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ARBITRATION UNDER THE NEW PENNSYLVANIA ARBITRATION STATUTE*

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As indicated in detail in the main text of this article the new *Pennsylvania Arbitration Statute* is a companion statute with the following recently enacted arbitration acts: The United States Arbitration Statute (1926), and the statutes of New York (1920), New Jersey (1923), Massachusetts (1925) and Territory of Hawaii (1925). The California Act of 1927 likewise falls into this group. The Oregon Act of 1925 is similar. A bill is now pending in the legislature of Rhode Island to provide the same type of statute in that state. This group of statutes is similar to the *English Arbitration Statute of 1889*. A different type of arbitration statute has been recently enacted in Nevada (1925), Utah (1927), North Carolina (1927) and Wyoming (1927). These states have adopted the *Uniform Arbitration Act* submitted by the Commissioners on Uniform Laws. The important departure in this second group of statutes is that

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*Act of April 25, 1927, P. L. 381.

the statute deals only with agreements to arbitrate *existing* controversies. Common law rules of revocability and enforceability are left unchanged as concerns future-disputes agreements.

Constitutionality of the Statute

Apprehension that some part of the statute may be held unconstitutional is indicated by the provision in section 19 that "if any part of this act shall be declared to be invalid or unconstitutional, the remaining parts hereof shall remain the valid act of the Legislature." It is inferred that this apprehension arises, in part at least, because section 1 excepts from the statute future-disputes agreements in contracts for "personal services." Presumably this doubt was prompted by generalizations upon the majority opinion of the United States Supreme Court in the case of *Truax v. Corrigan*,[1] to the effect that legislative discrimination in legal remedies predicated upon the relationship of employer-employee is a prohibited denial of the equal protection of the laws under the 14th Amendment,[2] and by the generalization that arbitration contracts and statutes have been classified by the courts as a matter of remedy as distinguished from matters of substantive law.

As a matter merely of syllogism, the apprehension seems unwarranted. The "matter of remedy" involved in the *Truax* case was injunctional relief by a court in a case, which, in the opinion of the majority of the court, involved an "admitted tort," [3] whereas the "matter of remedy" category into which

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[1] 257 U. S. 312, 42 Sup. Ct. 124 (1921).

[2] The statute prohibited the courts of Arizona from issuing restraining orders and injunctions "in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving or growing out of a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property . . ."

[3] The majority of the court used this term to express their conclusion that on the facts of the case the conduct of the defendant was so tortious and unlawful that if the statute denied injunctional relief to the plaintiff employer in such case, as had been ruled in the case below by the Supreme Court of Arizona, the statute denied plaintiff equal protection of the laws contrary to the 14th amendment. Had the majority viewed defendants' behavior with more indulgence it certainly is not clear that they would have declared the statute unconstitutional merely because it denied the remedy of injunction as it did.

arbitration contracts and statutes have been classified on occasion has had a different idea-content to date.[4] The presence of the logical fallacy of "ambiguous middle" is therefore obvious.[5]

On analysing the facts and the function of the Arizona labor statute involved in the *Truax* case in comparison with the function of the arbitration statute in question, the following distinctions are readily observed: (1) that the exception in the arbitration statute was not enacted to give legislative protection against injunctions to one of the parties to the employer-employee bargaining process; (2) that the exception in question does not legalize any tort; (3) that parties to personal service contracts are apparently left free to make arbitration agreements and to conduct arbitrations thereunder according to common law rules and statutes which are not repealed because of "inconsistency" with the new statute; (4) that quite probably the controlling reason for providing the exception in the new statute was that at least some groups of employers and of employees asked for it because of some general notion that their controversies can be settled as well, if not better, by other methods.

Doubt concerning the constitutionality of the statute with the exception in question may also have arisen in connection with Article III, Section 7, of the Constitution of Pennsylvania which provides as follows: "The General Assembly shall not pass any local or special law: . . . Regulating the practice or jurisdiction of, . . . or changing the rules of evidence in, any judicial proceeding of inquiry before courts . . . arbitrators . . . ," etc. Does the exception of future disputes clauses in contracts for personal services render the new statute a "special" law? No

[4] See Matter of Berkovitz v. Arbib and Houlberg, 230 N. Y. 261, 130 N. E. 288 (1921); Red Cross Line v. Atlantic Fruit Co., 264 U. S. 109 (1924); Atlantic Fruit Co. v. Red Cross Line, 276 Fed. 319 (S. D. N. Y. 1921); *In re* Red Cross Line, 277 Fed. 853 (S. D. N. Y. 1921); Atlantic Fruit Co. v. Red Cross Line, 5 F. (2d) 218 (C. C. A. 2d, 1924); Lappe v. Wilcox, 14 F. (2d) 861 (N. D. N. Y. 1926).

[5] Clearly it is not a universal principle of constitutional law with the Supreme Court that an employer-employee relationship is not reasonable basis for any discriminatory legislation. See opinion by Holmes, *J., dissenting,* in Truax v. Corrigan, *supra* note 1; N. Y. Central R. R. Co. v. White, 243 U. S. 188 (1917); International Harvester Company v. Missouri, 234 U. S. 199 (1914). *Cf.* Wolff Packing Co. v. Court of Industrial Relations of the State of Kansas, 262 U. S. 522 (1923); Michaelson v. United States, 266 U. S. 42 (1924).

cases arising under this provision have been discovered which are deemed closely analogous to the question at hand. The supreme court has declared many times, however, in a variety of cases involving this provision that "classification" of persons is not precluded and that the court will review the propriety of all classifications. It remains for the supreme court to point out the unreasonableness of the present classification for the purposes of the instant legislation.[6]

Aside from the foregoing questions, there appears to be little cause [7] to doubt the constitutionality of the act.[8] The points of constitutional law passed upon by the New York Court of Appeals in the noted case of *Matter of Berkovitz v. Arbib & Houlberg* [9] are pertinent because of the similarity of the New York Arbitration Law. The New York Law was attacked as unconstitutional for the following reasons:

(1) That it violated Article 1, Section 10 of the Constitution of the United States because it impaired the obligation of a contract.

The court dismissed the argument with these words: "There is no merit in the contention. The obligation is strengthened, not impaired."

[6] The generalizations in the opinions of the following cases may be suggestive: Appeal of D. P. Ayars *et al.*, 122 Pa. 266, 16 Atl. 356 (1889); Bennett *et al.* v. Norton *et al.*, 171 Pa. 221, 32 Atl. 1112 (1895); Seabalt *et al.* v. Commissioners of Northumberland County, 187 Pa. 100, 41 Atl. 22 (1898); Commonwealth v. Gilligan, 195 Pa. 509, 46 Atl. 124 (1900); Commonwealth v. Grossman, 248 Pa. 11, 93 Atl. 781 (1915); Commonwealth v. Puder, 261 Pa. 20, 104 Atl. 505 (1918); Commonwealth v. Mecca Corporative Co., 60 Pa. Super. 314 (1915).

The same constitutional provision appears in the following states: Missouri, Art. IV, sec. 53; Oklahoma, Art. V, sec. 46; Texas, Art. III, sec. 56. See State v. Julow, 129 Mo. 163, 31 S. W. 781 (1895), which is deemed to be the only pertinent case in these states.

It should be noted that a special statutory system has already been provided in Pennsylvania for "Arbitration Between Employer and Employed," Act of 1883, P. L. 15 and Act of 1893, P. L. 102, PA. STAT. (West. 1920) § 666; or for arbitrating differences which arise "between an employer and his employees," Act of 1913, P. L. 396, § 18, PA. STAT. (West. 1920) § 13500. See *infra*, "Relation of the statute to prior legislation concerning arbitration."

[7] See, however, *infra*, "Jury trial in enforcement proceedings under the statute."

[8] It is deemed impracticable to deal with a hypothesis that the statute is unconstitutional because of the exception, or that the exception only is unconstitutional or to discuss what might be the effects of the clause of section 19 making the statute severable.

[9] 230 N. Y. 261, 130 N. E. 288 (1921).

(2) That the law violated Article 1, Section 2 of the Constitution of the State which secures the right to trial by jury.

The objection was overruled on the ground that "the right is one that may be waived. . . . It *was* waived by the consent to arbitrate." [10]

(3) That the law abridged the system of courts and their jurisdiction, particularly of the supreme court, in violation of the judiciary clauses of the constitution of the State.

The objection was denied. Part of the court's explanation for its position follows: "The supreme court does not lose a power inherent in its very being when it loses power to give aid in the repudiation of a contract, concluded without fraud or error, whereby differences are to be settled without resort to litigation. For the right to nullify is substituted the duty to enforce."

As a matter of legislative policy, distinct from the question of power, it does not readily appear why the exception of future-disputes clauses in contracts for personal services was desired or enacted. A provision in a written contract to arbitrate future-disputes arising out of the contract is not operative under the statute unless the parties contract for the provision; the statute does not impose arbitration. If the parties to "a contract for personal services" should desire to use a future-disputes clause and should insert same in a written contract between them why should the statute be made inapplicable? [11]

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[10] And the court so held although the arbitration agreement was entered into prior to the enactment of the statute. "A consent none the less, it was, however deficient may once have been the remedy to enforce it. Those who gave it, did so in view of the possibility that a better remedy might come. They took the chances of the future."—Cardozo, *J.*

[11] The New York Arbitration Law does not contain this exception. In Matter of Application of Amalgamated Association of Railroad Employees, 196 App. Div. 206, 188 N. Y. Supp. 353 (1921), it is inferable that the court assumed that a future-disputes clause in an employer-employee trade agreement would be governed by the law.

Under the recently enacted California arbitration statute "contracts pertaining to labor" are excepted from the entire act. Code of Civil Procedure (1923) Chapter 225, as amended by Assembly Bill No. 460, Approved April 22, 1927. The United States Arbitration Act likewise excludes "contracts of employment of seamen, railway employees, or any other class of workers engaged in foreign or interstate commerce." 43 Stat. 883 (1925), U. S. C. TIT. IX.

APPLICATION OF THE STATUTE—GENERAL

(a) *Time of Taking Effect*

By Section 19 the statute became effective on the date of its enactment, "but [it] shall not apply to contracts made prior to the taking effect of this act." The law was approved April 25, 1927.

(b) *Relation Of The Statute To Common Law Arbitrations*

The statute does not expressly repeal common law rules affecting arbitration agreements and arbitrations conducted thereunder. It does not appear to imply the exclusion of all arbitrations which are not had in compliance with its provisions. Indeed, if an arbitration agreement is not in *writing* according to Section 1, it is inferred that such agreement and any proceedings under it shall be governed by common law rules—that *pro hoc vice* common law rules are effective.[12] Moreover, in one instance, the statute affirmatively recognizes arbitrations outside its provisions. Section 6 provides that if "the arbitrators selected, *either* as prescribed in this act or *otherwise,* may summon any person to attend before them . . . as a witness." (Italics are the writer's.) The express exception of future-disputes claims in personal service contracts likewise tends to indicate that the statute provides a cumulative system.

On the other hand, granting that the statute does not abrogate all common law arbitrations, it seems clear that whenever an agreement to arbitrate *is in writing* that it will apply so as to prevail over any common law rules which are contrary to its provisions. Thus written agreements to arbitrate cases pending in court and proceedings thereunder lose the special regulations accorded to them by common law rules as compared with arbitrations of causes not in litigation.

A third variation of the same question may be stated in this way: Granting that the statute does not repeal common law

[12] And note the problem raised in Red Cross Line v. Atlantic Fruit Co., 233 N. Y. 373, 135 N. E. 821 (1922), s. c. 264 U. S. 109 (1924); Lappe v. Wilcox, 14 Fed. (2d) 861 (N. D. N. Y. 1926).

rules in cases where it is expressly or impliedly not applicable, as, for example, in case of an *oral* agreement to arbitrate, will common law rules apply to the agreement and proceedings thereunder to the exclusion of all of the provisions of the statute? In other words, does the statute provide a statutory system of arbitration only for cases where it is applicable to the original agreement for arbitration and have no further operation, or may it be regarded as also a statute of general regulatory provisions governing, in at least some details, common law arbitrations? As heretofore noted, Section 6 expressly provides that "arbitrators selected, *either* as prescribed in this act *or otherwise,* may summon any person" to testify before them.[13] Aside from this instance, however, it is not clear that the statute extends beyond arbitration agreements and proceedings thereunder which comply with its provisions.

(c) *Relation Of The Statute To Prior Legislation Concerning Arbitration*

The statute repeals "all acts and parts of acts inconsistent with this act." (Section 19.) While contrary provisions can be discovered in prior legislation concerning arbitration it remains for the supreme court to determine whether it is "inconsistent." The prior legislation may be broadly classified as follows:

(1) A statute (group of statutory provisions) providing for the arbitration of labor disputes only, where the only parties in dispute are an employer and his employees,[14]

(2) A statute (group of statutory provisions) providing a system of so-called compulsory arbitration and effective in case of a pending civil action or suit to enable either party thereto to require a reference of the case to arbi-

[13] See Matter of Zimmerman, 204 App. Div. 375, 198 N. Y. Supp. 139 (1923), where the court applied the New York Law to what it called a "common law arbitration." Compare Matter of Yeannakopoulos, 195 App. Div. 261, 186 N. Y. Supp. 457 (1921).

[14] See *supra,* note 6.

trators under a rule of court. No agreement to submit to arbitration, in writing or otherwise, is necessary;[15]

(3) A statute (group of statutory provisions) which provides for the arbitration of disputes generally between persons generally. It requires a contract in writing between the parties wherein they agree that their agreement to arbitrate shall become a rule of a chosen court of record and "the same shall, upon producing affidavit thereof, made by the witnesses thereto, or any of them, in the court of which the same is agreed to be made a rule, and filing the said affidavit in court, be entered of record in such court, and a rule shall thereupon be made by the said court, that the parties shall submit to, and finally be concluded by the arbitration or umpirage, which shall be made pursuant to such submission." [16]

It is submitted, after comparing these statutes with the new one, that no one of them is "inconsistent" with the latter although not a few parts thereof are contrary. The statute concerning labor controversies provides a specialized technique for adjusting a special class of disputes accruing between a particular class of persons, namely, employers and employees. The specialized character of the disputes and of the parties have induced statutory provision for state interference through a state board. Looking upon that statute as providing a specialized system with a specialized function, its "consistency" with the new statute may well lie in the non-application of the latter when the former and not the latter is invoked by the parties in a given case.

The same argument seems plausible when applied to the compulsory arbitration law. As noted, it is not predicated upon any contract between the parties, but only upon a civil action or suit commenced, and a rule of court. Quite clearly such proceedings are not within the repealing clause of the new act which is predicated upon written agreements for arbitration.

[15] PA. STAT. (West. 1920) § 607—TIT. ARBITRATION, Part II.
[16] PA. STAT. (West. 1920) § 597, § 648—TIT. ARBITRATION, Parts I and III.

The third statute is less specialized; it provides for the arbitration of disputes generally; it is predicated upon a written contract between the parties *and more*. It requires a written agreement to arbitrate and other special provisions and a recourse to a court for the rule of court. In short, by a written contract in the required form and filed as prescribed, the parties can initiate an "amicable action" between themselves to be adjudged by their chosen arbitrators. Their award is given the effect of a verdict of a jury in an ordinary civil action upon which judgment may be taken as in civil actions generally. It seems doubtful if the merely general repeal of "inconsistent" statutes by the new act abrogates this statutory system of arbitration. It seems plausible to argue that it is left available to parties and that they may invoke it if they have not already invoked the new statute.[17]

If the supreme court should find merit in the foregoing propositions, question is likely to arise in a given case whether the parties have invoked one statute or another. By way of answer it may be suggested that there should be little doubt in distinguishing the case which invokes the compulsory arbitration statute; there will be a pending case and a court rule of reference to arbitrators without any agreement between the parties for any arbitration. As respects either the statute which provides for the arbitration of labor disputes or the "amicable action" arbitration statute which deals with disputes generally, clearly more is required than merely the execution of an "agreement in writing to settle a dispute by arbitration." When there is an agreement in writing to arbitrate and there are not enough provisions inserted therein to indicate the parties' purpose to appeal to one of these older statutes it would seem plausible to apply the provisions of the new statute, except in case of future-disputes provisions in contracts for personal services.

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[17] It is not intended to argue that this older statute has superior merits, nor to intimate that it is a necessary or useful auxiliary to the new statute. It is intended merely to suggest that parties who have a dispute may choose under which statute they shall proceed. Only the new statute embraces future-dispute clauses.

(d) *If the parties to an arbitration agreement invoke an arbitration statute, will an award rendered in proceedings which are a departure from the regulations of that statute be effective as a common law award or as award rendered under another arbitration statute?*

The supreme court has passed upon this question where the submission agreement was construed to contemplate an arbitration under the "amicable action" statute and the award was claimed to be effective as a common law award. It decided the question in the negative.[18]

Whether the same question will arise under the new statute, or whether it will arise in a case where an award is rendered in proceedings which were under a written arbitration agreement which contemplated one statute but which were had pursuant to another statute remains to be observed.

AGREEMENTS TO ARBITRATE DISPUTES WHICH MAY ARISE IN THE FUTURE

PROVISIONS OF THE STATUTE

(a) *General*

Section 1 of the act provides that "a provision in any written contract, except a contract for personal services, to settle by arbitration a controversy thereafter arising out of such contract, or out of the refusal to perform the whole or any part thereof . . . shall be valid, irrevocable, and enforceable, save upon such

[18] M'Killip v. M'Killip, 2 S. & R. 489 (Pa. 1816),—award not a bar to an action on the original cause for "the consequences of a reference in an action . . ., and a reference at common law are so different, that when persons enter into one, it cannot be supposed that they mean the other." Benjamin v. Benjamin, 5 W. & S. 562 (Pa. 1843),—action on the award to enforce it denied. See also Lockwood v. Denning, 1 Pittsburgh Reports 212 (Pa. 1855).

The extent to which the parties have attempted to comply with the provisions of the statute appears to have been taken as a measure of the intention of the parties to invoke the statutory method of arbitration—at least where their arbitration agreement does not expressly invoke the statute. M'Killip v. M'Killip, *supra;* White v. Shriver, 2 Watts 471 (Pa. 1834); Climenson v. Climenson, 163 Pa. 451, 30 Atl. 148 (1894); and see Massey v. Thomas, 6 Binney 333 (Pa. 1814). Compare Hume v. Hume, 3 Pa. 144 (1846). In Benjamin v. Benjamin, *supra,* and Lockwood v. Denning, *supra,* the parties expressly invoked the statute in their arbitration agreement.

grounds as exist at law or in equity for the revocation of any contract." [19] Section 16 also expressly provides that the act shall apply to any written contract of the state or any municipality.

Reference has already been made to the exception of future-disputes clauses in contracts for personal services.

(b) *The "or out of the refusal to perform the whole or any part thereof" clause*

This clause also appears in the recent arbitration statutes of New Jersey, Territory of Hawaii, California, and in the United States Arbitration Act. The New York law, which was enacted prior to these statutes, does not contain the clause.

Apparently some doubt has been felt whether a claim for damages for "refusal to perform" the main contract in whole or in part would constitute "a controversy thereafter arising between the parties to the contract," as the New York law reads, or "a controversy thereafter arising out of such contract," as provided in the later statutes, so that parties could include it in a written future-disputes clause and bring it under the statute. No case appears to have discussed the point. It would seem, however, that there should be little doubt that a claim based upon an alleged refusal to perform the principal contract by one of the parties thereto is "a controversy thereafter arising between the parties to the contract" under the New York law, or "a contro-

[19] Except as noted, this section is identical with a corresponding section of the recent arbitration statutes in the following jurisdictions: New York, Laws of 1920, Ch. 275—does not contain clause "or out of the refusal to perform the whole or any part thereof"; New Jersey, Laws of 1923, Ch. 134; Territory of Hawaii, Laws of 1925, Act No. 276; California, Code of Civil Procedure, 1923, Ch. 225 as amended by Assembly Bill No. 460; The United States Arbitration Act, 43 Stat. 883 (1925), U. S. C. Tit. IX, differs somewhat with respect to "a written provision in any maritime transaction or a contract evidencing a transaction involving commerce."

The Massachusetts statute, Laws of 1925, Ch. 294 provides that "the parties to a contract may agree in writing that any controversy thereafter arising under the contract which might be the subject of a personal action at law or of a suit in equity shall be submitted to the decision of one or more arbitrators."

The Oregon Act, General Laws 1925, Ch. 186, is thought to embrace future-dispute clauses. It is not explicit however.

The Statutes which except employer-employee contracts are reported, *supra*, note 11.

The New York Law provides that parties may agree to arbitrate "a controversy thereafter arising between the parties," instead of "a controversy thereafter arising out of such contract."

versy thereafter arising out of such contract" as the later statutes read.[20]

On the other hand, whether the "refusal to perform" clause does or does not appear in the statute, and whether or not the statute embraces written agreements to arbitrate such disputes, the problem of construing the particular arbitration agreement which is used by the parties in a given case is open to court review. In this connection the New York Court of Appeals has indicated in one case that the question of the refusal of the defendant to perform the main contract was not subject to arbitration, but the court was there dealing with the construction of the particular arbitration clause which the parties had used—the question: what disputes did these parties agree to arbitrate? There was no suggestion by the court that a written agreement to arbitrate a claim predicated upon a refusal to perform the main contract is not embraced in the Arbitration Law.[21]

(c) *Is refusal to perform a "controversy"?*

An allied question is raised by a recent New York case wherein the supreme court advances the general proposition that

[20] See Comment, *Fraudulent Inducements as a Defense to the Enforcement of Arbitration Contract* (1927) 36 Yale L. J. 866. As reported in the previous note the Massachusetts Act reads: "arising *under* the contract."

[21] Matter of Young v. Crescent Development Co., 240 N. Y. 244, 148 N. E. 510 (1925). Part of the opinion of the court follows: "The arbitration clause provides for the submission of 'all questions that may arise under this contract *and in the performance* of the work thereunder.' We know by common experience the class of questions to which this language naturally applies. It applies, as stated, to questions arising under and in the performance of a contract and such questions are those which involve an interpretation of its provisions for the purpose of determining whether work has been done according to the contract, whether work which has been done under the contract is really covered by its provisions or constitutes extra work, when payments become due, and so on. All these questions involve recognition of the contract and not repudiation of it.

"This is not true of the claim under discussion. According to respondent's theory the acts done by appellant were not done under and in performance of the contract but in violation of it and in repudiation of its provisions. There is involved no interpretation of its meaning, but a wilful refusal to be bound by it and, as it seems to me, this clause was intended to cover controversies which do not deny but seek an interpretation of and submission to its provisions; an attitude which seeks action under the contract and not one outside of and in denial of it." Compare Matter of Buxton v. Mallery, 245 N. Y. 337, 157 N. E. 259 (1927). See, *infra*, FUTURE DISPUTES CLAUSES WITH NAMED ARBITRATORS —CASES AT COMMON LAW, (e) Construction of future-disputes clauses—What disputes did the parties agree to arbitrate?

a claim based upon the refusal by a party to pay a sum of money according to the terms of the main contract (a promissory note) does not constitute a "controversy" within the meaning of the Arbitration Law.[22] If this idea is followed or extended it seems doubtful if the addition of the "refusal to perform" clause will lead to any different result for the settlement of "a controversy" is the object of the parties' arbitration agreement under all of the arbitration statutes.

(d) *What future-disputes agreements are agreements "to arbitrate?" "Appraisals" and "Valuations" distinguished*

Another problem arising in connection with Section 1 of the statute may be stated as follows: What is an agreement to settle a matter by "arbitration"? Is an agreement for an "appraisal" of loss and damage under a fire insurance policy, or for "estimates" and "awards" of an architect or engineer in a building contract, or for some other "findings," "reports" and "awards" by some designated person, as fixing the price in a sales contract, a provision to settle by "arbitration" under the statute? The New York Court of Appeals dealt with this question in the case of *Matter of Fletcher,* decided in 1924.[23] A stock deposit contract with an option to buy provided as follows: "The said fair value of the stock on November 1, 1917, at which Mr. Nicholas may purchase the same, shall be determined by an appraisal thereof by three arbiters, one to be appointed by Mr. Fletcher, or his representative, another to be appointed by Mr. Nicholas, or his

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[22] Webster v. Van Allen, 217 App. Div. 219, 216 N. Y. Supp. 552 (1926). The court explained its position as follows: "A 'controversy' is the basis of arbitration at common law and under the statute. . . . What controversy is there between the parties under the first contract? Two notes have been given, admittedly valid and due. The defendants offer no defense on their respective notes. Like all delinquent debtors, they merely neglect to pay. . . . It is a mere default. A controversy is a dispute, a disagreement based on conflict of evidence or opinion. The term implies a situation in which something is asserted on one side and denied on the other. . . . The neglect to pay a note admittedly does not fall within that class." See also Matter of Fletcher, 237 N. Y. 440, 143 N. E. 248 (1924). Webster v. Van Allen is criticized adversely in (1926) 36 YALE L. J. 137. Compare Matter of Application of S. A. Wenger Co., Inc., 209 App. Div. 784, 205 N. Y. Supp. 566 (1924), reversed in 239 N. Y. 199, 146 N. E. 203 (1924).

[23] 237 N. Y. 440, 143 N. E. 248 (1924).

representative, and a third to be appointed by the other two." Application was made to the supreme court under Section 4 of the New York Arbitration Law for the appointment of an arbiter. The application was denied. The court advanced the proposition that the foregoing clause was not a provision to settle a controversy by "arbitration." The opinion quotes with approval certain English authorities as follows: " 'In order to constitute a submission to arbitration there must be some difference or dispute, either existing or prospective, between the parties and they must intend that it should be determined in a quasi-judicial manner. Therein lies the distinction between an agreement for a valuation and a submission to arbitration, for in the case of a valuation there is not as a rule any difference or dispute between the parties and they intend that the valuer shall, without taking evidence or hearing argument, make his valuation according to his own skill, knowledge and experience.' We cannot hold that either party may in such a case compel an appraisal, valuation or determination of fact preliminary to the assertion of a right, as an 'arbitration' within the purview of the Arbitration Law, without at the same time bringing confusion into the law and inconvenience to the parties to the contract. No party to such a contract would know till the courts have passed upon the question whether in a given case the application of any particular section of the Civil Practice Act would be practicable. At his peril a party would be obliged to determine for himself whether the so-called arbitrators should be sworn,[24] whether he must hold hearings upon notice [25] and make a formal award. The award would be ineffective unless confirmed; if confirmed no appeal could be taken unless a judgment is entered.[26] Yet sometimes as in the present case it would be difficult to decide what judgment could be appropriately entered upon the determination of the particular

[24] The Pennsylvania statute differs from the New York Law in this connection—the arbitrators are not required to be sworn under the former statute.

[25] See Green & Coates Streets Passenger Railway Co. v. Moore, 64 Pa. 79 (1870); compare Curran v. Philadelphia, 264 Pa. 111, 107 Atl. 636 (1919).

[26] The Pennsylvania statute differs from the New York Law in this connection—an appeal may be taken from an order confirming, modifying, or vacating an award, or from a judgment entered thereon. Section 15.

question settled by the 'arbitration.' [27] A party would be required to make a motion vacating the award in case of misconduct of the 'arbitrators,' and then to enter upon another 'arbitration' instead of being permitted to disregard a determination improperly made and to assert his rights without any further prior determination. The present case in my opinion aptly illustrates the clumsiness of the proposed remedy when applied to contracts of this type." [28]

It is apparent that the court's position was that to decide otherwise would lead to the inconvenience and confusion recited. It is obvious, however, that its specifications of inconvenience and confusion do not expressly refer to the section of the statute providing for stay of an action brought by a party in disregard of his arbitration agreement nor to the section which provides for specific performance of the agreement, nor to the section providing for court-appointment of an arbitrator or umpire—the latter section being immediately involved in the case. It seems clear, moreover, that the court's particulars of inconvenience and confusion do not apply to proceedings under these sections. If it is good doctrine that where the reason for a rule ceases the rule ceases, it is submitted that the court should have appointed the arbitrator according to the statute.

Where parties agree to submit questions to "arbiters"—so called by the parties—certainly nothing in Nature determines that such agreement is not one "to settle by arbitration" a dispute between them. To assert that an agreement to submit a question concerning the value, quality, quantity, or condition of an eco-

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[27] Under both the New York Law (Civil Practice Act, section 1461) and the Pennsylvania statute (section 12) upon the granting of an order confirming, modifying or correcting an award, "judgment shall ("may" under the New York law) be entered in conformity therewith. . . ."

[28] Accord, Matter of American Ins. Co., 208 App. Div. 168, 203 N. Y. Supp. 206 (1924)—"appraisal" clause in fire insurance policy. Compare Matter of Scott, 200 App. Div. 599, 193 N. Y. Supp. 403 (1922); American Eagle Ins. Co. v. New Jersey Ins. Co., 240 N. Y. 398, 148 N. E. 562 (1925). Consult Green & Coates Streets Passenger Ry. Co. v. Moore, 64 Pa. 79 (1870); Fitzsimmons v. Lindsay, 205 Pa. 79, 54 Atl. 488 (1903); Kaufman v. Liggett, 209 Pa. 87, 58 Atl. 129 (1904). Compare Curran v. Philadelphia, 264 Pa. 111, 107 Atl. 636 (1919), and the attitude of the court in cases where an architect or engineer is to find the amount of work done and value of same; for example, Reynolds v. Caldwell, 51 Pa. 298 (1865).

nomic good about which the parties confessedly disagree is not an agreemnet to settle a "controversy" is mere manipulation of words. The influence of *Matter of Fletcher* remains to be determined by the courts in cases to follow.

COMMON LAW CASES

(a) *General*

Most of the cases dealing with future-disputes agreements have involved an issue concerning their revocability. In this connection it should be noted that that term may have either of two meanings as follows: (1) power to maintain an action upon a cause embraced in the agreement to arbitrate, or (2) power, by giving due notice of revocation of the authority of arbitrators already appointed but before award rendered, to terminate their power to act. A statement similar to the following appears many times in the reports: "General clauses providing for the settlement, by arbitration, of disputes that may arise between the contracting parties . . . do not take away the jurisdiction of the courts." [29] According to this common law rule such agreements are revocable in both senses of that term.

(b) *Arbitration agreements classified. "General clauses"—Revocability—Validity*

At an early date, however, the court made a distinction between future-disputes agreements to submit to persons *not then chosen*—"general clauses,"—and future-disputes agreements to submit to persons designated at the time the agreement is executed. "Where parties stipulate that disputes, whether actual [30] or prospective, shall be submitted to the arbitrament of a particular individual or tribunal, they are bound by their contract, and cannot seek redress elsewhere.[31] . . . But such is not this case.

[29] Gray v. Wilson, 4 Watts 39 (Pa. 1835).

[30] Compare *infra,* THE SUBMISSION AGREEMENT—Common Law Cases—Revocability.

[31] Fox v. Hempfield Railroad Co., 1 Pittsburgh Reports 372, 14 Leg. Int. 148 (1859); Lauman v. Young, 31 Pa. 306 (1858); Hartupee v. City of Pittsburgh, 97 Pa. 107 (1881); Commonwealth v. Central Paving Co., 288 Pa. 571, 136 A. 853 (1927); and cases cited, *infra,* notes 70-72.

The parties here, instead of designating an umpire, agreed simply that all misunderstandings or difficulties should be submitted to the judgment of three arbitrators to be mutually chosen, whose decision should be final." [32]

Not only are these "general" arbitration clauses revocable in the particular that they can be pleaded neither in abatement nor in bar to an action brought on a cause embraced therein, but they are also revocable in the particular that due notice of revocation of the authority of arbitrators already appointed thereunder, before award rendered, nullifies their powers.[33] Similarly, a provision in such clauses which authorizes one party to appoint the panel of arbitrators after notice to and default by the adverse party, is ineffective to give arbitrators so appointed power to make an award which will be obligatory at least upon the defaulting party.[34]

The supreme court has expressed regret for the revocability of these "general" future-disputes agreements as follows: "It is much to be regretted that agreements to arbitrate, founded on consideration, should be excepted from the general law of contracts and treated as revocable by one party without consent of

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[32] Snodgrass v. Gavit, 28 Pa. 221 (1857). Accord Gray v. Wilson, 4 Watts 39 (Pa. 1835); Page v. Van Kirk, 1 Brewster 282 (Pa. 1866); Phoenix Hosiery Co. v. Griffin Smith Co., 16 Phila. 568 (Pa. 1883); Gowan v. Pierson, 166 Pa. 258, 31 Atl. 83 (1895); and cases cited, *infra,* note 45.

[33] Henry v. Lehigh Valley Coal Co., 215 Pa. 448, 64 Atl. 635 (1906). The arbitration clause in the contract in this case provided that "this arbitration proceeding may be had under the act of 1836 and be proceeded with in the court of common pleas of Luzerne County." The *court below* expressed the opinion that this statement was too indefinite reference to the "amicable action" arbitration statute—*Act of June 16, 1836,* P. L. 715, PA. STAT. (West. 1920) § 597 *et seq.*,—to render the agreement irrevocable thereunder, and that since there was no action pending, a provision in the submission agreement that it should be entered as a rule of court was indispensible. The supreme court did not decide the point. *Quære,* therefore, if sufficient incorporation by reference of the *Act of June 16, 1836,* and a clause to make it a rule of court inserted in a "general" *future-disputes* agreement will render such agreement irrevocable. The *Act of June 16, 1836,* appears to deal only with agreements to arbitrate *existing* controversies.

[34] See Phoenix Hosiery Co. v. Griffin Smith & Co., 16 Phila. 568 (Pa. 1883); Gray v. Wilson, 4 Watts 39 (Pa. 1835)—a judge to appoint if party refused. The precise question decided by these cases, however, was that the agreement was revocable. They did not expressly decide the specific question of the validity of an award rendered in an *ex parte* hearing had before arbitrators so appointed. See also Penn Plate Glass Co. v. Insurance Co., 189 Pa. 255, 260, 261, 42 Atl. 138, 139, 140 (1899).

the other. But the law is too firmly settled to be changed without legislative authority.[35]

Whether an award rendered in an arbitration duly held under such "general" clauses is void for any or all purposes for the sole reason that such agreements are revocable in the particulars stated above has not been decided by the supreme court.[36]

Again, no decision has determined whether such future-disputes agreements will support an action for damages for their breach.[37]

(c) *"General clauses" in courts of equity*

The position of these "general" arbitration clauses in courts of chancery has not been extensively considered in Pennsylvania cases. In *Page v. Van Kirk* [38] such an agreement was held to be revocable in the sense that it could not be pleaded to bar an action on the cause agreed to be arbitrated.

Two other cases have come before the chancery courts, as follows: The first case involved an option contract to buy certain stock in a corporation and provided that if the parties disagreed on the price they should select appraisers to determine the fair price. The court advanced the position, but without squarely deciding it, that if the plaintiff had established that defendant had refused to perform the arbitration provision, the court would fix the price under a general prayer for equitable relief.[39] The second case involved a similar arbitration clause. Each party had selected one arbitrator, but the two could not agree either upon an award or upon an umpire. They adjourned *sine die.*

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[35] Henry v. Lehigh Valley Coal Co., 215 Pa. 448, 64 Atl. 633 (1906). Consult Fritz v. British Americans Assurance Co., 208 Pa. 268, 57 Atl. 573 (1904); Chester City v. Union Ry. Co., 218 Pa. 24, 66 Atl. 1107 (1907).

[36] If the contesting party participated in the arbitration till award rendered there should be no difficulty in this connection. See N. P. Sloan Co. v. Standard Chemical & Oil Co., 256 Fed. 451 (C. C. A. 5th, 1918); Penn Plate Glass Co. v. Insurance Co., *supra* note 34.

[37] In Gray v. Wilson, 4 Watts 39 (Pa. 1835), doubt is expressed "whether there would be ground for action, should one party, on the request by the other, refuse to concur in nominating an arbitrator. . . ." But see Mentz v. Armenia Fire Ins. Co., 97 Pa. 478, 480 (1875).

[38] 1 Brewster 282 (Pa. 1866).

[39] Fitzsimmons v. Lindsay, 205 Pa. 79, 54 Atl. 488 (1903).

Held, that the court would fix the price as a grant of general equitable relief.[40]

It should be noted that the proposition of the first case is predicated upon the defendant's default and that the second rests on the fact that the arbitral proceedings had reached an *impasse* whereby an award could not be rendered by the chosen arbitrators. Whether the plaintiff must put a defendant in default by offering to perform as a condition precedent to procuring such general equitable relief or whether it is sufficient to establish merely his readiness and willingness to perform is not determined by these cases. This question was apparently decided, however, in the earlier case of *Wolf v. Pennsylvania Railroad Co.*[41] The plaintiffs filed a bill for an accounting under a lease which contained a provision that the parties would select arbitrators to settle any difference which might arise between them. The court denied the bill because (*inter alia*) "it aims to avoid the necessity for first seeking relief in the way thus expressly agreed upon." It is believed to be a safe generalization, therefore, that this "general equitable relief" will be granted in a proper case for equity provided the plaintiff has first made a *bona fide* effort to initiate the arbitration agreed upon by the parties.

No case has been found wherein the court has granted or denied a bill asking for specific performance of a "general" future-disputes agreement. No case has been found wherein a court of equity has appointed or refused to appoint one or more arbitrators or an umpire. There are statements in the opinions, however, that such relief would be denied.[42]

Lastly, no cases have been found wherein an equity court has been asked to enjoin an action brought in a law court upon a cause embraced in a "general" arbitration agreement, or to enjoin

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[40] Kaufman v. Leggett, 209 Pa. 87, 58 Atl. 129 (1904), land lease with right of renewal; rent to be fixed by the arbitrators.

[41] 195 Pa. 91, 45 Atl. 936 (1900). Consult Boswell's Appeal, 3 Pennypacker 305 (Pa. 1883).

[42] ". . . and this upon the very good ground that the courts remain open to the parties, with better provisions for securing justice than are possessed by arbitrators," and because "a court of equity will not undertake to compel an arbitration which it cannot control. . . ." Kaufman v. Liggett, *supra* note 40. Compare the attitude of the court expressed in the cases cited, *supra* note 35, and in Hume v. Hume, 7 Watts 205 (Pa. 1838).

the revocation of the authority of arbitrators who have been appointed under such agreement.

(d) *Future-disputes clauses in fire insurance policies*

These clauses generally provide for the determination of the amount of a loss or damage under the policy by arbitrators to be appointed by the parties if the insured and insurer do not agree. In the leading case of *Mentz v. Armenia Fire Insurance Co.*,[43] the clause provided that "in case any difference or dispute shall arise between the assured and this company touching the amount of any loss or damage sustained by him . . . ," same shall be submitted to arbitrators to be selected by the parties "and no action, suit or proceedings at law or in equity shall be maintained on this policy, unless the amount of loss or damage in case of difference or dispute shall be first thus ascertained." After plaintiff, the insured, had submitted his evidence in an action brought to recover on the policy, defendant moved for nonsuit because of the above arbitration provision. Plaintiff objected that no arbitration had been offered or asked for by the defendant. *Held,* error to grant the nonsuit.

The court advanced two propositions as follows: (1) "There can be no doubt that if this case stood upon a general arbitration clause in the policy alone, it would fall within the principles settled by this court, conformably to all the previous English authorities, in Gray v. Wilson, 4 Watts 411; Snodgrass v. Gavit, 4 Casey 224, and Lauman v. Young, 7 id. 310;[43a] that it is not in the power of the parties to a contract to oust the courts of their jurisdiction.

"The cases in which the certificate or approbation of any particular person—as the engineer of a railroad company—to the amount of a claim, is made a condition precedent to an action, rest upon entirely different principles. He is not created a judge or arbitrator of law and facts, but simply an appraiser of work done. Monongahela Navigation Co. v. Fenlon, 4 W. & S. 205;

[43] 79 Pa. 478 (1875).

[43a] Gray v. Wilson, 4 Watts 411 (Pa. 1835); Snodgrass v. Gavit, 28 Pa. 221 (1857); Lauman v. Young, 31 Pa. 306 (1858).

Lauman v. Young, 7 Casey 306.[44] In all these cases there is an actual reference, founded upon consideration, and therefore irrevocable. That which is before us, is a mere agreement to refer to arbitrators to be chosen at a future time; (2) that since the arbitration clause was restricted to a decision upon the amount of loss or damage it was a "special" and not a "general" agreement, but, even in such case, "it was incumbent on the defendants below, in order to avail themselves, to show that a dispute had arisen touching the amount of the loss. In other words, they must show that they admitted the validity of the policy, and their liability under it, and that the only question was as to the extent of the loss."

It will be noted that the term "general" is made to do double duty as follows: (1) to describe a future-disputes clause with arbitrators to be appointed; (2) to designate arbitration clauses which embrace both the questions of fact and legal responsibility in a controversy. "Special" agreements are distinguished from "general" clauses, when the latter term is used in the second sense; in that the facts only are to be decided by the arbitrators, *i. e.*, the amount of the loss or damage. With these categories in mind it may be said that the court held that a "special" future-disputes agreement which was "general" in the sense that it named no arbitrators, was revocable in the sense that an action could be brought by the insured to recover on the policy without regard for the arbitration clause where the company failed to show that it had admitted legal responsibility on the policy and that a dispute had arisen between the parties concerning the amount of loss.

The same result has been reached in the subsequent cases.[45]

[44] Monongahela Navigation Co. v. Fenlon, 4 Watts & S. 205 (Pa. 1842); Lauman v. Young, *supra* note 43a. Compare Curran v. Philadelphia, 264 Pa. 111, 107 Atl. 636 (1919).

[45] Wright v. Susquehanna Mut. Fire Ins. Co., 110 Pa. 29 (1885); McMahon v. The Watermans' Beneficial Assn., 17 Phila. 286 (Pa. 1885); Conn. Union Assurance Co. v. Hocking, 115 Pa. 407, 8 Atl. 589 (1887); Boyle v. Insurance Co., 169 Pa. 349, 32 Atl. 553 (1895); Moyer v. Sun Ins. Co., 176 Pa. 579, 35 Atl. 221 (1896); Yost v. McKee, 179 Pa. 381, 36 Atl. 317 (1897); Penn. Plate Glass Co. v. Ins. Co., 189 Pa. 255, 42 Atl. 138 (1899); Needy v. German-American Ins. Co., 197 Pa. 460, 47 Atl. 739 (1901); Fritz v. British American Assur. Co., 208 Pa. 268, 57 Atl. 573 (1904); Seibel v. Firemans' Ins. Co., 24 Pa. Sup. 154 (1904); Andree Curran v. Philadelphia, 264 Pa. 111, 107 Atl. 636 (1919).

The opinions in these cases, however, show some shifting of emphasis in their assignments of reasons. In *Wright v. Susquehanna Mutual Fire Ins. Co.*[46] the clause provided for arbitration "at the written request of either party." It was held error to nonsuit the insured in his action on the policy, notwithstanding the arbitration clause, because, "it was the right of either party to demand arbitration; it was the right of either to waive it, and the defendant, having made no such demand, must be presumed to have waived it." Part of the opinion in the *Mentz* case was also quoted with approval. *Commercial Union Assurance Co. v. Hocking*[47] followed. The arbitration clause provided that "in case differences shall arise respecting any loss or damage," arbitration shall be had "at the written request of either party," that there should be no right of action on the policy until the arbitration was had, and that the arbitration should be no waiver of any legal defense which the company might have against the policy. The court declared that the arbitration clause was revocable because it named no arbitrators. "But it is equally true, that where the agreement in question does not provide for submitting matters in dispute to any particular person or tribunal named, but to one or more persons to be mutually chosen by the parties, it is revocable by either party. . . ." The *Mentz* case was cited to this proposition, and to the further one that the provision making the arbitration a condition precedent to any recovery on the policy did not render the clause irrevocable. But the court also made the following observation: "Nor is the effect of the general arbitration clause in this contract affected by the fact that two arbitrators were in fact chosen; they failed to agree; both parties appear to have abandoned the proceeding, and the bringing of this suit was a plain revocation of the submission." If the "abandonment" referred to shall be taken seriously, the case is apparently not very significant on the point concerning the revocability of the arbitration clause. *Boyle v. Ins. Co.*[48] added to the second point of the *Mentz* case. The court argued that the first clause of the arbitration provision: "if the parties cannot

[46] 110 Pa. 29 (1885).
[47] 115 Pa. 407, 8 Atl. 589 (1887).
[48] 169 Pa. 349, 32 Atl. 553 (1895).

agree upon the amount of loss or damage," contemplates an actual effort to agree and when this fails, but not before, either party may say "we differ, and our points of difference must be referred to arbitrament under the terms of the policy." Neither can insist on the second [clause] [to select arbitrators] who has not shown himself ready and willing to enter upon the first, because the remedies are not optional to either. They are successive, unless both agree to the contrary. . . . If the fact was, as the plaintiffs alleged, that the company after receiving the proofs of loss made no effort to agree with the plaintiffs upon the amount of their loss but gave notice that a difference had arisen and demanded the appointment of appraisers in the first instance, its position was unwarranted, and it has no right to complain that its demand was disregarded and that the plaintiffs resorted at once to an action. *Moyer v. Sun Insurance Co.*[49] expressly followed the *Boyle* case. The arbitration was held not to be a condition precedent to recovery on the policy "for the company had not shown itself ready and willing to try to agree upon the loss." In *Yost v. Insurance Co.*[50] the court emphasized the fact that the arbitration agreement was to unnamed arbitrators, and noted also that the defendant company had contested its legal responsibility under the policy in the action brought by the insured. The *Mentz* and *Hocking* cases were cited for the conclusion that such an arbitration agreement is revocable under such circumstances. The case of *Penn Plate Glass Co. v. Insurance Co.*[51] followed. In that case the insured sued on the policy and alleged that the defendant refused to appoint an appraiser or to participate in an appraisal according to the provisions of the policy, but that plaintiff and the other insurance companies involved, fixed the extent of the loss by appraisement. Plaintiff sought to recover accordingly; the defendant denied all legal responsibility. The court held that this *ex parte* appraisal was not even of evidentiary validity against defendant. It explained its position as follows: "The policy provides that, in case of disagreement as to the amount of loss, it shall be ascertained by

[49] 176 Pa. 579, 35 Atl. 221 (1896).
[50] 179 Pa. 381, 36 Atl. 317 (1897).
[51] 189 Pa. 255, 42 Atl. 138 (1899).

appraisers, and further that no action shall be brought on the policy until after compliance with all its requirements. . . . Such appraisement or the effort to have it would be at the most a condition precedent to an action by the insured, and the failure to have it a ground for a plea in abatement by the company. Refusal to join in the appointment of appraisers, or denial of liability altogether, either or both, would stop the defendant from such a plea, but it could go no further. . . .

"But it has been held that the condition of the policy as to appraisement before suit is in substance no more than an undertaking to refer to arbitrators to be chosen in the future, and therefore revocable. Suit by the insured without preliminary appraisement has been sustained because the agreement being revocable could not bind him, *Mentz v. Ins. Co.; Commercial Union Assurance Co. v. Hocking; Yost v. McKee.*[51a] The same rule must apply to the other party to the contract, and therefore if the defendant company omits or refuses to join in an appraisement, its rights cannot be prejudiced thereby, and it certainly cannot be estopped by a denial of liability from requiring that if its liability is established, the amount of it shall be proved by competent evidence." *Needy v. Lerman American Insurance Co.*[52] involved an action by the insured to recover on a policy. The defendant offered testimony that the parties disagreed as to the extent of the loss, that each appointed an appraiser, but that plaintiff prevented them from choosing an umpire according to the policy; that the defendant made no issue as to its legal responsibility except the extent of the loss. *Held:* That the evidence was properly rejected for the agreement to appraise was revocable at plaintiff's pleasure. The court cited Gray v. Wilson, and the *Mentz, Yost, Hocking* and *Penn Plate Glass Co.* cases as supporting its decision.[52a] *Fritz*

[51a] Mentz v. Ins. Co., 79 Pa. 478 (1875); Commercial Union Assurance Co. v. Hocking, 115 Pa. 407, 8 Atl. 589 (1887); Yost v. McKee, 179 Pa. 381, 36 Atl. 317 (1897).

[52] 197 Pa. 460, 47 Atl. 739 (1901). See also Gowen v. Pierson, 166 Pa. 258, 31 Atl. 83 (1895).

[52a] Gray v. Wilson, 4 Watts 411 (Pa. 1835); Penn Plate Glass Co. v. Ins. Co., 189 Pa. 255, 42 Atl. 138 (1899); Mentz, Yost and Hocking cases, *supra* note 51a.

v. British American Assurance Co.[53] is the last case which has come from the supreme court. The parties could not agree upon the extent of the loss and each appointed an appraiser and they chose an umpire according to the policy. They failed, however, to render an award and abandoned the appraisement. The policy provided that no action should be brought on the policy after twelve months from the date of a fire. This suit was brought by the insured after such period. The defendant contested all legal responsibility relying on that provision. The court held that the delay incident to the appraisal was deductible from the foregoing time limit; that the defendant company "must be regarded as having waived its right to depend upon the litigation clause until the appraisers have made an award or the appraisement has been abandoned, unless the award has been delayed or the appraisement has been abandoned by reason of the conduct of the insured. . . .

If the failure to make an award is not due to the insured, his right to enforce his claim by an action at law should not be prejudiced thereby. The court also reiterated the proposition that when the parties disagreed and selected appraisers "the hands of the insured were then tied until an award had been made or the appraisement had been abandoned." It remains for the future cases to determine whether these remarks concerning the failure of the appraisment bcause of the conduct of the insured and concerning his hands being tied until award rendered or appraisement abandoned are to be applied beyond the issue of this particular case—the operation of this twelve-months limitation-clause.[54]

Relation of the Statute to Common Law Rules Concerning "General" Future-Disputes Agreements

(a) *General*

The new statute materially modifies the foregoing common law rules in cases where it is applicable.[55] Section 1 declares gen-

[53] 208 Pa. 268, 57 Atl. 573 (1904).

[54] See Henry v. Lehigh Valley Coal Co., 215 Pa. 448, 64 Atl. 635 (1906).

[55] It is possible, of course, that the supreme court may find in this and the prior arbitration statutes sufficient legislative indication of a new public policy

erally that future-disputes agreements in writing and not in a contract for personal services shall be "valid, irrevocable, and enforecable, save upon such ground as exist at law or in equity for the revocation of any contract. Sections 2, 3 and 4 are the executing sections of this general declaration of policy.[56]

Section 2 of the Statute supplants the common law rule that "general" arbitration clauses are revocable in the particular that court action can be brought on a cause in disregard of the agreement to arbitrate the same. By this section, the trial of any such action shall be stayed, upon the application of a party thereto, "until such arbitration has been had in accordance with the terms of the agreement," provided "the applicant for the stay is not in default in proceeding with such arbitration." [57]

The statute does not specifically deal with the revocability of such agreements in the case where notice of revocation is served after arbitrators have been appointed, but prior to award rendered. The general declaration of irrevocability in section 1, however, together with the remedies of sections 2, 3 and 4 indicate clearly enough that such agreements are irrevocable in this particular.

Not only are the common law rules of revocability thus abro-

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toward arbitration agreements to be influenced to change the common law rules of revocability in cases which may not be embraced within the terms of the new statute. With the attitude expressed by the court in Henry v. Lehigh Valley Coal Co., *supra* note 54, and in Chester City v. Union Ry. Co., 218 Pa. 24, 66 Atl. 1107 (1907), compare Ezell v. Rocky Mountain Co., 76 Colo. 409, 232 Pac. 680 (1925), and State *ex rel.* Faucher v. Everett, 258 Pac. 486 (Wash. 1927).

On the question whether the statute applies to "appraisal" clauses in fire insurance policies, see, *infra*, RELATION OF THE STATUTE TO COMMON LAW RULES CONCERNING FUTURE-DISPUTES CLAUSES WITH NAMED ARBITRATORS—"APPRAISALS," "VALUATIONS."

[56] Substantially the same provisions appear in the arbitration statutes of New York, New Jersey, Territory of Hawaii, Massachusetts, California and in the United States Arbitration Act. Similar provisions are found in the Oregon Act.

[57] The statutes of New Jersey, Territory of Hawaii, California and the United States Arbitration Act contain the same *proviso*. It does not appear in the statutes of Oregon and New York. See, however, Samuels v. Sanies, 124 Misc. 35, 207 N. Y. Supp. 249 (1924); Matter of Zimmerman v. Cohen, 236 N. Y. 15, 139 N. E. 764 (1923); Matter of Hosiery Mfr. Corp. v. Goldston, 238 N. Y. 22, 143 N. E. 779 (1924); Matter of Young v. Crescent Development Co., 240 N. Y. 244, 148 N. E. 510 (1925); Nagy v. Arcus Brass & Iron Co., 242 N. Y. 97, 150 N. E. 614 (1926).

The Massachusetts *proviso* reads as follows: "providing that the applicant for the stay is ready and willing to submit to arbitration."

gated when the statute applies, but it also provides a procedure for specifically enforcing such agreements. Section 3 provides for the procurement of a general order or decree that the defendant perform his agreement to arbitrate. Such order may be had on petition to the court of common pleas of the county "having jurisdiction of the parties or the subject matter," upon five days' written notice to the adverse party, served according to the law governing the service of a summons. Regulations governing the trial of this petition vary according as "the making" of the agreement for arbitration or "the failure, neglect, or refusal to perform the same" is put in issue. The court shall hear the cause "upon the petition and answer and depositions," or in open court, as it may direct, and thereby determine whether either of the foregoing matters are in issue. Upon being satisfied by such hearing that neither of these matters is in issue it shall order the parties to proceed with their agreement forthwith. If, on the other hand, the court is satisfied on such hearing that the making of the arbitration contract or the defendant's default thereunder is in issue the court shall try that issue if a jury trial is waived. If a jury trial is not waived the court shall direct such trial of the issue, same to be had at the earliest possible date. If the court or jury, as the case may be, find that the alleged agreement to arbitrate was not made, or that there has been no default thereunder, the proceeding shall be dismissed; if it is found that the agreement was made and that the defendant has failed, neglected or refused to perform it, the court shall summarily order the parties to proceed or to continue with the performance of the agreement.

Section 4 of the statute, obviates the power of a party to defeat his arbitration agreement by refusing to appoint arbitrators. If the parties have agreed upon a method of selecting them, and the defendant fails or refuses to participate in accordance therewith, application may be made to a court of common pleas having jurisdiction and it shall designate and appoint the arbitrators or umpire, as the case may be. Unless the arbitration agreement provides otherwise, one arbitrator shall be so appointed by the court. The objective of the proceedings under this

section is the appointment of an arbitrator or umpire by the court in lieu of performance by the defendant.

(b) *Jury trial in enforcement proceedings under the statute*

Section 3 of the statute imposes a jury trial, unless it is waived, if "the making" [58] of the arbitration agreement or the defendant's "failure, neglect, or refusal to perform same" is put in issue in proceedings under that section. To do so seems to afford an unwarranted opportunity for delay. Sections 2 and 4, on the other hand, make no provision for trial by jury.

If the ruling by the New York Court of Appeals in *Matter of Berkovitz v. Arbib & Houlberg,*[59] shall be followed the making of an agreement to arbitrate is a waiver of the right to trial by jury. Clearly, however, where "the making" of such contract is put in issue, this waiver cannot be assumed. Where, on the other hand, "the making" of the contract to arbitrate is not in issue it seems clear that there is no constitutional right to trial by jury of the issue of the "failure, neglect, or refusal to perform" the contract. Moreover, if the type of relief which is sought be deemed a fit measure by which to determine whether the proceedings are legal or equitable it is clear that the proceedings under section 3 to require the defendant to specifically perform the written arbitration agreement, are equitable, and as such need not allow a trial by jury even on the issue of "the making" of the contract sought to be specifically enforced. Again, if historical practice be taken as the proper measure of whether an action is legal or equitable it is clear that courts of equity have been appealed to from earliest times to grant such relief of specific performance as section 3 now directs. The statute now requires this equitable relief from the court of common pleas in derogation of the common law equity rule which the equity courts, in the exercise of their jurisdiction, deemed it expedient to deny. It is certain that equity courts had technical jurisdic-

[58] Concerning some of the details of this issue see Comment, *Fraudulent Inducement As a Defense to the Enforcement of Arbitration Contracts* (1927) 36 YALE L. J. 866.

[59] 230 N. Y. 261, 130 N. E. 288 (1921).

tion in such cases, and that the relief sought would have been accorded, if at all, only by them. It seems plausible to conclude, therefore, that there is no constitutional right to trial by jury in these proceedings under section 3, even when "the making" of the contract is put in issue.

If these proceedings are equitable by the foregoing measures and if the statute be regarded as changing the prior equity rule so as to require the court of common pleas to decree specific performance, question arises whether it is constitutional for the legislature to impose a jury trial in such cases. Respectable authority supports an answer in the negative. According to this authority there is a constitutional right not to have a jury trial in an equity case.[60]

It remains for the Pennsylvania supreme court to impose the jury trial as of right under the statute either by classifying the proceedings under section 3, as not "equitable" or by deciding that there is no constitutional right *not* to have a trial by jury in an equity case, or to decide that the statute is intended to grant trial by jury only as a matter of court discretion, or that it is mandatory that the trial be by jury unless waived but that the verdict is only advisory, or that this statutory imposition of jury trial is of no effect.[61]

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[60] Callahan v. Judd, 23 Wis. 343 (1868); Brown v. Circuit Judge, 75 Mich. 274, 42 N. W. 827 (1889); Campbell v. Gowans, 35 Utah 268, 100 Pac. 397 (1909); Michaelson v. United States, 291 Fed. 940 (C. C. A. 7th, 1923); compare Michaelson v. United States, 266 U. S. 42 (1924); and see Carter v. Commonwealth, 96 Va. 791, 32 S. E. 780 (1899); 1 COOK, CASES ON EQUITY (1925) 173, note; Clark, *Trial of Actions Under the Code* (1926) 11 CORN. L. Q. 482 at 497.

It should be noted that the statutes of Massachusetts and Oregon have no section corresponding to section 3 of the Pennsylvania Act. There is no other provision for trial by jury in those statutes.

[61] As noted, trial by jury is not imposed in sections 2 and 4. It seems clear, however, that "the making" of the contract can be put in issue in proceedings under these sections. From the New York cases involving corresponding provisions, it is not clear whether jury trial of that issue is required. See Matter of H. I. Gresham & Co., Ltd., 202 App. Div. 211, 195 N. Y. Supp. 106 (1902); Matter of Palmer & Pierce, Inc., 195 App. Div. 523, 186 N. Y. Supp. 369 (1922).

If the question arises as *a matter of construing the written arbitration agreement* the question seems to be to the court and not to a jury. Matter of Hosiery Mfrs. Corp. v. Goldston, 238 N. Y. 22, 143 N. E. 779 (1924),—"no . . . question of fact is presented, only the question of law as to the application of the arbitration clauses" is involved.

FUTURE-DISPUTES CLAUSES WITH NAMED ARBITRATORS—COMMON LAW CASES

As pointed out heretofore the Pennsylvania courts have distinguished future-disputes arbitration clauses with named arbitrators from "general" clauses, that is, agreements to submit to arbitrators thereafter to be selected.[62]

(a) *Requisite "Naming" Of The Arbitrators*

Few cases have dealt with the particulars of naming the arbitrators, arbitrator, or umpire. That a christian or surname is not used is clearly no objection; reference to the office or position is sufficient; for example, to "the engineer" or "the architect," it being clear that the holder of a designated position is contemplated by the parties.[63] Thus, where the clause named "the architects, Messrs. E. J. Carlisle and Company, who shall be sole arbitrators" the court said: "Andrew McMasters was shown to have been a member of the firm of E. J. Carlisle and Company. He was the architect in charge of the work, recognized as such by plaintiffs and defendants . . ." That was a sufficient "naming." [64] An agreement to refer future disputes to the Director of Public Works, "or his authorized representatives," was held to necessarily refer to the director only, "else there would really be no referee named to fill the office [of arbitrator] whereas such a designation is indispensable to the validity of every engagement to settle prospective disputes by arbitration." [65]

(b) *Other Required Provisions*

It is not clear that any other special provisions are necessary to render such an arbitration clause irrevocable. In *Gray v.*

[62] See, *supra,* notes 32 and 45.

[63] See The North Lebanon R. Co. v. McGrann, 33 Pa. 530 (1859); Wernberg v. Pittsburgh, 210 Pa. 267, 59 Atl. 1000 (1904); Holecher v. Ingalls Stone Co., 66 Pa. Super. 76 (1917); Boyd v. Whelan, 17 Phila. 270 (1884).

[64] Weymard v. Deeds, 21 Pa. Sup. 332 (1902).

[65] Curran v. Philadelphia, 264 Pa. 111, 107 Atl. 636 (1919). The court cited Mentz v. Armenia Fire Insurance Co., 79 Pa. 478, 480 (1875); Commercial Union Assurance Co. v. Hocking, 115 Pa. 407, 414, 8 Atl. 589 (1887); Yost v. McKee, 179 Pa. 381, 384, 36 Atl. 317 (1897), as authority for this proposition.

Wilson,[66] however, the court remarked in passing: "It is not supposed that parties by such agreements, [to unnamed arbitrators in that case,] waive the jurisdiction of the ordinary tribunals of the country, unless they expressly exclude them." It may be noted that express provisions in "general" arbitration clauses to the effect that "the decision of the arbitrator shall be final and conclusive," or that "all actions or suits at law or in equity are hereby waived," will not render such arbitration clauses irrevocable,[67] and it is held that such stipulations are not necessary to secure the irrevocability of an agreement which is not "general" but names the arbitrator.[68] To provide, however, that the award shall be binding upon one party, but not upon the other, renders it non-obligatory apparently as to both parties.[69]

(c) *Building And Construction Contracts*

From earliest cases arbitration clauses in such contracts have been held irrevocable in the sense that they can be pleaded in bar to any action in court upon a cause embraced in them, provided some person or official is designated therein as arbitrator. Indeed it is these clauses in this class of contracts which constitute most of the category of future-disputes clauses with named arbitrators. Whether the particular clause embraces only those disputes which concern quality and quantity of workmanship and materials or includes disputes concerning the interpretation of plans and specifications, or whether "any and all disputes" which may arise out of or in connection with the contract are included, the rule is the same.[70] These agreements for arbitration are also irrevocable in the sense that notice of revocation of

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[66] 4 Watts 39 (Pa. 1835).

[67] Snodgrass v. Gavit, 28 Pa. 221 (1857); Mentz v. Insurance Co., 79 Pa. 478 (1875); Needy v. German American Ins. Co., 197 Pa. 460, 47 Atl. 739 (1901).

[68] Kennedy v. Poor, 151 Pa. 472, 25 Atl. 119 (1892); Somerset Borough v. Ott, 207 Pa. 539, 56 Atl. 1079 (1904). See also McManus v. McCulloch, 6 Watts 357 (Pa. 1837).

[69] Curran v. Philadelphia, *supra* note 65.

[70] Fox v. Hempfield Railroad Co., 1 Pittsburgh Reports 372, 14 Leg. Int. 148 (Pa. 1857); Quigley v. De Haas, 82 Pa. 267 (1876); Hartupee v. City of Pittsburgh, 97 Pa. 107 (1881); Commonwealth v. Eastern Paving Co., 288 Pa. 571, 136 Atl. 853 (1927). See Krelich v. Klein, 10 Phila. 486 (Pa. 1873).

the authority of the named arbitrator prior to award rendered is ineffective. An award rendered thereafter by such arbitrator after notice in *ex parte* proceedings will support an action to enforce it.[71] Likewise an award duly rendered in proceedings conducted pursuant to such agreement or in the foregoing *ex parte* proceedings is "conclusive," that is, it concludes either party from retrying the case in court.[72] It does not appear whether an action for damages can be brought for breach of such agreement. No cases have been observed where a court of equity has been appealed to for a decree of specific performance in any particular or to have the court appoint an arbitrator. Perhaps this may be accounted for by the fact that the arbitrator is already appointed in such cases and that awards duly rendered even in *ex parte* proceedings under such agreements are conclusive and enforceable. For like reason probably, no cases have been found where it has been sought to injoin giving notice of revocation before award rendered.

(d) *Cases Where Future-Disputes Clauses With Named Arbitrators Are Imperative*

Waiver by the parties. It is clear that certain behavior of either party to one of these arbitration agreements will constitute a "waiver" of his rights thereunder. Few cases, however, have passed upon the question. It is settled that although a party has commenced an action on the principal contract that if he discontinues it, he does not thereby forfeit his rights under the arbitration clause.[73] If the owner

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[71] Gowan v. Pierson, 166 Pa. 258, 31 Atl. 83 (1895); Frederick v. Margworth, 221 Pa. 418, 70 Atl. 797 (1908). Want of notice and opportunity to be heard is fatal to such award. Curran v. Philadelphia, 264 Pa. 111, 107 Atl. 636 (1919). Compare Graham v. Graham, 9 Pa. 254 (1848); s. c. 12 Pa. 128 (1849). See, *infra, Ex parte* Proceedings.

[72] Monongahela Navig. Co. v. Fenlon, 4 W. & S. 205 (Pa. 1842); Reynolds v. Caldwell, 51 Pa. 298 (1865); O'Reilly v. Kearns, 52 Pa. 214 (1866); Hostetter v. Pittsburgh, 107 Pa. 419 (1884); Kennedy v. Poor, 151 Pa. 472, 25 Atl. 119 (1892); Harlow v. Borough of Wilkinsburg, 189 Pa. 443, 42 Atl. 135 (1899); Commonwealth v. Union Paving Co., 288 Pa. 571, 136 Atl. 856 (1927); Hallock v. Lebanon City, 234 Pa. 359, 73 Atl. 333 (1909).

[73] North Lebanon R. R. Co. v. McGrann, 33 Pa. 530 (1859) (action discontinued after a favorable judgment had been reversed by the supreme court); Barclay v. Deckerhoof, 171 Pa. 378, 33 Atl. 71 (1895) (similar);

refuses to appoint a successor when the architect or engineer-in-charge, who is named as arbitrator, resigns, dies or refuses to act, the contractor can disregard the arbitration clause and sue in court.[74] Likewise, if the owner "accepts" the work without requiring the prescribed "estimate" or award, he thereby waives the requirement and the contractor can bring an action in court for his claims under the main contract.[75]

Misconduct of the arbitrator. If the arbitrator refuses to act on the ground only that the owner is dissatisfied, that is, "if he does not exercise his own judgment," or if he refuses to act without assigning any reason, the complaining party can disregard the arbitration agreement and maintain an action in court.[76] *A fortiori,* where there is collusion between the arbitrator and owner with respect to his refusal to act or his conduct generally as arbitrator.[77] Again, if the dispute involves, among other questions, the determination of the due performance by the arbitrator himself in his capacity as architect or engineer-in-charge under the main contract, the clause will not bar the contractor's action in court. In this connection the supreme court took the following position in *Hunn v. Penn. Institution for the Blind:* "Nearly all

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Agricultural Assn. v. Surety Co., 225 Pa. 592, 74 Atl. 620 (1909) (discontinued before trial); and see Trust & Surety Co. v. Howell, 19 Pa. Super. 255 (1902). Compare Hart v. Hamilton, 125 Pa. 142, 17 Atl. 226, 473 (1889); McKenna v. Lyle, 155 Pa. 599, 26 Atl. 777 (1893).

[74] Coon *et al.* v. Citizens Water Co., 152 Pa. 644, 25 Atl. 505 (1893). See also Reynolds v. Caldwell, 51 Pa. 298 (1865); Dhrew v. Altoona, 121 Pa. 401, 15 Atl. 636 (1888).

[75] Hartupee v. City of Pittsburgh, 97 Pa. 270 (1881) (held, no "acceptance"); Coon *et al.* v. Citizens Water Co., *supra* note 74; Hunn v. Penn. Institution for Blind, 221 Pa. 403, 70 Atl. 812 (1908). See also Quigley v. De Haas, 82 Pa. 267 (1876).

[76] Dhrew v. Altoona, 121 Pa. 401, 15 Atl. 636 (1888) (not an "absolute refusal"); Pittsburgh etc. Co. v. Sharp, 190 Pa. 256, 42 Atl. 685 (1899); Wernburg v. Pittsburgh, 210 Pa. 267, 59 Atl. 1000 (1904); Fay, Admx. v. Moore, 261 Pa. 437, 104 Atl. 686 (1918); see also Boyd v. Whelen, 17 Phila. 270 (1884); Holecher v. Ingalls Stone Co., 66 Pa. Super. 76 (1917); Smith, Trustee v. Cunningham Piano Co., 239 Pa. 496, 86 Atl. 1067 (1913). The demand that the arbitrator proceed is properly made upon the owner, at least where the arbitrator is the architect or engineer in the owner's employ. Drew v. Altoona, *supra.* It need not be in writing. American Marble Co. v. First National Bank, 6 D. & C. 695 (Pa. 1925).

[77] Pittsburgh etc. Co. v. Sharp, 190 Pa. 256, 42 Atl. 685 (1899); Fay, Admx. v. Moore, 261 Pa. 437, 104 Atl. 686 (1918); American Marble Co. v. First National Bank, 6 D. & C. 695 (Pa. 1925). Compare Reynolds v. Caldwell, 51 Pa. 298 (1865); Payne v. Roberts, 214 Pa. 568, 64 Atl. 86 (1906).

the rejected offer of testimony relates to default in the performance of duties imposed upon the architects by the contract, and certainly it could not have been the intention of the parties to deliberately enter into a covenant providing that the arbiters should have the right to pass upon and finally determine questions involving their own failure in the performance of duties." [78] Atl. 636 (1919).

(e) *Construction Of Future-Disputes Clauses—What Disputes Did The Parties Agree To Arbitrate?*

Power of the arbitrator to decide. It is manifest that a future-disputes clause with a named arbitrator as well as one with no named arbitrator is effective only with respect to those controversies which are embraced within the particular agreement.[79] Does the arbitrator in the given case have the legal power to decide what the parties agreed to arbitrate? The question may arise when the agreement is pleaded by one party in bar to an action brought by the other party; it may be raised before the arbitrator at the hearing; it may be involved as a defense either to an action brought to enforce an award or to an action on the original cause brought after an award rendered. It is settled that the court will consider and decide the question whenever it is raised unless the parties have agreed that the arbitrator shall

[78] 221 Pa. 403, 70 Atl. 812 (1908); Payne v. Roberts, *supra* note 77; Smith, Trustee v. Cunningham Piano Co., 239 Pa. 496, 86 Atl. 1067 (1913); and see Shoemaker v. Riebe, 241 Pa. 402, 88 Atl. 662 (1913).

It appears from the foregoing cases that if, in the opinion of the court, there is sufficient evidence of a "refusal" by a party or arbitrator to act, or of a "waiver" by "acceptance" by the owner, or of the default of the arbitrator as architect or engineer-in-charge, to go to the jury, these questions then become jury questions. See Drew v. Altoona, 121 Pa. 401, 15 Atl. 636 (1888); Smith v. Cunningham Piano Co., *supra;* Coon *et al.* v. Citizens Water Co., 152 Pa. 644, 25 Atl. 505 (1893); Hunn v. Penn. Institution for the Blind, 221 Pa. 403, 70 Atl. 812 (1908). Compare Curran v. Philadelphia, 264 Pa. 111, 121, 107

[79] See Lauman v. Young, 31 Pa. 306 (1858); Chandley Bros. & Co. v. Cambridge Springs Borough, 200 Pa. 230, 49 Atl. 772 (1901); Hunn v. Penn. Institution, *supra* note 78.

Where there is a deviation from a written contract containing an arbitration clause pursuant to subsequent oral contract between the parties, the deviation may be sufficient to at least raise a question for the jury whether the oral contract has been substituted for the original contract in whole or in part, including the arbitration clause. If the clause survives, apparently matters arising under the oral deviation will not be ordinarily embraced within the clause. See Malone & Son v. R. R. Co., 157 Pa. 430, 27 Atl. 756 (1893). Compare O'Reilly v. Kerns, 52 Pa. 214 (1866).

do so, and it is clear that such agreement by the parties will not be readily inferred.[80]

Particular clauses construed. Many of the cases wherein this question has arisen involve the "repudiation," "rescission," or refusal of a party to perform the main contract.

In the famous case of *Monongahela Navigation Co. v. Fenlon,*[81] the arbitration clause provided that "in any dispute which may arise between the contractors and the company, the decision of the engineer shall be obligatory and conclusive." The company was unable to procure necessary funds to continue the contract. The contractors quit the job and sued for work done and for damages for loss of profits. *Held:* that these claims were within the arbitration clause, at least, where, as here, the company had not acted in bad faith and where, according to the court, "the suspension or abandonment, as in the case here, arises from unforeseen contingencies acquiesced in by all the parties." The court emphasized the generality of the term "any" dispute as used in this arbitration clause. In *Lauman v. Young*[82] the contractor sued on the contract for damages for breach by defendant and for loss of profits. The plaintiff based his claims upon the facts that defendant failed to procure the necessary right-of-way as agreed and that defendant let the job to others whereby plaintiff was prevented from performing. The arbitration clause provided that "the said engineer shall, in all cases, determine the amount and quantity of the several kinds of work which are to be paid for under this contract, and the amount of compensation, at the rates herein provided for; and . . . also that the said engineer shall, in all cases, decide every question which can or may arise, relative to the execution of this contract, on the part of said contractors." *Held:* That the general term "all dis-

[80] Lauman v. Young, 31 Pa. 306 (1858); North Lebanon Ry. Co. v. McGann, 33 Pa. 530 (1859); Connor v. Simpson, 104 Pa. 440 (1883); Hunn v. Penn. Institution, 221 Pa. 403, 70 Atl. 812 (1908); Kann v. Bennett, 234 Pa. 12, 82 Atl. 1111 (1912). See also Matter of Priore v. Schermerhorn, 237 N. Y. 16, 142 N. E. 337 (1923); Bullard v. Grace, 240 N. Y. 398, 148 N. E. 562 (1925).

[81] 4 W. & S. 205 (Pa. 1842).

[82] 31 Pa. 306 (1858). Compare Hartupee v. City of Pittsburgh, 97 Pa. 107 (1881).

putes" was limited by the subsequent particularization regarding work done and compensation paid. That the last clause: "relative to the execution of this contract, on the part of said contractors," likewise limited the application of the arbitration agreement to disputes arising out of the performance of the work by the contractor. "The plaintiffs in the case do not sue for work done, in performance of the contract, but to recover damages from the defendant for preventing or refusing to permit them to perform it. There is no dispute about the amount of work done, or the price or the manner of executing the contract, but solely to recover damage for the loss of the contract; and nothing else is claimed in the *narr.* nor was claimed on the trial. . . . The right of trial by jury will not be taken away by implication merely, in any case."

The court distinguished *Monongahela Navigation Co. v. Fenlon* on the point that the claim in that case was for work done as well as for damages for suspending the contract and on the point that the clauses were different in the two cases.

In *Connor v. Simpson,*[83] the arbitration clause provided for the arbitration of "all and every question of difference between the parties, growing out of this contract." Issue was raised whether plaintiff's claim for damages for defendant contractor's breach of contract was within the terms of the foregoing clause. *Held:* "If it were not for the obligation of the contract, such claim could not be made, and when made, it must stand or fall, under the agreement of the parties; rights which accrue from non-performance are as much the outgrowth of the contract as those which accrue from performance." In *Fulton v. Peters* [84] it was held that the following clause: "Should any question arise in regard to the quality or quantity of the work, the same shall be referred to the said superintendent," was a bar when plaintiffs brought *scire facias* sur mechanic's lien apparently for work done and for damages because defendant refused to faithfully perform and thereby compelled plaintiffs to abandon the contract.

[83] 104 Pa. 440 (1883). See also Hartupee v. City of Pittsburgh, 97 Pa. 107, 119 (1881); Agricultural Assn. v. Surety Co., 225 Pa. 592, 74 Atl. 620 (1909).

[84] 137 Pa. 613, 20 Atl. 936 (1890).

Dobbling v. York Springs Ry. Co.[85] involved the application of the following arbitration clause: "any dispute which may arise between the parties to this agreement relative to or touching the same," the award to be conclusive "on the rights and claims of said parties." Plaintiff sued for damages for breach of contract only, and not for work done. He alleged that defendant ordered plaintiff to stop work. *Held:* "Such a contingency as the entire stoppage of the work by the defendant company, or the rescission of the contract, was not apparently anticipated by either of the parties, and no provision was made in contemplation of any such occurrence. The agreement to submit to the decision of the engineer was limited to disputes relative to or touching the agreement itself, . . . and did not cover questions outside the contract, and clearly could not include a claim for damages for the abrogation of the contract." The court also stated that *Lauman v. Young, supra,* "squarely ruled the question here involved." *Connor v. Simpson* and *Fulton v. Peters* were not cited by the court.

Somerset Borough v. Ott [86] likewise considered the decision in *Lauman v. Young* applicable in the following case: the arbitration clause provided that the engineer "shall be referee in all cases to determine the amount, quality, acceptability and fitness of the several kinds of work which are to be paid for under this contract, and to decide upon all questions which may arise as to the fulfillment of said contract on the part of said contractor." Dispute arose between the parties. Defendant contractor abandoned the work and plaintiff claimed damages for breach of contract. The court said: "An agreement to submit questions that may arise as to the fulfillment of the contract does not give the right to pass on a claim for damages for non-fulfillment." Referring to *Lauman v. Young,* the court said: "It is true that in that case there was no dispute as to the character of the work done, but an apparently arbitrary refusal to permit the contractor

[85] 203 Pa. 628, 53 Atl. 493 (1902); s. c. 207 Pa. 123, 56 Atl. 349 (1903).

[86] 207 Pa. 539, 56 Atl. 1079 (1904). See also Shoemaker v. Riebe, 241 Pa. 402, 88 Atl. 662 (1913); compare this case with cases cited *supra* note 78. But compare the *Ott* case with Agricultural Assn. v. Surety Co., 225 Pa. 592, 74 Atl. 620 (1909).

to proceed with the work after a right of way had been secured; and that in this case the contractor abandoned the work after a dispute had arisen as to whether certain changes directed to be made by the engineer came under the head of extra work. The claims, however, were of the same character, damages for non-fulfillment, and their character determined the jurisdiction of the referee."

In the following cases question arose whether the given arbitration clause embraced claims for extra work or claims for damages because of defective workmanship or defective materials, or claims for delay in performance of the main contract.

In *Gallagher v. Sharpless* [87] a claim for damages for defective workmanship and an additional sum for omissions and delay by the plaintiff contractor was held not to be a dispute within an arbitration clause providing for the arbitration of "any dispute arising respecting the true construction or meaning of the drawings or specifications, or as to what is extra work outside of contract. . . . or any dispute . . . respecting the value of any work omitted by the contractors." In *Chandley Brothers & Co. v. Cambridge Springs Borough* [88] the court held that a claim for damages for delay by the contractor, provided for in the main contract, was not embraced in an arbitration clause covering "any disagreement or difference as to the true meaning of the drawings or specification on any point, or concerning the character of the work." In *Clark & Sons Co. v. Pittsburgh* [89]

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[87] 134 Pa. 134, 19 Atl. 491 (1890).

[88] 200 Pa. 230, 49 Atl. 772 (1901).

[89] 217 Pa. 46, 66 Atl. 154 (1907). See also Agricultural Assn. v. Surety Co., 225 Pa. 592, 74 Atl. 620 (1909); English v. School District, 165 Pa. 21, 30 Atl. 506 (1894).

"The agreement, referring to the architect 'all disputes, however arising, and all questions of doubt as to the tenor and intention of the drawings and specifications, or of the contract,' is certainly broad enough to embrace the question whether the contractor and his sureties were bound to refund to the plaintiff (owner) the amount paid by him on the mechanic's lien (which was filed by a supply man not a party to the clause), especially in view of the clauses in the building contract by which the contractor agreed to deliver the building free from all claims, and to furnish, provide and deliver, at his own cost, all necessary materials." Barclay v. Deckerhoof, 171 Pa. 378, 33 Atl. 71 (1895).

See the following cases involving the problem of construing two or more arbitration clauses in the same contract, Henry v. Lehigh Valley Coal Co., 215

an arbitration clause covered "any question on dispute under the said plans, specifications or terms of this contract, respecting the quality, quantity or value of the work or labor done or materials furnished or to be done or to be furnished, or any of the terms, stipulations, covenants or agreements herein contained, or respecting any pay for extra work, or respecting any matter pertaining to this contract, or any part of the same." *Held:* that the contractor's claim for sum due for extra work, and claim of city for liquidated damages for delay in completing performance pursuant to terms of the contract providing therefor were embraced in the arbitration clause. It was the opinion of the court that these matters were within the clause "any question or dispute respecting any matter pertaining to" the contract.

Who are parties to an arbitration agreement. A similar question of construction arises in determining what persons are entitled to the benefits and subject to the obligations of a given arbitration clause.

Subcontractors. It has been stated generally that whether or not a subcontractor is a party to an arbitration clause in the main contract depends upon the terms of his own contract.[90]. In *Warren-Ehret Co. v. Byrd*[91] the plaintiff, a supply man to a subcontractor, contracted to put on roofing "per plans and specifications" of the main contract. There was evidence, moreover, that plaintiff was familiar with some of the terms of the principal contract. *Held:* That only those terms of the main contract governed plaintiff which related to the particular work which he engaged to do and that he was not bound by any other provisions in the general contract—thereby excluding the arbitration clause. The court also noted, however, that the terms of the arbitration clause included only the "owner," "contractor" and "subcontractors" and said that thereby it "expressly excludes the plaintiff and

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Pa. 448, 64 Atl. 635 (1906); Curran v. Philadelphia, 264 Pa. 111, 107 Atl. 636 (1919); American Marble Co. v. First National Bank, 6 D. & C. 695 (Pa. 1925).

[90] See Barclay v. Deckerhoof, *supra* note 89.

[91] 220 Pa. 246, 69 Atl. 751 (1908).

those like him, doing work or furnishing materials to a subcontractor." [92]

Sureties. Sureties who have guaranteed faithful performance by the contractors have contested their responsibility on an award rendered by an architect or engineer against the contractor under a variety of arbitration clauses. The supreme court has overruled the defense in each case. Where the award has been held conclusive and enforceable against the principal it has been enforced against his surety, the surety having had notice of the time and place of hearing and having had opportunity to defend.[93]

Assignees. The position of assignees of the main contract with respect to an arbitration clause therein has been scarcely touched upon in the cases. Whether they are subject to such clauses; whether they can avail themselves of such clauses, are questions yet to be determined. It has been indicated that a general arbitration clause would not embrace the question whether the contract was assignable.[94]

Identification of the proper arbitrator. A problem of construing an arbitration clause with named arbitrator is likewise involved when question arises as to who is the *person* named?

In *North Lebanon Railroad Co. v. McGrann* [95] the parties

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[92] The court also relied on a clause in the contract which defined the term "contractor" as referring to "those who have a direct contract with the owner, and to subcontractors to such direct contractors, and to no other persons whatsoever."

[93] Hostetter v. City of Pittsburgh, 107 Pa. 419 (1884); Agricultural Assn. v. Surety Co., 225 Pa. 592, 74 Atl. 620 (1909); and see Pittsburgh Construction Co. v. West Side R. Co., 227 Pa. 90, 75 Atl. 1029 (1910). Compare Citizens' Trust and Surety Co. v. Howell, 19 Pa. Sup. 255 (1902).

[94] See Citizens' Trust & Surety Co. v. Howell, *supra* note 93.

The New York Court of Appeals has taken the following position: "Arbitration contracts would be of no value if either party thereto could escape the effect of such a clause by assigning a claim subject to arbitration between the original parties to a third party." Matter of Hosiery Mfrs. Corp. v. Goldston, 238 N. Y. 22, 143 N. E. 779 (1924) (assignee subject to the future-disputes clause); Matter of the Application of Max Lowenthal as Receiver, 233 N. Y. 621, 135 N. E. 944 (1922) (receiver entitled to enforce arbitration—"assignee by operation of law"); Matter of Scott, 200 App. Div. 599, 193 N. Y. Supp. 403 (1922), affd. without opinion, 234 N. Y. 539, 138 N. E. 438 (1922) (devisees and general trustee of estate of a party held entitled to enforce arbitration).

[95] 33 Pa. 530 (1859). See also Connor v. Simpson, 7 Atl. 161 (Pa. 1886).

agreed to refer their disputes to "the chief engineer." The person who was the chief engineer when the agreement was executed, resigned. His name was Worrell. Plaintiff requested him to arbitrate a dispute between the parties which, it is inferred, arose between them before he resigned, but which, apparently, was not submitted to him until after that time. Defendant denied his authority and refused to participate. The late engineer, however, heard the case *ex parte* and rendered award for plaintiff. Thereupon plaintiff brought suit thereon. *Held:* that the award would not support the action. The court explained the case as follows: "That the agreement was not to refer to Mr. Worrell as Mr. Worrell, cannot be doubted. He was not named. The submission was to be to an officer competent by virtue of his office . . . So, if there had been a succession of chief engineers, he alone could have awarded, who was in office when the adjudication was called for; and this though his superintendence of the work might have been less than that of his predecessors." In *Wernberg v. Pittsburgh*[96] a similar case arose wherein the "director of public works of the city of Pittsburgh" was designated as arbitrator. One Wilson, who was director at the time of the contract and at the time the dispute arose, after notice, heard the parties. Before his award rendered, however, he was duly removed from office by the Mayor of the city and one McCandless was appointed Wilson's successor. Wilson refused to return an award. McCandless, after his appointment, gave notice that he would hear the dispute. Plaintiff refused to participate and thereupon sued on his original claim. *Held:* that neither the award by McCandless nor the arbitration clause could be pleaded to bar plaintiff's action. The opinion of the majority of the court argues that the removal of Wilson from office did not deprive him of power to render an award. "The duties of the two positions (arbitrator in this contract and Director of Public Works) are separate and distinct, and are in no way interdependent upon each other . . . The severance of his relations with the city as director, by resignation or removal is the end of his authority as such, but it cannot affect his position as arbitrator,

[96] 210 Pa. 267, 59 Atl. 1000 (1904).

the duties of which he has then assumed, and which are those of the individual and not those of the director of public works." The majority explained away the decision in *North Lebanon Ry. Co. v. McGrann* on the ground that in that case Worrell was not, *at the time of the submission,* "competent by virtue of his office." The majority also argued that nothing in the arbitration clause gave the city a right to have the person who decided the cause as arbitrator to be at the same time in some official relation with it—in this case as director of public works. A minority of the court: Dean, Brown, and Potter, *JJ.,* considered the case to be governed by the *McGrann* case and emphasized the point that defendant city ought to be protected "from the litigation of unfounded claims." Dean, *J.,* declared that there was "not a spark of real merit" in plaintiff's claim. The majority noted that the director of public works held an office of precarious political tenure—that in less than three years four incumbents had been removed and their places filled by appointment by the mayor.[97]

(f) *State And Municipal Contracts*

Until the most recent cases no question appears to have been raised concerning the power of the state, municipal corporations, boroughs and counties to use arbitration clauses in their contracts. Where these clauses were not "general" but were with named arbitrators they have been constantly held irrevocable, and awards duly rendered thereunder have been held conclusive and obligatory against and in favor of both parties thereto.[98] In *Commonwealth v. Eastern Paving Company,* however, the issue was raised concerning such an arbitration clause in a contract with the state department of highways for certain paving. Dis-

[97] The majority also noticed that little remained to be done by Wilson except to render his award. "Here the dispute had not only been referred to Director Wilson but the parties had submitted to him all their proofs, and he had fully heard them, and the only other act to be performed by him in the discharge of his duties as arbitrator was to announce his decision." In this connection see cases, *infra,* notes 179-182.

[98] See, for example, Hartupee v. City of Pittsburgh, 97 Pa. 107 (1881); Harlow v. Borough of Wilkinsburg, 189 Pa. 443, 42 Atl. 135 (1899); Commonwealth v. Pittsburgh, 204 Pa. 219, 53 Atl. 769 (1902); Clark & Sons v. Pittsburgh, 217 Pa. 46, 66 Atl. 154 (1907).

pute arose between the parties. In disregard of the arbitration clause the contractor made demand for payment directly upon the auditor general and state treasurer for the balance which was claimed to be due. Upon refusal action was brought to recover. The supreme court overruled plaintiff's contention that the clause was void for want of power of the commissioner of highways to include such agreements in highway contracts and also held that the Act of 1811 regulating the manner of settling state debts was not applicable to plaintiff's claim. The court also took the position that plaintiff in such case at least could not bring itself within the statutes, particularly the Sproul Act of May 31, 1911, regulating payments of highway accounts.[99] Likewise, an adverse award by a designated engineer-in-charge under a similar contract was held to bar the contractor's recourse to any court action to litigate the same matter, in the companion case of *Commonwealth v. Union Paving Co.*[100]

RELATION OF THE STATUTE TO COMMON LAW RULES CONCERNING FUTURE-DISPUTES CLAUSES WITH NAMED ARBITRATORS—"APPRAISALS," "VALUATIONS"

It remains for the supreme court to decide how these clauses in building and construction contracts shall be affected by the new statute which deals with agreements to settle disputes "by arbitration." There is no doubt that they have been almost universally referred to by the courts in the common law cases as "arbitration agreements." The revocability of such agreements and the conduct of the arbitrator and the conclusiveness and enforceability of the award have been decided accordingly. The basis of classification employed by the New York Court of Appeals in the case of *Matter of Fletcher*[101] will be an innovation if it is accepted to exclude these future-disputes clauses from the statute as being "appraisals" or "valuations" and not agree-

[99] 288 Pa. 571, 136 Atl. 853 (1927).

[100] *Supra* note 99.

[101] 237 N. Y. 440, 143 N. E. 248 (1924). See *supra* note 23 and text discussion in connection therewith. Compare Matter of Scott, 200 App. Div. 599, 193 N. Y. Supp. 403 (1922), aff'd without opinion 234 N. Y. 539, 138 N. E. 438 (1922).

ments to settle "by arbitration." If the statute is construed to be applicable, the enforcement remedies of sections 3 and 4 will be available and also the summary proceedings to enforce the award. If the statute is held not to apply, it may be inferred that the foregoing common law rules will stand.

The position of future-disputes clauses in fire insurance policies under the statute will likewise arise. Again, with respect to these clauses it may be noted that except for statements in the *Mentz* case [102] they have been referred to as "arbitration" agreements, but being "general," that is, to unnamed arbitrators, they have been held to be revocable. The application of the statute to these clauses becomes of special importance in light of the common law rules of revocability which govern them. It remains for the Pennsylvania supreme court to decide whether the general basis of classification of the case of *Matter of Fletcher* shall be followed.

Persons Competent to Contract to Arbitrate

(A) Future Disputes

(a) *Provisions Of The Statute*

Section 1 deals with " a provision in a written contract," except one in a contract of personal services, and enacts that such provision shall be "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." It may be inferred that the saving clause allows the legal power of special parties, for example, of agents, fiduciaries, partners, personal representatives, married women or minors to enter into such agreement to be put in issue. If the written contract is one for "personal services" a future-disputes clause therein is not made "valid, irrevocable and enforceable" by and pursuant to the statute. By section 16, the state, "or any agency or subdivision thereof, or any municipal corporation or political division" thereof, is authorized to insert a future-disputes provision in "any written contract" to which it or they are a party.

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[102] 79 Pa. 478 (1875).

(b) *Cases At Common Law*

The cases at common law have already been noted wherein future-disputes provisions with named arbitrator in state and municipal contracts have been held irrevocable. It has also been noted that awards duly rendered in arbitrations held under such provisions have been held to be conclusive upon each party and to be enforceable by action. Otherwise the question of the legal power of parties to contract to arbitrate future disputes does not appear to have been raised.

(B) AGREEMENTS TO ARBITRATE EXISTING DISPUTES

(a) *Provisions Of The Statute*

Section 1 of the statute provides that an agreement in writing between "two or more persons" to submit an existing dispute to arbitration "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." The statute does not expressly provide any exceptions to the "two or more persons" other than such as is to be inferred from the saving clause. It may be noted also that "personal service" contracts are not expressly excepted from the provisions of the statute so far as they deal with agreements to arbitrate an existing controversy. Section 16 of the act expressly authorizes the state and its municipalities to enter into agreements of submission of existing disputes.[103]

(b) *Cases At Common Law*

Co-operative Associations. No cases.

Corporations—Business. No cases.

[103] The New York Law (C. P. A. section 1448) expressly provides that the submission of an *existing controversy* cannot be made "either as prescribed in this article or otherwise . . . where one of the parties to the controversy is an infant, or a person incompetent to manage his affairs by reason of lunacy, idiocy or habitual drunkenness. . . . "But where a person capable of entering into a submission has knowingly entered into the same with a person incapable of doing so, as prescribed in subdivision first of this section, the objection on the ground of incapacity can be taken only in behalf of the person so incapacitated." The Act of the Territory of Hawaii likewise excludes "an infant, or a person incompetent to manage his affairs" from qualification to enter into a submission agreement of an *existing* dispute. It does not contain the last quoted paragraph of the New York Law.

—Municipal. In *Smith v. Williamsburg Borough*[104] the rule is broadly laid down that "unless restrained by positive enactment, municipal corporations possess inherent power to submit disputed claims to the arbitrament of referees, and they are as much bound by such submissions and the awards made in pursuance thereof as are natural persons."

Married Women. No cases.

Minors. No cases.

In the following cases the question of authority and power of a *representative* to enter into an arbitration agreement on behalf of another to settle an existing controversy between such party and a third person was involved.[105]

Attorneys-At-Law. An attorney for a client in a case pending in court has power to submit the cause to arbitration—at least when the client does not object to the knowledge of the other party. No cases have been found, however, which decide that this power extends to causes which are not in pending actions.

Agents—general. No cases.[106]

Partners. As distinguished from corporations generally there is no question in case of partnerships as to the charter power of *partnerships* to become parties to an agreement to settle a dispute by arbitration. The recurring question is that of the authority and legal power of less than all of the partners to bind their partnership account by the agreement to arbitrate. In *Taylor v. Coyrell,*[107] a partner in an ordinary commercial partnership submitted to arbitration in the firm name certain firm accounts with third persons which were in dispute. The submission agreement was not under seal. *Held:* Award enforceable against objection

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[104] 172 Pa. 121, 33 Atl. 371 (1895). "Equitable" claims against the Borough for rebate of sewer taxes were the subject-matter of the submission agreement. See also cases cited, *supra* notes 99 and 100.

[105] It should be noted that these cases deal with arbitration agreements to settle *existing* disputes and that it remains to be observed whether the rules in those cases will be extended to future-disputes clauses which are or are not governed by the statute.

[106] Possibly it is inferable from the opinion in Gay v. Waltham, 89 Pa. 453 (1879), that if a power of attorney to enter into a sealed submission agreement is to be given that it must be under seal also.

[107] 12 S. & R. 243 (Pa. 1824). *Accord:* Gay v. Waltham, 89 Pa. 453 (1879).

that only one partner in fact knew of and executed the agreement. The court said: "On mature reflection my opinion is, that one partner may fairly enter into an agreement to refer, by writing not under seal, any partnership matter, and this would bind the whole firm." The court continued, however, as follows: "I do not say, that one partner can bind the others, where there is an express dissent communicated to the party litigant." It should be noted, however, that the *Uniform Partnership Act* has been adopted in Pennsylvania and that section 9 (3) provides as follows: "Unless authorized by the other partners, or unless they have abandoned the business, one or more but less than all the partners have no authority to: . . . (e) Submit a partnership claim or liability to arbitration or reference." [108]

Trustees. The case of *Brower v. Osterhaut* [109] raised the question of the validity of an award of a piece of land to the defendant under a submission to arbitration to which plaintiffs as express trustees were parties. They sought to disregard the award in action of ejectment to recover the land. They failed. By the terms of the trust they were to manage, rent, and sell the premises, which were lands adjoining defendant's property, and to reinvest any proceeds for the benefit of a named *cestui.* The court explained its position as follows: "The principal purpose of the trust was to lease the premises, and apply the rents to specific objects; but to do so to advantage, required the contested ownership of the ground in dispute to be speedily and permanently settled; an end which could not well have been attained by action, for two consecutive verdicts in ejectment could scarce have been expected within the period limited for the expiration of the trust; and a contested possession must have occasioned a serious diminution of the rents. A submission to arbitration, therefore, was not only expedient but indispensable to a beneficial execution of the trust, especially as the trustees were not in possession; and a power to bind those whom they represent in

[108] Act of 1915, P. L. 18, PA. STAT. (West. 1920) § 16596 *et seq.* See also section 4 (1). It remains for the supreme court to determine the meaning of the term "authority" as used in section 9 (3) when involved in the question at hand.

[109] 7 W. & S. 344 (Pa. 1844).

equity, would be implied, were it necessary, from the nature of the case." *Personal Representatives: Grace v. Sutton*[110] declares it to be the general rule: "That an executor or administrator may submit a matter in dispute between another and himself in right of his testator or intestate. . . . It is not a higher power than is constantly exercised by them of disposing of the effects and chattels of the deceased, ascertaining legacies, releasing debts and confessing judgments binding on the estate." Concerning the comparative responsibility of the estate and of the executor or administrator personally, the court explained: "Where there is no express undertaking of the personal representative to perform, as here, and the award finds a sum due, but does not order the administrator to pay it, as here, the administrator is not personally bound—he may plead want of assets." The court cites *Hoare v. Muloy* [110a] for the proposition also that submission to a reference is not an admission of assets by the personal representative. In the principal case, moreover, it is decided that any one of several administrators or executors has power to submit such causes to arbitration "inasmuch as they have a joint and entire authority over the whole property."

Guardians. No clear decisions in point have been found. In *Power v. Power,*[111] the court expressly left undecided whether a guardian of a minor has power to enter into a common law submission agreement for the partition of the minor's land. In *Hume v. Hume,*[112] however, the court indicates that such an award would be sustained as it would be for the minor's advantage since arbitration would obviate litigation, "and according to the rule that the guardian has authority to act for the benefit of the infant in regard to his property, it would be a valid act, and such as a court of law or equity could sanction. At any rate it could only be voidable by the infant on coming of age, and here he has acquiesced, and now ratifies by living upon it [the land

[110] 5 Watts 540 (Pa. 1836). *Accord:* Peter's Appeal, 38 Pa. 239 (1861).
[110a] 2 Yeates 161 (Pa. 1834).
[111] 7 Watts 205 (Pa. 1838).
[112] 3 Pa. 144 (1846). See also Johnston v. Furnier, 69 Pa. 449 (1871).

which had been awarded to him]." It yet remains for the court to more fully decide concerning the powers of a guardian for a minor, or other person, to submit claims in favor of and against the ward to arbitration.

(c) *Requisite Of Mutuality—When Agreement Is Voidable*

In cases where minors are parties to a submission agreement, or where an agent or other representative is without authority or legal power to bind those whom they represent, question arises under the doctrine of *mutuality* whether the other party is bound by the agreement or an award rendered thereunder. This "other" party may raise the issue as follows: (a) that he may and can revoke an executory arbitration agreement for want of mutuality—that since it is not obligatory on the adverse party unless he "ratifies" it is likewise not obligatory on himself unless he consents; (b) that an adverse award is not binding because of want of mutuality—that since he could not have enforced a favorable award unless the represented party ratified, he cannot be held to an adverse award unless he consents. No cases have been found which deal with the first question. The case of *McCume v. Lytle*,[113] with slight discussion of the question, indicates that in the second case the defendant could not so defend against an adverse award where he had participated in the arbitration with knowledge of the representative position of the other party.

[113] 197 Pa. 404, 47 Atl. 190 (1900). Compare Christman v. Moran, 9 Pa. 487 (1848). See provision of New York Arbitration Law, *supra* note 103.

(To be concluded)