. cites P. 1 Jac. B. Horton v. Horton.

(e) Keilway, 43. a. b. 45. b.

So, " where two bound themſelves in mutual obligations 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. *(a)*

In another place, *(b)* it is ſaid, " that if the condition of a " bond be that the parties ſhall ſtand to the award of J. S. con- " cerning 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, *(c)* 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 ſub- " miſſion, 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. *(d)*

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 an action for " the thing, yet if this be performed, the bond is forfeited;" *(e)* by which, I ſuppoſe, he means, ' the bond of the party, who, ' notwithſtanding 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

(a) 19 H. 6. 6. b.
(b) 9 E. 4. 44.
(c) Rol. Arb. B. 14.
(d) Markham v. Jennings. H. 4. Jac. B. R. Rol. Arb. K. 15.
(e) 1. Rol. Rep. 270.

' before

'before the word "performed," and then the meaning will be, 'that the party not *performing* the award will forfeit *his* bond.'

And ſo late as the time of William the third, it is obſerved, by one of the judges,*(a)* "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, *(b)* "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. *(c)*

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 concerning 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;" 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. *(d)*

In none of the books, which I have had an opportunity of conſulting, is there any reaſon given for this opinion; perhaps the principles 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

(a) Powell.
(b) Treby.
(c) Marks v. Marriot. 1 Lord Raym. 115.
(d) 22 H. 6. 46.

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; *(a)* and indeed there appears to 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,

(a) 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 parti 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. ſ. 44.

whereas

whereas they were joint-tenants before, they would now become tenants in common. *(a)*

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. *(b)* And in another book, *(c)* 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, *(d)* 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, 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.

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 dictated by any thing which appears in *our* books; it aroſe from that principle appearing in the civil

(a) Knight v. Burton. 3 Anne. 6 Mod. 231.
(b) Truſloe v. Aſewre. Cro. El. 223.
(c) Dy. 183, in marg.
(d) 29 Car. 2. c. 3. ſ. 1

law; but as it is founded in reaſon and good ſenſe, there can be no doubt that, if the queſtion had ever occurred in our courts, it would have received a ſimilar determination.

As arbitrators, ſay the writers on the civil law, *(a)* 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 no ſhare in the adminiſtration of juſtice, could neither juſtify nor condemn him. *(b)*

NEITHER can we, according to the ſame writers, ſubmit cauſes which relate to the ſtate of perſons; 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. *(c)*

(a) Domat. 1 vol. 225.

(b) Julianus indiſtincte ſcribit; ſi per errorem de famoſo delicto ad arbitrium itum eſt, vel de ea 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.

(c) 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.

CHAP. IV.

THE ARBITRATOR AND UMPIRE.

Who may be an Arbitrator.

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 appointed by the choice of the parties themſelves, and it is their folly to chooſe an improper perſon;*(a)* 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. *(b)* But with us an unmarried woman may be an arbitratrix, *(c)* 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. *(d)*

(a) 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.

(b) 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 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.

(c) Vid. the Ducheſs of Suffolk's caſe. 8 E. 4. 1. Br. 37.

(d) Sancimus, mulieres, ſuæ pudicitiæ memores et operum quæ eis natura permiſit, et a quibus eas juſſit abſtinere, licet ſummæ atque opitimæ opinionis conſtitutæ, in 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.

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. *(a)* There are, however, one or two caſes mentioned in our books of reports, which ſeem to infringe on this 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 mentioned above; 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, *(b)* 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. *(c)*

Another caſe is reported *(d)* of a ſubmiſſion by two on each ſide, to ſeveral arbitrators, of whom one of the two on one ſide

(a) 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.

(b) Dolben J.

(c) Matthew v. Ollerton. 5 W. and M. B. R. Comb. 218. 4 Mod. 226.

(d) Hunter v. Benniſon. Hardr. 43.

was

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 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. *(a)* 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 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

(a) 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.

void:

void: *(a)* 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. *(b)*

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 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. *(c)*

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 agree-

(a) 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.

(b) Si societatem mecum coieris, ea conditione, *ut partes societatis constituerem*, 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 millesimis 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.

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

ment,

ment, 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 opinion moſt prevalent among the Roman lawyers; for though they acknowledge 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 can not agree in an award, ought to compel them to nominate a third perſon to decide between them. *(a)*

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 underſtanding, but the arbitrators in this caſe had followed neither, but had truſted the matter to chance. *(b)*

(a) Si in duos fuerit ſic compromiſſum, *ut ſi diſſentirent, tertium adjumant*, 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.

(b) Harris v. Mitchell. 2 Vern. 485.

THERE

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 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 this 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." *(a)*

(a) Lumley v. Hutton, on Demurrer. H. 15 Jac. B. R. Rol. Arb. P. 1.

BUT

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, *(a)* that Rolle held, and delivered, that if it had been alledged, 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 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 alledged 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. *(b)*

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

(a) Pr. Twiſden. 1 Mod. 275.
(b) Barnard v. King, on demurrer. Rol. Arb. P. 6.

award

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 make their award, 'till any time before the day, there was no time given to the umpire, who therefore could make no award. *(a)*

FROM theſe caſes and others *(b)* 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 before the firſt of May; but if he declined it, then to B, as umpire, provided he ſhould make his umpirage the *ſame* day;" an umpirage made on that day would have been good, on an averment of refuſal by the arbitrator. *(c)*

AND in that report of one of the former caſes, *(d)* 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

(a) Barber v. Giles. Rol. Arb. P. 2. S.P. 2 Vern. 100.

(b) Copping v. Hurnard. 1 Sid. 428, 454. Sr. T. Raym. 187. 2 Keb. 462, 619. 2 Saund. 132.

(c) Luſh v. Crabbe. 19 and 20. Car. 2. 2 Keb. 263, 332.

(d) Copping v. Herauld, or Hurnard. 2 Saund. 129.

defective

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 umpirage 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 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, *(a)* the opinion was totally overruled, 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 ar-

a) Chaſe v. Dare. P. 33. Car. 2. Sir T. Jones 168.

bitrators 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 *(a)* 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 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. *(b)*

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 award before the tenth of June, and this

(a) Vid. the caſes cited infra.

b) 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. 672. 12 Mod. 512.

was

was held to be good; though it was objected, that the arbitrator had the whole of the firſt day of May to make his award in; *(a)* 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. *(b)*

SOMETIME before this laſt caſe, occurred that of Jennings and Vandeput, of which the circumſtances were theſe: *(c)* 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 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 overruled, 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, be-

(a) Watſon v. Clement. M. 24 Car. B. R. Rol. Arb. P. 5.

(b) Elliot v. Cheval. Lutw. 541, 544. Tr.. 11 W. 3.

(c) Cro. Car. 263. T. 8. Car.

fore 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 *(a)* 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; 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 *(b)* 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 occured late in the reign of William the third: *(c)* A ſub-

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

(b) Rainsford and Morton.

(c) Mitchel v. Harris. 13 W. 3. 1 Salk. 71. 1 Ld. Raym. 671. 12 Mod. 512.

miſſion

miſſion 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 choſe 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 had choſen 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 choſen 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. *(a)*

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. *(b)* And it is in fact not unuſual for the parties to make it a condition in the ſubmiſſion that the umpire ſhall be choſen by the arbitrators, before they do any other act.

(a) Rep. Pract. in C. B. 116. Paſch. 8 G. 2. Danes v. Monſay cited Com. Abr. Arbit. P. 18.

(b) 2 Term Rep. 645.

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. *(a)*

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.

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,

(a) Burdet v. Harris. 3. Keb. 387. Freem. 378. Adams v. Adams. 2 Mod. 169.

the

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.

THE 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 choſe 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. *(a)*

(a) Cowel v. Waller. Trin. 5 Geo. 2. 2 Barnard. K. B. 154.

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 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, *(a)* which occurred in the Common Pleas, in the firſt of William and Mary, this opinion was ſtrenuouſly maintained by the Chief Juſtice, *(b)* in 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

(a) Trippet v. Eyre. 1 W. and M. in C. B. 3 Lev. 263. 2 Vent. 113.
(b) Pollexfen.

had

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 here 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,

again, which was reſolved to be well. *(a)* 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. As to the caſes cited by the Chief Juſtice, relative to this latter point, theſe were caſes, in which the umpire was named in the ſubmiſſion, and therefore could not apply to the preſent; and had, beſides, been expreſsly over-ruled by that of Chaſe 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 beſt report of the caſe, *(b)* that, on an allegation that the arbitrators *refuſed* to make any award, the umpirage would have been good—On theſe grounds judgment was given for the plaintiff—Yet, notwithſtanding the good ſenſe apparent in the reaſoning of the three juſtices, Lord Chief Juſtice Holt held, not long after, that having once choſen an umpire, the arbitrators had executed their authority, and therefore could not chooſe another, though the firſt refuſed, unleſs the nomination was under a condition that he ſhould accept, for then he was no umpire 'till the condition was fulfilled: but Juſtice Rokeby doubted the ſoundneſs of this diſtinction; becauſe, he ſaid, every election implied a condition that the office ſhould be accepted. *(c)* Is it neceſſary to add, that good ſenſe, on the preſent queſtion, is at variance

(a) Palm. 289.

(b) Copping v. Horner. 2 Saund. 129.

(c) Reynolds v. Gray. 9 Will. 3. 1 Salk. 70. 1 Ld. Raym. 222. 12 Mod. 120.

with

with the opinion of the two Chief Juſtices? That the ſelfiſhneſs of parties, and their deſire to defer the payment of a juſt demand, ſhould prompt them to bring ſuch a queſtion before a court, is not ſurpriſing; the wonder is, that grave and learned judges ſhould be able to perſuade themſelves that there was any ground for raiſing it.

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

ſelf 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; *(a)* 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. *(b)* 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, muſt 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 intention; 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 in-

(a) Diem proferre vel præſens, vel per nuncium, vel per epiſtolam poteſt. Ff. l. 4. t. 8. ſ. 27.

(b) Vid. ante page 19.

ſerted

ſerted 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. *(a)* The proviſions of 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

(a) 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 eum 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 ex compromiſſio 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 proferendâ. Cæterum impune jubenti non parebitur. 32. n. 21.

there

there was no clauſe of that kind, yet if the time 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. *(a)*

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 with-

(a) 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 coactum*, attamen interdum rationem ejus habere debet, et excuſationem recipere cauſa cognita: 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 interdum 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.

out

out his attendance; *(a)* 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 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. *(b)*

In this reſpect the Roman law is ſomething ſimilar to ours, for the party by not atending, and thereby preventing the arbitrator from making his award, forfeited the penalty of his ſubmiſſion. *(c)*

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

(a) Waller v. King. Ca. in Law and Eq. 2 pt. 63.

(b) Hetley v. Hetley, in the Exchequer. M. 1-89.

(c) Siquis litigatorum defuerit; quia per eum factum eſt, quo minus arbitretur, poena committetur. Ff. l. 4. t. 8. f. 27. n. 4.

heard,

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. *(a)* 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 which they had: *(b)* 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. *(c)*

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.

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

(a) 39 H. 6. 9. Rol. Arb. P. 7.
(b) 39 H. 6. 11. b. per Priſot.—Rol. Arb. P. 8.
(c) Taſker v. Keary. 2 Barnard. 317.

ſeveral

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. *(a)*

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, *(a)* 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

(a) 39 H. 6. 11 b. per Priſot. Rol. Arb. P. 8.

(b) 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.

by himſelf, and could not be joined with the arbitrators, their authority being diſtinct. Whether this objection 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. *(a)*

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. *(b)* 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. *(c)*

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 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. *(d)*

In

(a) Hunter v. Benniſon, Hardr. 43.

(b) 1 Bulſt. 184.

(c) Soulſby v. Hodgſon. 1 Bl. Rep. 463. Eaſt. 4 G. 3. K. B.

(d) 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

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 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 agreed 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. *(a)*

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

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 ſit 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.

(a) Dalling v. Matchett. Barnes 57.

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 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

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 knowledge 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 they 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 knowledge. 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,

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 analogous 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. *(a)* 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. *(b)* 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 their peril, and that this had been before adjudged in the King's Bench in the ſame King's reign." *(c)* 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

(a) 8 E. 4. 1. Br. 37.
(b) Keilway, 175.
(c) Brian, Vaviſor, and Cateſby. 18 Ed. 4. 18. a.

bound

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." *(a)*

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:" *(b)* 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; *(c)* 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 ſomething awarded 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, *(d)* unleſs it had been ſpecially expreſſed in the ſubmiſſion, that ſentence might be pronounced in the abſence of one or of both 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,

(a) 1 H. 7. 5.

(b) 8 Co. 92. b.

(c) Vid. Cro. El. 97. Cro. Car. 132, 133.

(d) Si quis litigatorum defuerit; quia per eum factum eſt, quo minus arbitretur, pœna committetur. Pro inde 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. f. 27. n. 4.

by

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 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." *(a)*

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, *(b)* 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.

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

(a) Hungate's case. 5 Co. 103. Cro. El. 885. Mo. 642. pl. 885.
(b) 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.

made;

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, *(a)* 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 alledged, 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 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. Powel 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

(a) Wood v. Ardiſt. Tr. 1 Ann.

of

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. *(a)*

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 pronouncing 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. *(b)*

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

(a) Oates v. Bromell. 6 Mod. 160.

(b) *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 à 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.

he

he could not change it, becauſe this was the ſame thing as if there had been ſeveral ſubmiſſions. *(a)*

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. *(b)* And Rolle, in abridging the caſe, adopts the latter opinion. *(c)* 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. *(d)*

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 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 alledged 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

(a) Quid tamen ſi de pluribus controverſiis ſumptus eſt nihil ſibi communibus, et de unâ ſententiam dixit, de aliis nondum? 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 ſint compromiſſa: et ideo, quantum ad illam controverſiam pertinet, arbiter eſſe deſierat. Ff. l. 4. t. 8. ſ. 21.

(b) 39 H. 6 12.

(c) Rol. Arb. H. 1. 2.

(d) 39 H. 6. 12. Bro. Arb. pl. 29. Rol. Arb. H. 3.

ſuch

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; *(a)* 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. *(b)* So, it has been reſolved, though not till after many arguments, that, if they reſerve to themſelves the power of altering the whole, or part of the award, this is clearly void. *(c)*

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

(a) 19 E. 4. 1. Rol. Arb. H. 4. vid. Selby v. Ruſſel. 12 Mod. 139.

(b) 2 Rol. Rep. 214, 215.

(c) 2 Rol. Rep. 189, 214. Palmer 110, 146.

"admitting

"admitting *that* part of the award 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. *(a)*

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 council at the aſſizes, ſhould appoint; it was held, that this was a reſervation of authority, and therefore void. *(b)*

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. *(c)*

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 them, before the ſaid feaſt of Michaelmas; then ſo much as ſhould be ſo proved, ſhould not be paid at that feaſt. *(d)* 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

(a) Rol. Arb. H. 13.
(b) Thinne v. Rigby. Cro. Jac. 315.
(c) Royſton v. Ryall. 2 Jac. Rol. Arb. H. 8.
(d) Beckwith v. Warley. 16 Jac. Rol. Arb. H. 9. Warley v. Beckwith. Hob. 218.

ſhould

ſhould fruſtrate all reaching to the award, or whether the award ſhould ſtand, and the reſervation be void."

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, *(a)* 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 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. *(b)*

(a) Palmer. 110, 146.

(b) Brown v. Dalton. M. 9 Car. B. R. Rol. Arb. H. 10.

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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 limited 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 period.—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 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, *(a)* 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 re-

(a) 30 H. 6. tit. Arbit.

ferring it to the judgment of J. D. he delegated his whole authority, which he had not power to do. *(a)*

NEITHER have the court 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 ſaid 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 miniſterial act. Trevor, Chief Juſtice, and Blencow, Juſtice, were of opinion, that it was the former; Powell, Juſtice, that it was the latter. *(b)* 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. *(c)*

Delegation of their Authority.

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

(a) Vid. for theſe two caſes, 2 Rol. Rep. 189. 214.

(b) Cockſon v. Ogle. 15 W. 3. C. B. Lutw. 550

(c) Hunter v. Benniſon. Hardr. 43.

law,

law, that a delegation of authority is void. *(a)* 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. *(b)* 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. *(c)* 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 ſupplied; 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. *(d)*

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, 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. *(e)*

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 be-

(a) Puto vere non committi, ſi dicat *ad judicem de hoc eundum, vel ſe vel alium: in ſe vel in alium compromittendum.* Nam 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 eum 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.

(b) 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.

(c) 30 H. 6. Fhbt. 52. b. Rol. Arb. I. 9.

(d) Samon's caſe. Cro. El. 432. 560. 78.

(e) Glover v. Barrie. 10 W. 3. C. B. Latw. 1597. 1 Salk. 71.

tween 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. *(a)* 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. *(b)* 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 on the form. *(c)* 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; *(d)* but this ſeems to be a diſtinction without any foundation. *(e)*

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. *(f)*

THAT arbitrators, where they award the ſubſtance of the thing

(a) 19 Ed. 4. 1 Rol. Arb. H. 5.

(b) Tr. 1650 Cater v. Startut on demurrer. Rol. Arb. H. 7. Style 217, 218.

(c) 8 Ed. 4. 11. a. Brooke 37.

(d) 19 Ed. 4. 1. Rol. Arb. H. 6. Emery v. Emery. Cro. El. 726.

(e) Jenk. 128.

(f) 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, quem admodum 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.

to

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 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, excluſive 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 adminiſtrators, 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

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 particularly 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 deputed 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. *(a)*

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 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. *(b)*

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. *(c)* 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. *(d)* 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. *(e)* But if he award coſts of the ſuit, and of the reference, the court will order only the coſts of ſuit

(a) Lingood v. Eade. 2 Atk. 501. (515).

(b) Shephard v. Brand. B. R. H. 54.

(c) 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.

(d) Barnes, 56 vid. 1 Sid. 358.

(e) Dudley v. Nettleford. Str. 737. Thomlinſon v. Arriſkin. Comyns. 330.

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to be taxed, becauſe the officer cannot judge of the coſts of the reference. *(a)*

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. *(b)*

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. *(c)*

(a) Barnes, 58.

(b) Nutt v. Long. B. R. H. 181. Str. 1025.

(c) 6 Mod. 195. Salk. 75.

If,

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. *(a)*

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. *(b)*

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. *(c)* 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. *(d)*

(a) 39 H. 6. 11. a. per Priſot.
(b) Semb. ſed quære. Car. Rol. Arb. H. 12. Tr. 3 Jac. dubitatur.
(c) Latch. 14.
(d) Withers v. Drew. Cro. El. 676.

CHAP.

CHAP. V.

THE AWARD OR UMPIRAGE.

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. *(a)* This is equally the general doctrine of the civil and the Engliſh law; but in both 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. *(b)* 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. *(c)*

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,

(a) Arbitrorum genera ſunt duo; unum ejuſmodi, ut ſive æquum ſit ſive iniquum, parere debeamus; quod obſervatur cum ex compromiſſo ad arbitrum itum eſt. Ff. l. 17. t. 2. ſ. 76, 77, ante page 43. Qualem autem ſententiam dicat arbiter, ad Prætorem non pertinere, Labeo ait, dummodo dicat quod ipſi videtur. Ff. l. 4. t. 8. ſ. 19.

(b) Vid. ante page 3. Quæſitum eſt de ſententia dicenda? et dictum, non *quamlibet*: licet de quibuſdam variatum ſit. Ff. l. 4. t. 8. ſ. 32. n. 16.

(c) 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.

though

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. *(a)* It 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. *(b)*

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 more 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. *(c)*

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 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. *(d)*

(a) 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 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.

(b) 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.

(c) Vid. 2 Mod. 309.

(d) 36 H. 6. 11 b. Bro. Arb. pl. 27, 50.

BUT

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. *(a)*

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. *(b)*

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 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 ar-

(a) 9 Ed. 4. 44. a. Fhbt. 52. a. Rol. Arb. D. 6 7.
(b) Id. ibid.

bitrator

bitrator 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. *(a)*

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 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 the 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. *(b)*

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

(a) Vid. 9 Ed. 4. 44. Rol. Arb. B. 11. Dict. cont. per Moyle.

(b) Purſlow v. Baily. 6 Mod. 221. 2 Ld. Raym. 1039. 1 Salk. 76.

of

of the ſatisfaction to be given to himſelf; time and place in ſuch a caſe, making a principal circumſtance. *(a)*

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. *(b)*

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. *(c)*

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." *(d)*

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," is binding on the huſband, becauſe, it is ſaid, he is intitled to it in right of his wife. *(e)*

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

(a) 1 Sid. 12.

(b) Keilway 99. vid. 1 Ld. Raym. 115 acc.

(c) Roberts v. Marriot. 2 Saund. 190.

(d) 3 Buſtr. 312.

(e) 21 H. 6. 19. Br. 45 a. Pl. 22. ſed quære et vid. page 28.

that

that is out of the ſubmiſſion, the action between B and his wife, and A, not being an action depending between A and B. *(a)*

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. *(b)* 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. *(c)*

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

(a) H. 38 El. B. R. Brockas v. Savage. Rol. Arb. D. 4.
(b) Waters v. Bridges. Cro. Jac. 639, 640.
(c) 8 H. 6. 18. b. Rol. Arb. B. 2. C. 4. 5. 6.

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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; *(a)* and Rolle, in abridging the caſe, gives it as decided the other way, with the exception of Moyle. *(b)*

THE ſubmiſſion was concerning a term for years, and every thing depending on it; the award included rent to become due at Michaelmas next after the date of the award; this was held to be beyond the ſubmiſſion, becauſe the rent might be extinguiſhed by ſurrender, eviction, or otherwiſe, before Michaelmas. *(c)* 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. *(d)*

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. *(e)*

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

(a) 9 Ed. 4. 44.
(b) Rol. Arb. B. 13.
(c) Inter Gray et Wicker. Rol. Arb. B. 3.
(d) Barnardiſton v. Foulyer. 10 Mod. 204.
(e) Taylor v. Waltam. P. 10 Car. B. R.

the future tythes; becauſe the ſubmiſſion comprehended not only a diſpute concerning the tythes then due, but a queſtion concerning the future right. *(a)*

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, alledging, that the arbitrator had exceeded his authority. The court held that, under ſuch a general reference, the arbitrator had clearly a power to diſſolve the partnerſhip; and added, that if a difference between a maſter and his apprentice were 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 the partnerſhip was then a matter of diſpute. *(b)*

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 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

(a) Beckingham v. Hunter. H. 42. El. B. R. Rol. Arb. D. 8.

(b) Green v. Waring. 1 Bl. Rep. 475.

his

his demand againſt the plaintiff, by way of ſet-off; and a proviſo, that the coſts ſhall abide the event, makes no difference. *(a)*

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; *(b)* ſuch an award indeed ſeems perfectly nugatory, becauſe the land lord 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;" *(c)* 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 tho' the arbitrator order a claim of one party againſt the other, which has accrued ſince the ſubmiſſion and before the award, to be given 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:

(a) Vid. 2. Bl. Rep. 1118. 2 Term Rep. 644, 5. 3 Term Rep. 626.

(b) Hall v. Maſſey. Rol. Arb. K. 14.

(c) Hardres 45.

this was adjudged a good award. *(a)*—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. *(b)* 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 inconvenience, 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. *(c)* 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. *(d)*

(a) Nicklas v. Thomas, adjudged good. T. 15 Jac. B. R. Rol. Arb. B. 10. Reporter quære ceo.

(b) 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.

(c) Pinkney v. Bullock. 2 Keb. 832. vid. 10 Mod. 201.

(d) 2 Term Rep. 645.

When

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 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. *(a)*

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. *(b)*

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 dif-

(a) Highnam et al. v. Haſſel. H. 14. G. 3. cited 3 Term Rep. 139.

(b) 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.

ferent 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 been committed when the defendants were attempting to exerciſe a right of way negatived by the arbitrator. It was held, on the authority of the two preceding caſes, 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. *(a)*

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 caſes 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 caſes, 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 caſes have gone further, and the award has been frequently conſidered as altogether void, on account of ſo trivial an 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. *(b)*

(a) Swinglehurſt v. Altham et al. 3 Term Rep. 138.

(b) Vid. poſt, "Where an award ſhall be good in part though void in part," and, "how awards ſhall be conſtrued."

THE

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. *(a)*

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. *(b)*

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. *(c)*

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

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.

(a) Samon's caſe. 5 Co. 77. b. 78. a. Rol. Arb. B. 7.

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

(c) Rol. Arb. N. 9.

(d) 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.

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. *(a)* And Brooke, in abridging the caſe, ſays this is good 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. *(b)*

IT is in general laid down, that the award of payment of money to a ſtranger is void: *(c)* 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. *(d)*

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. *(e)*

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. *(f)*

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."

(a) 2 R. 3. 13.
(b) Br. Arb. pl. 44.
(c) Godbolt. 12, 13.
(d) R. acc. 1 Lord Raym. 123. Dodderidge ſerj. P. 16 Jac. B. R. Buckhurſt and Mayo's caſe. Rol. Arb. E. 5.
(e) 1 Lord Raym. 123. M. 8. W. 3. Bedam v. Clerkſon.
(f) Dale v. Mottram. 2 Barnard. 291. 6 G. 2.

WC

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 ſtranger to the ſubmiſſion, becauſe it appears to be an advantage to both parties. *(a)*

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. *(b)* 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. *(c)*

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

(a) Gray v. Gray. P. 16 Jac. B. R. Rol. Arb. E. 6. F. 8.

(b) Barſey v. Clapſham. Rol. Arb. E. 11. S. C. Cro. Car. 541. vid. Becket v. Taylor. 1 Mod. 9. S. P. 2 Keb. 546. S. C.

(c) Bird v. Bird. 1 Salk. 74.

not

not accept the money awarded to be paid to him, the party's obligation is ſaved. *(a)*

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. *(b)* 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. *(c)*

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. *(d)*

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

(a) Norwich v. Norwich. 3 Leon. 62.

(b) Onyons v. Cheeſe. 10 W. 3. Lutw. 530.

(c) March, 78.

(d) 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.

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 Templeman, 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

ſolutely 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 condition, 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.*(a)*

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 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 betwen the parties;" that all proceedings in the replevin

(a) Lynch v. Clemence. 11 W. 3. Lutw. 571.

plevin 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.

It has been ſeen, that a man is bound by an award to which he ſubmits for another; *(b)* and that 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. *(c)* 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. *(d)* But by a modern caſe, *(e)* it appears, that the latter aſſertion is true, only when the agent does not bind himſelf for the performance of the principal; for 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 defend-

(a) Shelf v. Baily in C. B. 8 Ann Comyns Rep. 183.
(b) Ante page 24.
(c) Ante page 26, 27.
(d) Page 25.
(e) Cayhill v. Fitzgerald. B. R. 17 G. 2, 1743. 1 Wilſ. 28, 58.

ant,

ant, 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 Geo. 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, *(a)* 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, *(b)* 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 two tenants of the manor, who ſhall preſent the ſurrender; this is good, though it be awarded, that the ſurrender

(a) Ante page 27. *(b)* In 2 Salk.

der ſhall be made to ſtrangers, who cannot be compelled to accept it, becauſe they are only to be uſed as inſtruments. *(a)*

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 *(b)*. 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. *(c)*

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 for a moiety of other lands, and died ſo ſeized; and after her death, Green continued in poſſeſſion of the lands and houſes; ſome differences ariſing between 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, ſurrrender, and aſſign to Green, all his right to the houſes in Briſtol; and that, 'till ſuch conveyance

(a) Coote v. Pooley. Rol. Arb. E. 7.

(b) Rol. Arb. E. 8.

(c) Rees v. Lun. 1 Keb. 569.

made,

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. *(a)*

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

(a) John and Richard Warren v. Green, Hurtnal, et al. Ca. Temp. Finch 141. This *ſeems* to be the effence of the decree, for the report is not accurate.

out

out of her husband's estate, as if the bond had not been cancelled, and the award had never existed. *(a)*

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. *(b)* 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. *(c)*

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. *(d)*

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 pro-

(a) Mary Brown, widow, v. Will. Savage et al. executors of her husband. Ca. Temp. Finch 184. et vid. Id. 180, 441.

(b) Moor v. Bedel. Gouldsb. 91, 92, cited 10 Co. 131. 2. Jenk. 264. Rol. Arb. B. 4.

(c) Vanlore v. Tribb. Rol. Arb. 21. Vid. 6 Mod. 232.

(d) 2 Mod. 309. Vid. Rous v. Nun. 1 Sid. 154. Alablaster v. Clifford. Rol. Arb. B. 23. Vid. Hob. 190. Gosse v. Browne.

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ſecuted. 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. *(a)*

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. *(b)* 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.

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. *(c)*

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

(a) Ingram v. Webb. 1 Rol. Rep. 362. 2 Rol. Rep. 192. Cro. Jac. 663.

(b) 19 H. 6. 6. Fhbt. Abr. 51. a. 39 H. 6. 11. b. ſemb. cont. Brooke Arb. 29.

(c) Vid. 8 Co. 98. 19 H. 6. 6. b. Rol. Arb. L. 5.

other

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. *(a)*

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. *(b)*

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. *(c)*

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. *(d)*

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 ex-

(a) 10 H. 6. 6. Fhbt. Abr. 51. a. Brooke 44, 45. Rol. Arb. 51. a.

(b) 39 H. 6. 9. b. Brooke Arb. 29.

(c) 39 H. 6. 11. b. Rol. Arb. I.. 6.

(d) 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.

tend to *two* things, and an award of *one* of them;" for there, in favour of the award, it 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. *(a)*

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

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. *(d)*

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.

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 particular day." But it is not absolutely necessary, that, to produce its proper effect, this clause should exactly run in these words:

(a) Dyer, 216, 217.
(b) Bend.
(c) Dict. Barnes v. Greenwell. Cro. El. 858.
(d) 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.

"of

" 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. *(a)*

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. *(b)*

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 reference to the umpire is only an addition of time, and not the conſtitution of a diſtinct power. *(c)*

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. *(d)*

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 alledged 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

(a) Cro. El. 838. pl. 14. vid. Al. 52.

(b Lee v. Elkin. 13 W. 3. Lutw. 202.

(c) 1 Keb. 791, 865. 1 Lev. 140.

(d) 8 Co. 98. Baſpole's caſe. S. P. Hamond v. Hatch. Goldſb. 125. pl. 14. 19 H. 6. 6. Fhbt. Abr. 51. a. Rol. Arb. L. 9.

would counteract the very principle on which theſe domeſtic judgments are recognized by the law. *(a)*

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. *(b)*

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 *(c)*

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 good, becauſe it did not appear that any matter was depending

(a) 8 Co. 98. b. cited Hob. 49. Rol. Arb. l. 7. 8. Brownl. 63. 2 pt. 309.

(b) Vid. all theſe points adjudged. Middleton v. Weeks. Cro. Jac. 200. Ormlade v. Coke. Cro. Jac. 355.

(c) Vid. the Cobler's Award. 1 Bur. 274 et ſeq.

on

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. *(a)*

THE ſame determination has been given in may other ſimilar caſes, *(b)* 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 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

(a) T. 7 Car. B. R. Ward v. Unwin. Rol. Arb. B. 24. Cro. Car. 216.

(b) 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.

whether it ought to be allowed or not, and he had given his judgment by ordering general releaſes. *(a)*

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. *(b)*

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. *(c)* This, however, appears to be a hard meaſure of juſtice, unleſs it be accompanied with the qualification allowed in the Roman law, even in the caſe of a general ſubmiſſion; by which, if one of the parties had omitted to aſſert any particular claim, and the arbitrator of courſe made his award without conſidering that demand, the party was not barred by the award, from afterwards enforcing the claim omitted, by a ſuit in the ordinary courts. *(d)* 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. *(e)* 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

(a) Birks v. Trippet. 1 Saund. 32, 33.

(b) Hopper v. Hacker. 1 Keb. 738. 1 Lev. 132, 133.

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

(d) 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. ſ. 43.

(e) King v. Hammerton. 2 Geo. 2. 1 Barnard. K. B. 316.

provi-

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, *(a)* 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. *(b)*

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 wife, on account of the words, "between them, or any of them." *(c)*

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. *(d)*

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. *(e)*

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. *(f)*

(a) 8 Co. 98. a.

(b) Vid. 2 R. 3. 18. Brooke 44, cited Plowd. 289. 1 Keb. 885. contra. 1 Lev. 149. Bean v. Newbury. 16 Car. 2 B. R.

(c) Hardres 399.

(d) Arnold v. Pole. Rol. Arb. D. 5. Carter v. Carter. 1 Vern. 259.

(e) Althelſtone v. Mooneet Willis. Comyns 547.

(f) Harris v. Paynter. Rol. Arb. O. 8. cited Lutw. 1628.

THE

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 the reference. *(a)* 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 the reference is by rule of a court of equity, greater preciſeneſs is probably obſerved in the deſcription of the ſubjects referred, and, by omitting to decide on any, 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. *(b)* As by the Roman law no penalty was incurrred by non performance of any thing awarded which was diſhonourable. *(c)*

(a) Hide v. Petit. 1 Ca. Ch. 186. Colwel v. Child. Id. 87.

(b) 19 E. 4. 1. Rol. Arb. G.

(c) Non debent autem obtemperare litigatores, ſi arbiter aliquid non honeſtum juſſerit. Ff. l. 4, t. 8. ſ. 21. n. 7.

And

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. *(a)*

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. *(b)*

Muſt not be of a Thing impoſſible.

An award of a thing which it 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: *(c)* 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 he may levy a fine: *(d)* 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; *(e)* or to pay a ſum of money at a day which was paſt at the time of the award; *(f)* 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: or that he ſhall enter into an obligation to the other *immediately* after the award; for ſome time is neceſſary. *(g)* 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 *im-*

(a). Vid. 1 Sid. 12.

(b) Hanſon v. Liverſedge. 2 W. and Mary. 2 Vent. 243.

(c) 12 Mod. 585.

(d) 19 Ed. 41. 1. Rol. Arb. F. 2. 3. 4.

(e) 28 H. 6. Mo. 3. pl. 3.

(f) 8 Ed. 4. 1. Rol. B. 17.

(g) 18 Ed. 4. 21. Rol. Arb. E. II. 1.

mediately

mediately 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. *(a)*

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. *(b)*

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 Bench, becauſe he had found ſureties in Chancery, and the juſtices has 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. *(c)*

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. *(d)*

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. *(e)*

And, if the party's doing that which is awarded will have

(a) 18 Ed. 4. 21. Rol. Arb. E. II. 2.

(b) 3 Mod. 272, 273.

(c) 21 Ed. 4. 38. 39. Br. Arb. 40.

(d) 19 Ed. 4. 1. Rol. Arb. F. 2. 3.

(e) Id. ibid. cont. 18 Ed. 4. 1. Rol. Arb. E. II. 2. F. 2.

weight

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: *(a)* yet he ought to release, because his release shewn to the court will be an inducement to them to discharge the recognizance. *(b)*

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. *(c)*

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. *(d)* The same observation applies to an award that one of the parties shall discharge the other of his undertaking to pay a debt to a third person. *(e)* On the same principle, it is said, that, admitting no objection will hold to an award of a discontinuance, or of a nonsuit, on ac-

(a) 21 Ed. 4. 40, 41..

(b) 2 Hawk. Leach. 257. Quæ. et vid. as to the release of sureties of the peace. Jenk. 136.

(c) 17 Ed. 4. 5. b. Rol. Arb. F. 1.

(d) Darsey v. Clipsham. March. 18. 1 Rol. Arb. page 248. n. 11. vid. ante page.

(e) Becket v. Taylor, 1 Mod. 9.

count

count 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. *(a)*

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. *(b)* 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: *(c)* 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. *(d)* But 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. *(e)* 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; *(f)* eſpecially, if it be in the houſe of the arbitrator himſelf, for there a licence ſhall be preſumed. *(g)* 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. *(h)* 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

(a) Rol. Arb. F. 5. 6.

(b) 9 E. 4. 44. Rol. Arb. B. 12.

(c) 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.

(d) Taverner v. Skingley. Rol. Arb. E. 3.

(e) S. C. Cro. Car. 226.

(f) Alley v. Cox. 27 Car. 2. 3 Keb. 479.

(g) Freem. 205.

(h) Holland v. Helwis. 3 Lev. 153.

face

face of the award, that more was really due. *(a)* 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 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. *(b)*

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. *(c)*—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.

(a) Cont. 45 Ed. 3. 16. where it is by ſimple contract. Br. 44. b. acc. Rol. Arb. J. 4.

(b) Godfrey v. Godfrey. 2 Mod. 304.

(c) Cont. M. 45 E. 3. 16. Br. 44. b. Acc. Rol. Arb. J. 5.

Muſt

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. *(a)* So, if a man and a 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. *(b)* 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. *(c)*

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. *(d)*

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

(a) 9 Ed. 4. 44. Rol. Arb. J. 11.
(b) Id. ibid. et Rol. Arb. J. 10.
(c) Vid. all theſe points adjudged, 9 E. 4. 44. a. b. Rol. Arb. J. 10, 11, 12, 13, 15.
(d) Id. ibid. et vid. Freem. 51.

principle,

principle, it is held in many places, *(a)* 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, *(b)* 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; *(c)* 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. *(d)*

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, *(e)* nothing is awarded to be paid; or rather, ſays Rolle, *(f)* 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

(a) 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.

(b) 10 H. 6. 14. Br. 43. 19 Ed. 4. 8. Br. 38. Rol. Arb. J. 7.

(c) 12 H. 7. 14, 15. Vid. 45 Ed. 3. 16. Rol. Arb. J. 3. Br. 32.

(d) 19 H. 6. 37. b. Rol. Arb. J. 6.

(e) 45 Ed. 3. 17. Fhbt. 52. b. Brooke, 44. b. vid. Rol. Arb. 1. 2.

(f) Rol. Arb X. 7.

is they are ordered to do. It is to no purpoſe, ſays the civil law, *(a)* that the arbitrator ſhould pronounce an uncertain award; and the Engliſh law has, in this reſpect, adopted the ſame language. *(b)* 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. *(c)*

THE plaintiff and defendant having certain diſputes concerning a piece of land, ſubmitted them to arbitration. The arbitrator awarded, amongſt other things, 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. *(d)*

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 *(e)* held the award was bad, for uncertainty in not having mentioned the ſum. But one *(f)* 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. *(g)*

(a) Pomponius ait, inutiliter arbitrum incertam ſententiam dicere; utputa, *quantum ei debes redde*, diviſioni veſtræ ſtari placet. pro ea parte, quam creditoribus tuis ſolviſti, accipe. Ff. l. 4. t. 8. ſ. 21. n. 3.

(b) 10 Ed. 3. 18. 5 Co. 77. b. 78. a.

(c) Pope v. Brett. 2 Saund. 292. 293.

(d) Samon's caſe. 5 Co. 77, 78. Rol. Arb. Q. 1. 4. Cro. El. 432. pl. 40. Mo. 359. pl. 489.

(e) Doderidge and Houghton, Montague e contra.

(f) Houghton.

(g) Gray v. Gray. Rol. Arb. Q. 2. 3. Cro. Jac. 525. Godb. 275.

THE

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 *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. *(a)*

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. *(b)*

PERHAPS, in the three laſt caſes, the courts appear to have been abundantly nice; the ſame obſervation 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

(a) El. 242. 52. per curiam. Rol. Arb. Q. 5.

(b) Maſſey v. Aubrey, after verdict for the plaintiff. Rol. Arb. Q. 9.

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. *(a)*

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. *(b)* 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. *(c)*

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. *(d)*

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, *(e)* 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

(a) Hurſt v. Bambridge. Rol. Arb. Q. 7.

(b) Cockſon v. Ogle. 13 W. 3. Lutw. 550.

(c) Bedam v. Clerkſon. 1 Ld. Raym. 124.

(d) Duport v. Wildgooſe. 2 Bulſtr. 260. Thynne v. Rigby. Cro. Jac. 314. Tipping v. Smith. 2 Str. 1024.

(e) Coke et Doderidge.

ſubmiſſion,

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 *(a)* 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. *(b)*—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 ſhall not prevail.

On a ſubmiſſion by bond, "the condition of which recited ſeveral differences between the plantiff 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

(a) Houghton. *(b)* Lumley v. Hutton. 1 Rol. Rep. 271.

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 uncertaity. 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, *(a)* 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; *(b)* 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, 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 cer-

(a) Powell, Powis, and Gould. | Breame. 6 Mod. 244. But more fully reported in 2 Ld. Raym. 1076.
(b) 9 Ed. 4. 3. b. Arnote v.

tain

tain 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 aquit 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. *(a)*

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." *(b)*

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 ſay for what term the reaſſignment ſhall be, whether for years, life, or fee; it ſhall be underſtood to be for the whole intereſt mortgaged. *(c)*

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. *(d)*

"To pay the charges of a ſuit" is ſufficient, for theſe may be aſcertained by the attorney's bill. *(e)* 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

(a) Barſey v. Clipſham on demurrer. Rol. Arb. Q. 8.

(b) 1 Keb. 335.

(c) Roſſe v. Hodges. 1 Lord Raym. 234.

(d) Beale v. Beale on demurrer. Rol. Arb. H. 14.

(e) Cro. Car. 383.

what was in fact laid out. *(a)* So, "that the defendant ſhall pay as the plaintiff and his attorney, by a bill and oath ſhall make appear. *(b)*

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. *(c)*

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 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. *(d)*

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. *(e)* 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. *(f)*

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. *(g)*

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. *(h)*

(a) Hanſon v. Liverſedge. 2 W. and M. 2 Vent. 242.

(b) Rous v. Lun. 1 Keb. 569. et vid. acc. Linfield v. Ferne. 3 Lev. 18 et ante page 88.

(c) Semb. cont. Meſſenger v. Freeman. 3 Keb. 508.

(d) Backwell v. Knipe. 3 Keb. 293.

(e) Furſer and Bond v. Prowd. Cro. Jac. 423.

(f) Linfield v. Ferne. 3 Lev. 18.

(g) Kockill v. Wetherel. 2 Keb. 838.

(h) Collet v. Powell. 2 Keb. 670.

An

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 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 endeavours 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. *(a)*

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 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. *(b)* In

(a) Vid. Lee v. Elkins. 12 Mod. 585, 586. Lutw. 545.
(b) 2 Brownl. 311. 1 Keb. 92. et vid. Philips v. Knightly. Str. 923. 1 Barnard. 84. 151. 463.

this

this reſpect the Engliſh law exactly correſponds with the civil. *(a)*

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. *(b)* 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. *(c)*

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 was concerning an incloſure between *Barton* Down and *North* Down, and the award purported to be of an incloſure, between the *defendant*'s down and the down of *I. S.* it ſeems to have been admitted, an averment "that the incloſure 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. *(d)*

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. *(e)*

So, an award, "that the defendant ſhall pay the plaintiff for

(a) 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 not ſit, Celſus ſcribit, inеſſe quoddam modicum tempus: quod ubi præterierit, pœna ſtatim peti poteſt et tamen ſi dederit ante acceptum judicium, agi ex ſtipulatu non poterit. n. 12.

(b) Dict. per Gould J. 1 Lord Raym. 612.

(c) Vide ante page 135.

(d) Withers v. Drew. Cro. El. 676. pl. 5.

(e) Watſon v. Watſon. Sty. 28. T. 3. Car. B. R.

certain

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. *(a)*

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 in this part. *(b)* 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 antient 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. *(c)* 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. *(d)*

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

(a) Pope v. Brett. 2 Saund. 292.

(b) Bacon v. Dubarry. 1 Lord Raym. 246. 12 Mod. 129.

(c) Dyer 242. b. pl. 52. M. 7 and 8 Eliz.

(d) Per Co. Ch. J. conceſſum per Doderidge, but Houghton doubted: but Coke ſaid this is Dyer's caſe.

concurred,

concurred, yet there was ſome varying afterwards, and ſo it hung, and he thinks it was compounded, for he heard no more of it." *(a)*

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. *(b)*

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. *(c)* 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 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

(a) Hob. 49, 50. Nichols v. Grunnion.

(b) Non differendarum litium cauſa, ſed tollendarum ad arbitrum itur. Ff. l. 4. t. 8. ſ. 37.

(c) 19 H. 6. 36. Fhbt. 51. a. b. Brooke. 45. a.

forfeit

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. *(a)* 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 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. *(b)*

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. *(c)* 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

(a) 5 H. 7. 22. Fitzh. 52. b. 6 Mod. 232. 1 Barnard. K. B. 463.
(b) Vid. the places before cited, and Rol. Arb. T. 15. 16. 17. F. 9. 7.
(c) Vid. the places above cited.

ſeems

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.*" *(a)* 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 power of the party to do it or not: *(b)* and now it ſeems to be taken for granted, that no objection can be taken to ſuch an award. *(c)*

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 afterwards bring another action for the ſame cauſe. *(d)*

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 theſe 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. *(e)*

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. *(f)*

So, "that what is awarded on one ſide, ſhall be in full of all debts and demands on the other," will aid 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. *(g)*

An award, "that the plaintiff in an action ſhall not proſecute

(a) Dict. 1 Rol. Rep. 362. cites 19 H. 6. 36.

(b) Per G. Croke, in the caſe of Gray. Godbolt. 276.

(c) Vid. 1 Barnardiſton. 463.

(d) 5 H. 7. 22. Hbbt. 52. b. Brooke Arb. 31. Rol. Arb. F. 7.

(e) Squire v. Greville. 6 Mod. 33. 2 Ld. Raym. 961, 964. 1 Salk. 74. vid. Tipping v. Smith. 2 Str. 1024, which ſeems contra.

(f) Knight v. Burton. 6 Mod. 232. 1 Salk. 75.

(g) Id.

nor

nor proceed in the ſame term" is good. *(a)* 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 ſhould ceaſe." *(b)* 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. *(c)*

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. *(d)* 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. *(e)* 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

(a) Gray v. Gray. Cro. Jac. 525.

(b) Farmer v. Durant. 2 Keb. 351.

(c) 1 Bur. 274. Hawkins v. Colclough, vid. ante page 118.

(d) Si Arbiter pronunciaſſet, "Nihil videri Titium debere Seio:" tametſi Seium non vetuiſſet petere, tamen, ſi quid petiiſſet, videri contra arbitri Sententiam feciſſe. Ff. l. 4. t. 8. ſ. 21. n. 1.

(e) Dict. per Buller J. Hil. 1791.

bond;"

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. *(a)*

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 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, *(b)* 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 diſcontinue the ſuit, which he had brought on

(a) Milwood v. Stokes. Rol. Arb. O. 7. *(b)* Page J.

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. *(a)*

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. *(b)* So, to give a note or a bond, for the payment of money at a future day. *(c)*—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. *(d)*

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 frieght 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 ſeemed to be to conſider this award as void, becauſe it was not final at the time of making it. *(e)*

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. *(f)* So, an award, "that, if the plaintiff, on account, prove certain articles againſt the defendant,

(a) Philips 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 covenant to indemnify, in return for which the defendant in the preſent action was to pay him a ſum of money.

(b) Per Dodderidge. Palm. 110.

(c) Booth v. Garnett. 2 Str. 1082.

(d) Palm. 110.

(e) Dighton v. Whiting. 6 W. 3. Lutw. 51.

(f) Kinge v. Fines. 1 Sid. 59.

then he ſhall pay ſo much as the plaintiff was damnified thereby," is not final. *(a)*

So, alſo, "that if the defendant make out, upon oath before a judge, any diſburſements made on account of the plaintiff, that 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;" *(b)*—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 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. *(c)*

BUT where the proviſo is not merely repugnant to the other

(a) Selby v. Ruſſel, Comb. 456.
(b) Id. ibid.
(c) Dict. arg. by the court in Sherry v. Richardſon. Poph. 15, 16.

part

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 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. *(a)*

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 be ſaid of the actions which the other has againſt him," this is void. If the

(a) Id. ibid.

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. *(a)*

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 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. *(b)*

The most frequent complaint against awards for the want of mutuality, is that when something is awarded on one side,

(a) 7 H. 6. 41. 21 H. 6. 9. 22 H. 6. 39. Br. Arbit. pl. 23 cites same case.
(b) 8 Co. 98. a. Rol. Arb. K. 5.

there

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 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. *(a)* 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, 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. *(b)*

So, that all "controverſies" ſhall ceaſe, and that the one ſhall pay 10d. to the other, although the other have nothing given to

(a) Bacon v. Dubarry. Comb. 439. 1 Ld. Raym. 246.

(b) Strangford v. Green. 2 Mod. 228.

him, for perhaps, ſay the books, he had committed the greater treſpaſs. *(a)*

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 ſhall continue in love and friendſhip as formerly; it was held to be an award on 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. *(b)*

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. *(c)* 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*. *(d)* 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 treſpaſs." *(e)* Or "to pay ſo much for arrears of rent;" for that ſhall be taken "in ſatisfaction of all arrears, and

(a) Cole's caſe 8 Jac. Rol. Arb. K. 10. S. P. Harris v. Knipe. 13 and 14 Car. 2. 1 Lev. 58.

(b) 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.

(c) Mawe v. Samuel. 1 Rol. Rep. 1. 2. Rol. Arb. F. 6.

(d) 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.

(e) Ormlade v. Coke. Cro. Jac. 354. S. P. Hob. 49. Freem. 205. 266.

the

the party diſcharged by payment. *(a)* So, "for having made the firſt breach in the law," implies that the ſum awarded ſhall be taken in ſatisfaction. *(b)* 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 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. *(c)*

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. *(d)*

It was awarded that the defendant ſhould pay to the plaintiff's 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. *(e)*

In the more ancient reports, however, the rule ſeems to have

(a) Hopper v. Hackett. 1 Lev. 132.
(b) 1 Bur. 277.
(c) Colſton v. Harris.
(d) Elliott v. Cheval. Lutw. 541.
(e) Watmough v. Holgate. 2 Vent. 221. 222. S. P. Comb. 212.

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 ; *(a)* 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 *(b)* 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 of the money due by a ſingle bond could not be pleaded to an action on the bond, without a releaſe. *(c)* But this reaſon, ſince the ſtatute for the amendment of the law, *(d)* 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,

(a) May v. Samuel. Rol. Arb. F. 3. Kirby v. Pigot. 25 Car. 2. 3 Keb. 140.

(b) It may not be altogether uſeleſs to obſerve here, that a *ſingle* bond means a bond without a penalty.

(c) Hob. 49 Brownl. 58.

(d) 4 Ann. c. 16. ſ. 12.

and

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, 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 for 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. *(a)*

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. *(b)* 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 de-

(a) 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.

(b) Tomlinſon v. Ariſkin. Comyns 328.

fendant

fendant 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. *(a)*

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 limited, but does not alledge 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 circumſtance 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

(a) Cooper v. Hirſt. Lutw. 539.

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. *(a)*

THE adherence of the courts to this rule was in many inſtances ſo rigorous and ſtrict, that the power 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. *(b)* 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 obſerved in the conſtruction of awards; holding, that they ſhould be interpreted,

(a) Brownl. 92. Yelv. 98. | Arb. K. 15. Q. 6. Cro. Jac. 149.
(b) Markham v. Jennings. Rol. | Yelv. 97. 98.

as

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. *(a)*

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. *(b)*

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 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

(a) Dict. per Doderidge. Palm. 108. 3 Bulſtr. 66, 67.
(b) Brown's caſe, cited Hutton, 9.

court

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. *(a)*

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." *(b)*

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. *(c)*

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. *(d)*

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. *(e)*

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 it-

(a) M. 22 Car. B. R. Linnen v. Williamſon. Rol. Arb. K. 16. cited 6 Mod. 35. 2 Ld. Raym. 965.

(b) Stiles v. Triſte. 1 Sid. 54.

(c) Hooper v. Hirſt. Lutw. 539, cited 1 Ld. Raym. 612.

(d) Dis aliter viſum. Clapcott v. Davy. 1 Ld. Raym. 612.

(e) But ſemb. contr. Dighton v. Whiting. Lutw. 51.

ſelf,

ſelf, 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. *(a)*

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. 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. *(b)*

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. *(c)*

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. *(d)*

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 pay 1l. 5s. each to the arbitrators for their trouble; and that "on payment of the mo-

(a) Parſons v. Parſons. Cro. El. 211. S. P. M. 18 and 19 El. inter Treſſam et Robins.

(b) Al. 51.

(c) Per Powell J. 6 Mod. 35.

(d) Litt. 30.

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ney 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 arbitrators. *(a)*

An award, reciting that ſo much money had been diſburſed by one party, as was *alledged*, ordered that money to be paid by the other: in favour of the award, the court held, that this ſhould be underſtood as alledged, 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. *(b)*

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 before," 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. *(c)*

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

(a) Abrahat v. Brandon. 10 Mod. 201.

(b) Knight v. Burton. 6 Mod. 232.

(c) Bedam v. Clerkſon. 1 Ld. Raym. 123.

held

held not to be material. *(a)* So, where the ſubmiſſi was dated on the 10th of February, and the award recited as of the 7th. *(b)*

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. *(c)*

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 objection on that account will not be allowed, becauſe it is but recital. *(d)*

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. *(e)*

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

(a) Al. 85. 87.
(b) Toll v. Dawſon. 1 Vent. 184.
(c) Lambard v. Kingsford. Lutw. 558.
(d) Adams v. Adams. 2 Mod. 169.
(e) 6 Mod. 232.

of

of the money the ſubmiſſion was at an end, and every thing depending on it; and, on account of the clauſe of "ita quod," the releaſe ſhould be taken to extend only to the things ſubmitted. *(a)*

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. *(b)*

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. *(c)*

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

(a) Dubitatur M. 14 Car. B. R. Atnoke v. Orwell, moved in arreſt of judgment and the *Poſtea* ſtay ſur ceo. Rol. Arb. O. 4. Vid. acc. 2 Mod. 170.

(b) 23 Car. B. R. Lerwyn v. Hills on demurrer. Rol. Arb. O. 5. S. C. Al. 26. there called Gurman v. Hill.

(c) 5 Jac. Geſſe v. Brown. Rol. Arb. M. 1. Hob. 258. S. C. cited Mo. 885. pl. 1242.

meaning, and refer it only to controverſies at the time of the ſubmiſſion. *(a)*

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. *(b)*

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 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;" *(c)* 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 all 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 ar-

(a) Cro. El. 861. Goodman v. Fountain.
(b) Baſpole v. Freeman. Cro. Jac. 285.
(c) Vaſque v. Daniel. 25 Car. 2. 3 Keb. 253.

bitrators

bitrators 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. *(a)*

THE leading caſe on this ſubject is that of Vanlore and Tribb, as given in Rolle's Abridgment: *(b)* the ſubmiſſion was made on the firſt of May, of all controverſies 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. *(c)* 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

(a) Pickering v. Watſon. 2 Bl. Rep. 1117. M. 17. G. 3. C. B.

(b) Rol. Arb. N. 1. vid. Mawe v. Samuel. 2 Rol. Rep. 2, the ſame doctrine. Kynaſton v. Jones. Rol. Arb. N. 2.

(c) Adams v. Adams. 2 Mod. 169.

would have no remedy; for, if, on ſuch refuſal, the 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: *(a)* 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. *(b)* 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. *(c)*

Chief Juſtice Trevor, however, afterwards *(d)* 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

(a) See this diſtinction 3 Lev. 188, 344. 1 Show. 272.

(b) Marks v. Marriot. 1 Ld. Raym. 115, 116. M. 8. W. 3.

(c) Rees v. Phelps. M. 1. W. and M. 3 Mod. 264.

(d) M. 13 W. 3. Lee v. Elkins. Mod. 590. Lutw. 545.

up

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. *(a)*

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 they are intended. *(b)* 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. *(c)*

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 *(d)* 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

(a) Abrahat v. Brandon. 10 Mod. 201. Squire v. Grevill. 6 Mod. 33. 35. 2 Ld. Raym. 964, 5. Cooper v. Pierce. 1 Ld. Raym. 116. vid. 12 Mod. 116. Godb. 164, 5. 2 Keb. 431.
(b) Per Ld. Mansfield. 1 Bur. 277.
(c) 1 Atk. 504. (519)
(d) 12 Mod. 534.

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.

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. *(a)*

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 good, yet he ſhall be bound to perform the reſt. *(b)*

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. *(c)*

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. *(d)*

So, "that the defendant ſhall pay the plaintiff 150l. and find three ſureties for the payment of a *further* ſum," though void with reſpect to the ſureties he muſt pay the 150l. and be bound

(a) Vid. Rol. Arb. N. 6.

(b) Tomkins v. Webb. 2 Rol. Rep. 46.

(c) 18 Jac. Sayer v. Sayer. Rol. Arb. N. 5.

(d) 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.

himſelf

himſelf for the further ſum, if no objection can be taken to any other part of the award. *(e)*.

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. *(a)*

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. *(b)* 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. *(c)*

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." *(d)*

THE ſubmiſſion was by bond, conditioned to ſtand to an award of all controverſies and doubts, had, made, 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

(e) Id.

(a) M. 37. 38 El. Samon v. Pitt. Rol. Arb. N. 8.

(b) Keilw. 43. a. b. 45 b. 2 Keb. 290.

(c) Bretton v. Pratt. Cro. El. 758. pl. 27.

(d) Perryn v. Barry. Bridgeman 90, 91. Pinkney v. Bullock. 2 Keb. 759. 2 Lev. 3.

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. *(a)*

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 repay 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. *(b)*

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

(a) Jeanes v. Fourthe on a writ of error from C. B. and judgment affirmed in B. R. H. 10 Car. Rol. Arb. M. 6.

(b) Winch and Grave v. Saunders. Cro. Jac. 584.

after

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 to pay the 6l. when he could not have that in return which was intended by the arbitrator as a conſideration for it. *(a)*

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 the 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. *(b)*

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. *(c)*

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 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. *(d)*

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

(a) Yel. 98. Markham v. Jennings. Rol. Arb. K. 15. Brownl. 92.

(b) Rol. Arb. K. 13. 14. Cro. Jac. 577. 8. Al. 10. 10 Mod. 201.

(c) Barney v. Faierchilde. Rol. Arb. N. 9.

(d) 2 Saund. 293.

not,

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.—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. *(a)*

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. *(b)*—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

(a) Waters v. Bridges, adjudged on a writ of error. Cro. Jac. 639.

(b) Vanlore v. Tribb. Rol. Arb. N. 1. cites his own Reports.

of

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 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. *(a)* 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 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

(a) 1 Rol. Rep. 437. S. C. Bridgeman, 59.

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. *(a)* 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 though 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 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

(a) M. 24. Car. B. R. Kynaſton v. Jones. H. 15 Jac. Ley v. Payne. Hutt. 9. Mo. 885. pl. 1242.

their

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 tythes; 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." *(a)* But the only fair 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. *(b)*—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. *(c)* 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.

(a) Tr. 18 Jac. B. R. Ingram v. Webb. Rol. Arb. N. 4. 2 Rol. Rep. 162. Cro. Jac. 663, 664. Palm. 107.

(b) 10 Co. 131. b. 132. b. Rol. Arb. b. 22.

(c) 1 Leon. 170. Vid. 12 Mod. 587.

However,

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 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. *(a)*

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. *(b)*

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. *(c)*

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 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

(a) Rol. Arb. M. 4. K. 9.
(b) Held contra formerly. Stain v. Wild. Cro. Jac. 352, 353.
(c) Freem. 265.

was

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. *(a)*

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 ſuch a plea, the award was mutual without the releaſes, and no defect with reſpect to them ſhould vitiate it. *(b)*

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

(a) Kynaſton and Spencer v. Jones. Al. 87. Rol. Arb. N. 5.

(b) Marks v. Marriot. 1 Ld. Raym. 114, 5, 6.

the

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. *(a)*

BY an umpirage, it was ordered that all actions ſhould ceaſe. 2. That the defendant ſhould pay to the plaintiff 12l. 15l. 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 *(b)* 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

(a) Lee v. Elkin. 13 W. 3. C. B. Lutw. 545.
(b) Trevor, C. J. and Blencow, J.

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 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. *(a)*

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 particularly 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 alledged 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 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. *(b)*—Powell, J. ſays there is a diverſity to be obſerved; where an award conſiſts of ſeveral things, for

(a) Cockſon v. Ogle. 13 W. 3. Lutw. 550.
(b) 12 Mod. 588.

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 was good, the releaſe ought to be given. *(a)*—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

(a) Pinkney v. Hall. 1 Lev. 3. 23 Car. 2.

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. *(a)*

IF the ſubmiſſion be by bond, and the condition contain a proviſo that the award ſhould be made and ready to be delivered, either in writing or by word of mouth; a parol award is in this caſe alſo ſufficient. *(b)* And where the proviſo is merely that the award ſhall be made and delivered, it ſeems that it may be made without writing; *(c)* 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. *(d)*

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. *(e)* But if the arbitrator make his mark, that is ſufficient ſubſcription. *(f)*

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 alledge that he has it in court ſealed with the ſeal of the arbitrators, he muſt ſhew

(a) Cable v. Rogers. 3 Bulſtr. 312.

(b) Hanſon v. Liverſedge. 2 Vent. 240, 242.

(c) Rous v. Nun. 1 Sid. 155. vid. ante 74, 75 acc.

(d) Wilſon v. Conſtable. Lutw. 536.

(e) Thaire v. Thaire. Palm. 109, 112, 121.

(f) 3 Salk. 44.

that it was ſealed at the time of the delivery. *(a)*—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 to be delivered under their hands and ſeals, it will be ſufficient to ſatisfy the proviſo. *(b)*

It was formerly held that a proviſo "that the award ſhoud 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. *(c)* —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. (d)* 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. *(e)*

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 extended 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. *(f)*

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 the ſame, it is ſuf-

(a) Palm. 121. Jenkinſon v. Allenſon. 3 Keb. 513.

(b) Lambard v. Kingsford. Lutw. 558.

(c) Dict. per Hale in Elborough v. Yates. 3 Keb. 125. adj. in Hinton v. Cray. 3 Keb. 512.

(d) Burges v. Pleyer. Freem. 467.

(e) Barnes 56.

(f) 1 Keb. 790. 865.

ficient.

ficient. 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 alledge a delivery of letters teſtamentary, becauſe theſe are in effect the ſame thing. *(a)* 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, *(b)* 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.

WHERE the award orders a releaſe to a time beyond the ſubmiſſion, a releaſe to the time of the ſubmiſſion is ſufficient performance. *(c)*

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. *(d)*

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. *(e)*

(a) 17 Ed. 4. 3. cited 3 Bulſtr. 67.

(b) 21 Ed. 4. 38, et ſeq.

(c) Godb. 164, 5. 1 Sid. 365. 6 Mod. 34, 35. 12 Mod. 8, 117, 589. et vid. ante page 162—165.

(d) Jenk. 136. dict. contra of a retraxit.

(e) 3 Leon. 212.

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. *(a)* 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 without the preſence of the plaintiff or ſome one on his behalf to take livery. *(b)*

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. *(c)*

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

(a) 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.

(b) Roſſe v. Hodges. 1 Ld. Raym. 233, 234.

(c) 21 Ed. 4. 40—43. quære, for the report is very inaccurate.

him

him a 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 alledging the non-payment, in his plea. *(a)*

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. *(b)* 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 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. *(c)* 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

(a) Bilford v. Flint. 2 Bulſtr. 117. vid. 2 Keb. 163. 403. 3 Keb. 608. Sir T. Raym. 169.

(b) 36 H. 6. cited 3 Bulſtr. 67.

(c) Id.

two latter to make the default of C. in whoſe favour the award is made, excuſe B. *(a)*

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, *(b)* and ſo one might ſuppoſe if the award were to pay on the day, without the word, "before." *(c)*

If no day be limited for the payment of money awarded, it muſt be paid within a reaſonable time, and 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. *(d)* 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. *(e)*—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. *(f)*

A considerable number of years having elapſed ſince the making

(a) 22 Ed. 4. 27. Brooke Arb. pl. 41.

(b) Hinton v. Crane. 3 Keb. 675, 6.

(c) Si arbiter, me tibi *certâ die pecuniam dare* juſſerit, tu accipere noluiſti:—poſſe defendi, ipſo jure pœnam non committi. Sed ſi poſtea tu paratus ſis accipere: impune me non daturum; non enim ante feceram. Ff. l. 4. t. 8. ſ. 23. n. 3. ſ. 24.

(d) 21 Ed. 4. 38 et ſeq.

(e) Jenk. 136.

(f) Si dies adjectus non ſit, ineſt quoddam modicum tempus, 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,

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,

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 alia 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. f. 23.

but

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. *(a)*

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 not forfeited till ſome actual damage happen to the ſurety. *(b)*

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. *(c)*

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 per-

(a) Sweet v. Hole. Ca. Temp. Finch, 384.

(b) Freeman v. Sheene. 2 Bulſtr. 98. 1 Rol. Rep. 7, 8. Cro. Jac. 340. Brownl. 122.

(c) 1 Ld. Raym. 234.

ſon

ſon on the other, and conſequently the proſecution of a ſuit between ſuch parties is not a breach of the award. *(a)*

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. *(b)*

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 defendant of the ſum 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 knowledge of the plaintiff, to what the ſum amounted, and he could not compel the attorney to make the note. *(c)* 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

(a) Barnardiſton v. Fowlyer. 10 Mod. 204, 5.

(b) Gray v. Gray. Cro. Jac. 525.

(c) March. 109, 157.

the

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 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. *(a)*

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. *(b)*

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. *(c)*

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,

(a) Huys v. Wright. 1 Jac. Yelverton 35.

(b) Benl. 15. pl. 16. 27 Hen. 8. More. 3. pl. 8. there ſaid to be 28 Hen. 8.

(c) Str. 903. 1 Barnard. 463.

and

and the plaintiff muſt on non-payment be confined to his action on the note. *(a)*

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. *(b)*

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. *(c)* But with us the remedy is various, according to the various *forms* of the ſubmiſſion.

Though the ſubmiſſion be verbal, it has been ſeen, *(d)* 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 ſubmiſſion,

(a) Booth v. Garnett. Str. 1082.
(b) 2 Bulſtr. 96.
(c) Vid. p. 5. 6.
(d) P. 8.

then

then in an action on the case, proof must have been given of an actual promise. *(a)*

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. *(b)* 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. *(c)* 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: 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 im-

(a) Vid. Read v. Palmer. P. 24 Car. Al. 69, 70.

(b) 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 bond, but it does not appear whether either the submission or the award was verbal or in writing.

(c) Vid. Goodman v. Fountain. Cro. El. 861. Colston v. Harris. Id. 904.

port,

port, for the nomination may have been by ſome friend, to which the defendant might not have conſented. *(a)*

It is alſo ſaid, that it muſt appear for what cauſe the parties ſubmitted; *(b)* 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, 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. *(c)*

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. *(d)*—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. *(e)*

(a) Dilly v. Polhill. 2 Str. 923.

(b) Brooke Arb. pl. 34, cites 5 Ed. 4. 1. which ſeems a wrong citation.

(c) Adams v. Statham. 2 Lev. 235. 2 Show. 61.

(d) Birks v. Trippet. 1 Saund. 33. 2 Keb. 126.

(e) Semb. for in the caſe here cited the words "tho' requeſted" were inſerted.

In

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 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. *(a)*

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; *(b)* 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 alledging 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 then either rejoins that they made "no *ſuch* award," on which the plaintiff takes iſſue—or, he demurs, and the plaintiff joins in demurrer. *(c)*

Where by the condition of the bond, the award muſt be made before a certain day, the defendant, inſtead of pleading

(a) Jenk. 264. vid. Yelv. 35 a dictum which ſeems contra, with reſpect to the intirety of the damages.

(b) Vid. Str. 923. Freem. 410, 415.

(c) 5 Ed. 4. 108. Brooke pl. 33.

ſimply

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 alledge the award, which he ſets forth, to have been made before the day. *(a)*

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. *(b)*—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. *(c)*

TO this the defendant cannot rejoin, by ſaying that the arbitrators gave him no notice before the day, of 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, *(d)* it is a departure from his plea, by which he had denied the exiſtence of any award at all, before the day. *(e)*—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. *(f)* 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.—

(a) 31 H. 8. Brooke Arb. pl. 42.
(b) 1 Sid. 370.
(c) 1 Saund. 169. 2 Keb. 361, 388. 3 Bur. 1729, 1730.
(d) Vid. p. 67—73.
(e) Keilw. 175. a.
(f) Id. ibid.

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 alledge 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. *(a)*

If the plaintiff can contradict this plea, it is ſaid, that he muſt do it in direct terms, alledging expreſsly 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, *(b)* to alledge 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, *(c)* 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

(a) Bendl. 39. Benl. 108. 2 Keb. 402.
(b) Dyer 243. b.
(c) Cro. Jac. 285.

this

this cauſe, but as he had replied, the objection was not now open to him. *(a)*

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 alledging it to have been made *ore tenus*; it muſt alſo be ſaid to have been made before two witneſſes. *(b)*

So, formerly if the proviſo had been that the award ſhould be by deed indented, the plaintiff muſt have alledged it to have been ſo; otherwiſe it was thought, it would not have appeared that the arbitrators had purſued their authority. *(c)*

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. *(d)*—But, when the proviſo requires that the award ſhall be *ready* to be delivered, it is not neceſſary to alledge that it was *ready*; it is ſufficient to ſay that it was made; the allegation of the latter implies the former. *(e)*

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 a particular place was appointed, where the parties were to expect it, and not elſewhere. *(f)* 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

(a) Bedam v. Clerkſon. 1 Ld. Raym. 123, 124.

(b) Wilſon v. Conſtable. Lutw. 536.

(c) 2 Keb. 156. but ſee page 180.

(d) 1 Bulſtr. Scot v. Scot. Traire v. Traire. 2 Rol. Rep. 243. Sallows v. Girling. Cro. Jac. 278. 2 Mod. 77, 78.

(e) 1 Keb. 739. 1 Lev. 133. 6 Mod. 82. 2 Ld. Raym. 989.

(f) 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.

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. *(a)*

It is not neceſſary to ſtate the date of the award; if it be alledged 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. *(b)*

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; *(c)* however, it is allowed to be ſufficient, if the place appear by way of recital. *(d)*

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 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. *(e)* 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; *(f)* though another *(g)* took a diſtinction between the making of the award itſelf, and the manner of pleading it, ob-

(a) Elborough v. Yates. 2 Keb. 874. 3 Keb. 69, 125. But the judgment is reported contra in 2 Lev. 68.

(b) 6 Mod. 244. 2 Ld. Raym. 1076. Salk. 76, 498. 3 Bulſtr. 312.

(c) Vid. Cro. El. 758. 2 Vent. 72. et vid. 9 H. 6. 5. and Cro. El. 66.

(d) 2 Keb. 390.

(e) Lumley v. Hutton. 1 Rol. Rep. 271.

(f) Coke and Houghton.

(g) Dodderidge.

ſerving,

ſerving, 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 plantiff. *(a)*

But now there are only two caſes in which the plantiff muſt even ſuggeſt performance on his part: the firſt is where the part awarded to be done by him is void, and cannot be enforced by the law, and unleſs he avers performance, the defendant may object to the whole award for want of mutuality. *(b)* The ſecond 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 muſt ſhew that he has done every thing neceſſary to intitle him to call on the oppoſite party. But tender by the plaintiff, and refuſal by the defendant, will be ſufficient, unleſs the thing to be done by the plaintiff can be done without the concurrence of the other.

Thus, where the ſubmiſſion was concerning certain lands, and the arbitrators awarded that the plaintiff ſhould, on the ſecond of March then next following, pay to the defendant 7l. 10s. for every acre of the land, to be meaſured by an able meaſurer in the preſence of the arbitrators and umpire, or ſome or two of them, after the rate of ſeven yards to the pole; on payment of which, the defendant, his heirs or aſſigns, ſhould paſs, convey, or ſurrender to the plaintiff or his heirs, or ſuch as he ſhould appoint, all the ſaid lands, with warranty againſt the defendant and his heirs, and all claiming under him; or in default of ſuch payment, the plaintiff and his heirs ſhould ſeal and deliver a releaſe of all his claim to the ſaid lands, and every part of them, and a general releaſe of all actions, ſuits, and demands: the plaintiff having

(a) Vid. Brooke 45. pl. 22. verſ. finem and the year books paſſim.
(b) Vid. ante p. 168 et ſeq.

ſtated this award, averred 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. *(a)*

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. *(b)* But in an action on the bond, the award muſt have appeared 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. *(c)* 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.

(a) Hunter v. Benniſon. Hardres. 43, 44.

(b) Smith v. Kirfoot. 1 Leon. 72. Leake v. Butler. Litt. 312, 313, cited 1 Bur. 281. vid. 1 Rol. Rep. 437.

(c) Vid. Litt. 312, 313. 1 Mod. 36. Comyns. Tit. Arbitrament. I. 2. I. 5.

IF

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. *(a)*

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. *(b)* 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. *(b)*

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,

(a) Foreland v. Marygold. 1 Salk. 72. S. C. Foreland v. Hornigold. 2 Ld. Raym. 715. Perry v. Nicholſon. 1 Bur. 278.

(b) Per Ld. Mansfield. 1 Bur. 280. and in Litt. 312, 313.

(b) —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 dicet 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.

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 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. *(a)*

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 alledged 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, alledged 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. *(b)*

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 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. *(c)*

After ſtating the award, the plaintiff muſt aſſign a breach by

(a) Keind v. Carter. 2 Keb. 73. 1 Sid. 290. Vid. 2 Str. 923.
(b) Hanſon v. Liverſedge. 2 Vent. 242. Vid. the pleadings in that caſe.
(c) Hinton v. Crane. 3 Keb. 675.

the

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. *(a)* 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. *(b)*

If after ſetting for 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 not enter into the bond," but "that the defendant himſelf did not enter into it." *(c)*

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. *(d)* 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. *(e)* 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

(a) Wynche. 121. Yelv. 24, 78.
(b) Barret v. Fletcher. Yelv. 153.
(c) Godb. 165. 3 Bulſtr. 313. 2 Keb. 601. 1 Ld. Raym. 114, 123, 234. 2 Mod. 309. 12 Mod. 585.
(d) 12 Mod. 585, 6.
(e) Bridg. 91.

unpaid.

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. *(a)* 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 assigned by alledging 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. *(b)*

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." *(c)*

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 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

(a) 2 Vent. 221. 3 Lev. 293.
(b) Lutw. 545. 12 Mod. 586.
(c) Fitzgib. 54, 55. 1 Barnard. K. B. 151.

on

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. *(a)*

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 cauſe 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. *(b)*

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 alledged: therefore, where the plaintiff, in his replication, alledged 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 ſubmitted 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. *(c)* 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.

(a) Strong. v. Saunders. Lutw. 389.

(b) Waters v. Bridges. Cro. Jac. 640. vid. Rodham v. Stroher. 3 Keb. 830.

(c) Freeman v. Sheene. 1 Rol. Rep. 8. Cro. Jac. 339. Brownl. 122. 2 Bulſtr. 93.

If

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. *(a)*

Where the award is in the alternative that the defendant ſhall do one thing or another; in aſſigning the breach upon this, the plaintiff muſt ſay that he has neither done the one nor the other, becauſe if he has done either, he has obeyed the award. *(b)*

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. *(c)*—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. *(d)*

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. *(e)* It appears, therefore, that judgment againſt the plaintiff, in one form of action, ariſing from miſtake in the pleadings, is no bar to another.

(a) Anon. 1 Vent. 87.

(b) Semb. contra. Sav. 120, where one of the things is void.

(c) 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.

(d) Fox v. Smith. 2 Wilſ. 267, 9. vid. Addiſon v. Gray. S. P. Id. 293.

(e) Freem. 410, 415.

If the defendant, inſtead of pleading the uſual plea, "that the arbitrators made no award," plead ſome 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 of the plea, he may admit the truth of it by demurring, and put the whole of the cauſe on its validity. *(a)*

The ſtatute of limitations *(b)* 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 kind, and the diciſions given on theſe words alſo favour this courſe of argument.—The ſtatute ſays, it ſhall extend to all actions of debt for arrearages of rent; but on theſe words, it has been determined, that it was only an action of debt for arrearages of rent on a parol leaſe which could be barred by the length of time, and that they did not extend to rent reſerved on a leaſe under hand and ſeal.—On theſe grounds the whole court, except Keeling, C. J. held that an action of debt on an award, though not a ſpecialty, was not barred by the ſtatute; the

(a) Yelv. 25. 79. Cro. Jac. 300. *(b)* 21 Jac. c. 16. ſ. 3.

words

words not being, "all actions of debt without ſpecialty generally," but, "all actions of debt without ſpecialty, which are grounded on any lending or contract;" this action was clearly not grounded on lending; neither could it with propriety be ſaid to be grounded on ſuch contract as was intended by the ſtatute; 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 ſtatute meant to extend to ſuch contracts, the words "founded on lending or contract" would have been ſuperfluous and uſeleſs; and it clearly appeared what kind of contracts were meant, by coupling the word contract with lending; and if the more extenſive conſtruction of the act were adopted, it would extend to all actions of debt without ſpecialty whatever. *(a)*

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 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. *(b)* He muſt not rejoin that the award is void, becauſe that is a departure from his plea. *(c)* Nor can he alledge payment or performance of the thing, in which the breach was aſſigned, for that will alſo be a departure. *(d)* 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. *(e)* 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. *(f)*

So, if the ſubmiſſion be general of all matters in controverſy between the parties, with a proviſo that the award be made of the

(a) Hodſden v. Harridge. 2 Saund. 64. S. C. very inaccurately reported. 2 Keb. 464, 497, 533, 536.

(b) Jenk. 116.

(c) 1 Keb. 414. pl. 12. 678. pl. 72. 2 Keb. 156.

(d) Comyns Dig. Arbit. I. 6. Pleader, F. 7.

(e) 1 Keb. 434. contra. Freem. 266.

(f) Hil. 1791. B. R.

premiſes;

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. *(a)*

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 alledging performance.—Then the plaintiff demurs, and the queſtion comes before the court on the validity of the award itſelf. *(b)*

If the defendant has performed the award, he may after ſetting it forth in his plea alledge performance. But it is ſaid, that he cannot plead ſimply that he has performed, but muſt ſhew in what manner. *(c)* 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. *(d)*—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. *(e)*

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. *(f)*

An averment of tender and refuſal, is ſufficient, but the better

(a) Middleton v. Weeks. Cro. Jac. 200. vid. Farrer v. Gate. Palm. 511.

(b) Vid. Riſden v. Inglet. Cro. El. 838.

(c) 28 H. 8. Mo. 3 pl. 9. Bamfield v. Bamfield. 2 Keb. 238.

(d) 26 H. 6. 27 H. 6. 1. Fhbt. 51. a.

(e) Freeman v. Sheene. 1 Rol. Rep. 7, 8. Cro. Jac. 339. 2 Bulſtr. 93. vid. 36 H. 6. 8. 39 H. 6. 11. b.

(f) 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. 62.

opinion ſeems to be that it muſt be accompanied with an averment that he is ſtill ready to perform. *(a)*

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. *(b)*

IF the defendant ſet forth the award and alledge 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 ſhould give mutual releaſes;' then he alledged 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. *(c)*

(a) 22 H. 6. 39. b. vid. Morgan's precedents, 525.

(b) M. 5 E. 4. 7. a. Fhbt. 52. a Brooke. Arb. 36. Rol. Arb. Z. 6.

(c) Roſſe v. Hodges, 1 Ld. Raym. 234.

IT

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, acknowledged 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, 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. *(a)* 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 offered iſſue on the non-performance. The defendant demurred, becauſe the plaintiff had

(a) Veal v Warner. 2 Keb. 568. 1 Saund. 326.

concluded to the country, having alledged 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 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. *(a)*

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 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

(a) Seal v. Crowe. 3 Lev. 165.

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 alledged.—On demurrer the caſe was argued ſeveral times; the principal objection made by the defendant's counſel was that no ſufficient breach was alledged 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. *(a)*

In ſuch a caſe as this, if the plaintiff demand oyer of the award, and have it ſet forth at full length, 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 then 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. *(b)*

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

(a) Strike v. Benſley. Lutw. 525.
(b) Elliot v. Cheval. Lutw. 451.

ance of that, " without this that they awarded only as the defendant had ſet forth :" he will be ſecure againſt any objection to the 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 alledged : it was objected on the part of the defendant, that this replication was not good, becauſe it traverſed that which was not alledged by the plea, and it was a rule that nothing ſhould be traverſed but what was expreſsly alledged. The plea had not alledged 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. *(a)*

In ſuch a caſe, the defendant cannot rejoin, alledging 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 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

(a) Linſey v. Aſhton. Godb. 255. 1 Rol. Rep. 6.

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. *(a)*

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. *(b)*

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 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. *(c)*

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

(a) 8 Co. 81.

(b) Baldway v. Ouſton. 1 Vent. 71. 2 Keb. 624.

(c) Brown v. Goodman. 3 Term. Rep. 592. n.

award,

award, under theſe references; that it was a novel practice, thus to impriſon the body of 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. *(a)*

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. *(b)*

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. *(c)*

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. *(d)*

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;

(a) 1 Keb. 130, 138, 559. 1 Sid. 452, 3130. Sir T. Raym. 35, 152. 2 Keb. 22, 645.

(b) 2 Keb. 22. 3 Keb. 844.

(c) 1 Keb. 634.

(d) Hide v. Pettit. 22 Car. 2. 1 Ca. Ch.

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. *(a)*

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 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. *(b)*

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. *(c)*

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; *(d)* 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. *(e)*

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

(a) 3 Keb. 164, 446. Comb. 303.
(b) 1 Crompton's Practice, 264.
(c) 2 Bl. Rep. 990, 991.
(d) 1 Salk. 84.
(e) Barnes, 58.

grant

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 to have the "ſubmiſſion" made a rule of court. *(a)* 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. *(b)*

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. *(c)*

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; *(d)* but if he die in execution on a judgment, the plaintiff may ſtill have an execution on his goods. *(e)* But, if the defendant be taken in execution on the judgment, the attachment will be diſcharged. *(f)* And if 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 foreclоſure, 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,

(a) Vid. Harriſon v. Grundy. 2 Str. 1178. Anon. 2 Barnard. B. R. 163.

(b) Salk. 71.

(c) 1 Salk 73. 10 Mod. 333.

(d) Determined by the Judges in Webſter v. Biſhop. Prec. in Ch. 223. 2 Vern. 444.

(e) Paterſon v. Groſs. 2 Barnard. B. R. 227.

(f) Vid. Richardſon v. Chancey. 1 Barnard. 386. cited B. R. H. 107.

and

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. *(a)*

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. *(b)* And the ſubmiſſion muſt be made by the parties on the record: therefore, an attachment 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. *(c)*

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. *(d)*

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

(a) Stock and Huggins v. De Smith. B. R. H. 106.

(b) Owen v. Hurd. 2 Term Rep. 643, 4.

(c) Owen v. Hurd. 2 Term Rep. 643.

(d) Bevan v. Bevan. 3 Term Rep. 601.

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the award. The court therefore refuſed an attachment, on account of the contrariety of evidence, and left the plaintiff to his remedy by action. *(a)*

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. *(b)*

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. *(c)*

WHEN the award is for the payment of money, the only remedies to enforce performance are thoſe which have hitherto been conſidered. *(d)*—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. *(e)*

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 the defendant, *(f)* 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,

(a) Sir Thomas Hales v. Taylor. 1 Str. 695.

(b) Vid. B. R. H. 106, and 1 Bur. 278.

(c) 1 Term Rep. 266. denies 1 Atk. 58. to be law.

(d) 3 P. Wm. 189, 190.

(e) 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.

(f) Poole v. Pipe. 18 Car. 2. pr. Hyde Chancellor. 3 Rep. in Chan. 20.

with

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 the 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 defendants demurrer as to this part of the bill. *(a)*

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. *(b)*

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 de-

(a) Biſhop v. Biſhop. 1 Rep. in Chanc.

(b) Norton v. Manſell, 2 Vern. 24. S. C. 2 Rep. in Chan. 304.

fendant

fendant 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 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. *(a)*

THOUGH

(a) Hall v. Hardy. 3 P. Wm. 187.

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, fought 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 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. *(a)*

ON the ſame principle the court refuſed to reverſe a decree on a bill

(a) Scot v. Wray. 1 Rep. in Chan. 46.

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. *(a)*

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.

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

(a) Id. Goddard v. Goddard. 15 Car.

charge 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

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. *(a)*

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. *(b)*

(a) Suſan Ewes and Wm. Reeve v. Ed. and Wm. Blackwall. Rep. temp. Finch, 22.

(b) Biſhop v. Biſhop. 15 Car. 1 Rep. in Ch.

CHAP. VII.

THE MEANS OF PROCURING RELIEF 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.

BUT when the ſubmiſſion is of the former kind, 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 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. *(a)*

IN this reſpect the Roman law is ſomewhat different from ours; for though it provides no direct method, by which the

(a) Vid. 1 Saund. 327. 2 Veſey, 315. Wills v. Maccarmick, C. B. 2 Wilſ. 149.

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. *(a)*

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. *(b)*

But, except for corruption or improper conduct in the arbitrators, a court of equity will never ſet aſide an award, where the ſubmiſſion is voluntary. *(c)*

In a bill filed to have an award ſet aſide, it was alledged 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 de-

(a) 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. ſ. 32. n. 14.

(b) 2 Veſey, 315. 2 Wilſ. 149.

(c) 1 Ca. Ch. 276. 3 Atk. 529. (496.)

liver 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 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. *(a)*

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.

THE defendant inſiſted that the umpirage ought not to be ſet aſide without fraud or partiality proved; that the time when the

(a) Waller v. King. 2 pt. Ca. in Law and Eq. 63, 64. Vid. Geenhill v. Church. 3 Rep. in Ch. 49, to the ſame point.

umpire

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. *(a)* In another report of the ſame caſe, *(b)* 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 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; *(c)* the arbitrators 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. *(d)*

(a) Brown v. Brown. 1 Ca. Ch. 140.
(b) 1 Vern. 157.
(c) Ca. Temp. Finch, 141.
(d) 2 Atk. 396, (412.)

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. *(a)*

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 bring his bill againſt the party, in whoſe favour the award is made, to have it rectified. *(b)*

WHERE the ſubmiſſion is by rule of a court of law, whether in conſequence of a reference at *niſi prius*, or according to the ſtatute of William, a court of equity will not entertain a bill to ſet aſide an award for corruption and partiality, unleſs the court of law has refuſed that relief, or in the caſe of the ſubmiſſion according to the ſtatute, the time for complaining in the court of which the ſubmiſſion has been made a rule, is elapſed. *(c)*

WHERE 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 it was made obtained a rule to ſhew cauſe, why the award ſhould not

(a) Id. 396, 397, (412, 413.)
(b) 3 Atk. 644. (609.)
(c) 2 Atk. 155, (162.) Vid. Bunb. 265. 1 Barnard. 152.

be

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 was ſtill equally divided, and no attachment was, of courſe, 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, *(a)* 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 one ſide to his action, it left the other to ſeek relief by a bill in equity. *(b)*

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

(a) 21ſt April, 1719.

(b) Ward v. Periam, cited 2 Atk. 155, (162,) 396, (412.) 2 Veſey, 316, 317.

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 by no means to be 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, 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 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, *(a)* 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, *(b)* 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

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(a) 1 Barnard. K. B. 75, 152. *(b)* Bunb. 265.

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 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 *(a)* 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 *(b)* 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 afterwards made rules of thoſe courts, had equally the advantage of that ſpeedy remedy, which

(a) Bunb. *(b)* Barnard.

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. *(a)*

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, *(b)* 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

(a) Alardice v. Cambel in the Exchequer. 1 Barnard. 75, 152. Bunb. 265.
(b) Powell, Powys and Gould,

application

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 *(a)* report of the caſe ſays, great miſconduct appeared; but another *(b)* 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. *(c)*

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; *(d)* but it is not neceſſary, as ſuggeſted in one book, *(e)* 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. *(f)*

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 *(g)* that nothing is a ground within that ſtatute for ſetting aſide an award but the miſconduct of the arbitrators: 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

(a) Morris v. Sir Richard Reynolds. 2 Ld. Raym. 857.

(b) S. C. 1 Salk. 73.

(c) Vid. 2 Atk. 155, (162.) and a Dictum of Lord Macclesfield's. 1 Barnard. 461. Str. 301. 2 Bur. 701.

(d) 1 Str. 301. 2 Veſ. 317. 2 Str. 1178.

(e) 3 P. W. 362.

(f) Vid. 1 Barnard. 153.

(g) 1 Str. 301.

law

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; *(a)* 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. *(b)*

WHERE the ſubmiſſion is by conſent under an order of a court of equity in a cauſe depending there, exceptions may be made to the award, as to a maſter's report. And when the party complaining of the award alledges that the arbitrators had not conſidered certain particulars, which were in iſſue in the cauſe, the court will order the arbitrators to certify whether they had conſidered them, and examine into the merits of the award; and if it be found unjuſt, performance will not be decreed, even though it be expreſſed in the order of reference, that the award to be made ſhall be final, and confirmed by a decree of the court without exception or appeal. *(c)*

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; and when the complaint is made out, it is generally ſucceſsful. 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. *(d)*

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. *(e)*

WHERE an umpire was choſen by the arbitrators by throwing croſs and pyle, this was thought ſufficient reaſon to ſet aſide the umpirage. *(f)*

So, where the ſervant of the perſon choſen umpire had, before the award made, given out that he was ſure his maſter would

(a) Vid. 2 Bur. 701.
(b) Barnes, 57. Id. 55 contra.
(c) 1 Ch. Ca. 186. 1 Vern. 469, 470; 2 Vern. 109. 1 Brown, 398.
(d) 2 Vern. 515.
(e) Id. ibid.
(f) Id. 485.

award

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. *(a)*

So, where the arbitrators promiſed to hear witneſſes, but afterwards made their award without hearing any. *(b)* 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. *(c)*

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 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 re-

(a) Id. 101. *(b)* Id. 251. *(c)* Id. ibid.

jecting

jecting ſo many ſtated accounts ſo recently allowed and paſſed between both the ſubmitting parties, the court ſet aſide the award with coſts. *(a)* 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. *(b)*

Lord Hardwicke approved of this decree, and on the authority of it made a ſimilar one in the caſe 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 convince 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 was a partial reſult; his Lordſhip therefore ordered that G. and M. ſhould be examined on interrogatories before the maſter, Vine having been examined before; and if it ſhould come out that G. did make that declaration, he would follow the precedent, and make him pay coſts. *(c)*

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

(a) 3 P. W. 362. Spettigue v. Carpenter.

(b) 2 Veſ. 317.

(c) 2 Veſ. 216—218.

if

if it ſhould be ſuffered, it would be hard to diſtinguiſh what was corruption. *(a)*

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. *(b)*

If it appear that the arbitrators went on a plain miſtake, either as to the law, or in a point of fact, that is an error appearing on the face of the award, and ſufficient to ſet it aſide. *(c)*

If indeed they 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. *(d)*

It is reported to have been ſaid by Lord Hardwicke, that the arbitrators are not bound to give notice of the time when, and the particular place where they intend to meet, and that an objection of that kind is not material. *(e)* It is very difficult, however, to approve of the juſtice of his Lordſhip's obſervation.

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 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. *(f)*

Where any circumſtance is ſuppreſſed by either of the parties, or concealed from one of the arbitrators, and if the arbitra-

(a) B. R. H. 54. 2 Barnard. 463.

(b) Vid. 1 Barnard. 430.

(c) Corneforth v. Green. 2 Vern. 705, cited 3 Atk. 494, (462.)

(d) Dict. per Lord Hardwicke. 3 Atk. 495, (462.)

(e) 3 Atk. 497, (530.)

(f) 2 Vern. 251.

tor 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 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. *(a)*

On a ſubmiſſion at *niſi prius* of all matters in difference between the parties, the arbitrator, on ſettling all articles of account, found one or 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 granted a rule to ſhew cauſe: but the event I have not heard. *(b)*

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. *(c)*

Where

(a) 1 Atk. 77, (64.)

(b) M. 1790. B. R.

(c) 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

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. *(a)*

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 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 is inequitable, becauſe the infant may die, or if he live to full age, may refuſe to convey. *(b)*

ON a bill filed merely to ſet aſide an award, the court will not permit the plaintiff to diſcuſs any legal objections to the award itſelf, becauſe advantage may be taken of theſe at law; but will reſtrict him to thoſe for partiality and corruption: where the bill is for an account as well as to ſet aſide the award, the plaintiff, in order to let in ſuch account, may make legal objections. *(c)*

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 dola actio, vel exceptio locum habebit. Hoc autem compromiſſum plenum eſt, quod et doli clauſulæ habet mentionem.—Ff. l. 4. t. 8. ſ. 31.

(a) 2 Term. Rep. 781.

(b) 1 Ca. Ch. 279, 280.

(c) Champion v. Wenham. Ambler, 245.

CHAP. VIII.

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, *(a)* 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. *(b)* The wisdom of his Lordship's observation is, however, very questionable; as the defendant has a much less expensive, and 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, *(c)* 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 alledged, a void award may frequently be a good bar. An award,

(a) Reg. Br. Orig. 111. a.
(b) 3 Bulstr. 68, (66.)
(c) Cap. 3. page 30—40.

however,

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. *(a)*

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. *(b)*

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. *(c)* Both this and the caſe immediately preceding, however, ſeem altogether irreconcileable with good ſenſe. What reaſon can be given, why an award ſhould be

(a) Pope v. Brett. 2 Saund. 292. 2 Keb. 736. vid. 1 Keb. 754. Dudley v. Cole.

(b) Freeman v. Bernard. 1 Ld. Raym. 248. 12 Mod. 130. Comb. 440. 1 Salk. 69.

(c) Lutw. 56, 57.

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 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 ubmiſſion 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. *(a)*

To an "indebitatus aſſumpſit," and "quantum meruit" for work done, and goods ſold and delivered, the defendant pleaded an award, by which, it was ordered that the plaintiff, for 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; among other exceptions to this award as a plea, one was that, nothing being awarded for the goods ſold and

(a) Farrer v. Bates. Al. 5.

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. *(a)*

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. *(b)*

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; 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 *(c)* pronounced judgment in favour of the plaintiffs, but without ſtating his reaſons; but the reporter *(d)* has thought proper to give us his own argument in

(a) Clapcott v. Davy. 1 Ld. Raym. 612.
(b) Sem. Ld. Raym. ibid.
(c) Treby.
(d) Lutwyche.

favour of the plaintiffs. It was acknowledged, 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 any foundation for what was alledged 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. *(a)*

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

(a) Dighton et al. v. Whiting. Lutw. 51.

which he had accordingly done; and this was held to be a good bar to the action. *(a)*

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. *(b)*

To an action brought after the ſubmiſſion, and before the

(a) 7 H. 4. 31. b. Brooke, 44. b. pl. 48. Rol. Arb. 2 B. 1.

(b) Thomlinſon v. Arriſkin. Comyns, 328.

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. *(a)*

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. *(b)*

In pleading an award, the defendant, it is ſaid, muſt ſhew the place where the ſubmiſſion was made, and 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; *(c)* nor at what time the award was made. *(d)* 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 alledge the ſubmiſſion generally. *(e)* 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 alledging per-

(a) 13 R. 2.
(b) 20 H. 6. 41. Fhbt. 51. b.
(c) 8 H. 6. 25. b. 9 H. 6. 5. Brooke, 44. a.
(d) Per Brigges, 21 E. 4. 41. b. ad quod non fuit reſponſum.
(e) Br. 34. cites 5 E. 4. 1.

formance

formance 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; *(a)* 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. *(b)*

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 alledge a default on the plaintiff's part, and to ſay that on performance by him, he was ready to perform his part. *(c)*

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. *(d)*

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 alledge at leaſt that he always had been, and ſtill was ready to pay; and

(a) 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. Fitzh. 52. b. Br. 45. a. Rol. Arb X. 3. 6.

(b) 6 Mod. 221.

(c) 20 H. 6. 18. 19. Br. 44. a. 36 H. 6. 15. Brooke Arb. pl. 28.

(d) 9 E. 4. 44. Vid. 1 Ld. Raym. 248.

there

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. *(a)*

WHERE the award was for the payment of money at a certain day; in pleading this award, it was ſufficient to alledge that the day was not come. *(b)* 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. *(c)*

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 alledge performance of the thing awarded, unleſs where the award is void, and conſequently the plaintiff could not enforce it. *(d)*

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 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

(a) Vid. the places before cited.

(b) 22 H. 6. 52. b. 5 E. 4. 7. Rol. Arb. Z. 3. 46 E. 3. 17. b. Rol. Arb. X. 5.

(c) 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.

(d) Vid. 1 Ld. Raym. 122.

oppreſſion.

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.

INDEX.

INDEX.

FINIS.

ERRATA.

In pa. 6, note *(c)*, ſecond column, l. ſecond, *for* ſtari, *read* ſtare.
14, note *(a)*, *for* Compton, *read* Crompton.
18, at the bottom, *after* plaintiff, *ſupply (e)*.
19, note *(a)*, firſt column, laſt l. *for* ſtari, *read* ſtare.
20, l. 6, *after* hindered them, *ſupply* from.
38, note *(a)*, laſt l. firſt column, *for* parti, *read* parte.
41, note *(d)*, l. fourth, *for* opitimæ, *read* optimæ.
48, l. 26, *for* on before, *read* on or before.
49, l. 27, *for* the opinion, *read* this opinion.
51, l. 2, *for* firſt, *read* laſt.
59, l. 20, *for* reference, *read* referee.
62, l. 7, *for* owing, *read* owen.
67, note, ſecond column, l. firſt, *for* ſtari, *read* ſtare.
——— l. eighth, *for* ſummum, *read* ſummam.
74, note *(b)*, *for* delt, *read* debt.
76, note *(b)*, firſt column, l. four, *for* ſentiſſe, *read* ſenſiſſe.
82, l. 8, *for* ſaid, *read* ſide.
95, l. 8, *for* "demand," *read* "demands."
119, l. 5, *for* may, *read* many.
148, l. 26, *for* of the caſe, *read* of that.
151, l. 9, *between* free *and* ſuits, *ſupply* from.
—— note *(c)*, *after* Harris, *ſupply* Cro. El. 904.
160, l. 2, *after* recited, *ſupply* it.
203, l. 15, *for* cauſe, *read* caſe.
214, l. 25, *for* uot, *read* not.
226, l. 6, *dele* mere.
238, l. 11, *after* caſe, *ſupply* of.

*** There are ſeveral inaccuracies in the punctuation, which the candid reader will obſerve and excuſe.

No. 4, *Hare-Court*, *Temple*,
April 20, 1791.