Often it is desired that controversies be settled by other means than by submitting the matter to the decision of a court or the verdict of a jury. The law of arbitration has grown up to take care of this need. Arbitration can be an excellent means for the settlement of differences in which a quick and inexpensive decision is desired.

Under an arbitration the matter in dispute is submitted to one or more persons known as arbitrators who hear the facts as presented by the parties and render an award or decision in the case. Arbitration was recognized at common law. In earlier times, arbitration was frowned upon by the courts of England. The reason for this was that at that time the courts were extremely jealous of their jurisdiction, and did not believe that a means should be recognized which would to any extent oust them of their power. However, in recent times the courts have encouraged arbitration to a much larger extent.

Obviously the purpose of a submission to arbitration is not accomplished if there is litigation after the award is published. It is in order to avoid this undesirable result that this study of the reported cases involving arbitration is made.

The first Missouri statute of arbitration was adopted in 1825. This statute provided that submissions made in writing which provided for a written award should be governed thereby. As will be seen infra common law arbitration has not been invalidated by the statute. This statute has continued down to the present day practically unchanged.

The last important change in the Statute was made in 1909, when what is now Section 15233 of the Missouri Revised Statutes, 1939, was enacted. This section has received adverse comment.

*Attorney, St. Louis. A.B., University of Missouri; LL.B., Harvard University.
1. See Vynor's case, 8 Co. 81 b.
4. Werner, Progress in Voluntary Tribunals, 4 St. Louis L. Rev. 61, 66 (1919); Grossman, Commercial Arbitration in Missouri, 12 St. Louis L. Rev. 229 (1927).
Before discussing the decisions interpreting the various provisions of the Statute on Arbitration, it is deemed well at the outset to distinguish a submission to arbitration and the award thereunder, from several other situations more or less similar.

The cases are numerous in which a contract provides for the ascertaining of the value or price of property or services by certain other parties who are chosen by the contracting persons either at the time the contract is made or at a later time. Such contracts are said by the Courts to contain a provision for an appraisal. Provisions of this sort frequently occur in contracts for fire insurance. There is no conflict among the cases that contracts containing such provisions are not submissions to arbitration. Whether or not these contracts are covered by the various provisions of the statute with reference to arbitration will be considered later.

Probably the best discussion of the basis of this distinction is made by Judge Goode in Dworkin v. Caledonian Insurance Co. The court in that case, before stating what it deemed to be the proper ground for the distinction between the cases, pointed out several "would be" distinctions. The court stated: "Sometimes it has been pointed out that an agreement for an arbitration implies a controversy between the parties at the time of the submission, which is to be the subject-matter of the arbitration; whereas a stipulation for an appraisal of values does not presuppose a controversy." However the court stated that there are many cases in which the provisions for an appraisal were only to come into play in case the parties disagreed. It has been held that an appraisal is not an arbitration because the question of ultimate liability is not decided and, therefore, does not oust the jurisdiction of the courts. The amount of loss is the only dispute in insurance cases, as was the Dworkin case; but these have been held not to be cases of arbitration. The court then said

7. The court cited the following two cases. Garred v. Macey, 10 Mo. 161, 164 (1846); Scott, J. "An award is defined to be the determination of matters in controversy by submission to persons...contending. There was no...case, before the execution of the agreement which is regarded as a submission." Curry v. Lackey, 35 Mo. 389, 394 (1865), Dryden, J., said "A reference to arbitration occurs only where there is a matter in controversy between two or more parties."
that it had been held that in cases of appraisal the appraisers were agents of the respective parties. However, there are many cases of appraisal when the appraisers are not the agents of the parties. The two situations have been distinguished by the fact that an appraisal settles a subsidiary and incidental matter and not the main controversy. In insurance cases the amount of loss is the main controversy. The court then set out the proper basis of the distinction: "In our opinion the fundamental difference between the two proceedings lies in the procedure to be followed, and the effect of the findings." This distinction seems a reasonable one, if it is meant that the requisites are found from the contract of the parties and not from the law governing arbitration and award. It would seem clearly circular to say that a certain contract is one that is governed by the law of arbitration and award, and certain procedure must be followed as to the giving of notice etc., and that, therefore, for this reason, this contract is a submission to arbitration and is not an appraisal. Generally the opinions state the conclusion as applied to the facts under consideration, and, if it is an appraisal, say that an appraisal is something less than an award.

The recent case of *McManus v. Farmers Mutual Hail Insurance Company* held that a policy of insurance contained provisions for a submission to arbitration. The court cited the *Dworkin* case as holding that appraisers are restricted solely to finding the amount of damage while arbitrators endeavor to settle the whole dispute. The court refers to the fact that an oath was taken by the arbitrators; that the form of award referred to their findings "after carefully considering the evidence;" and that the words arbitration and arbitrators were uniformly used throughout the provision of the policy. Although the court did not give an accurate statement of the distinction between an appraisal and an arbitration made in the *Dworkin* case it seems that the holding of the case can be supported on the ground that the procedural matters set out in the agreement indicated that an arbitration was intended.

13. 203 S.W. 2d 107 (Mo. App. 1947).
The court also stated in the McManus case that "whether it was an arbitration agreement was a question of law to be decided by the court."

The following situations more or less similar to a submission to arbitration, have been distinguished by our courts: a reference to the court; a person agreed upon to act as a justice of the peace; an accountant agreed upon to audit the accounts between partners; a contract that the amount of certain construction work done for a railroad was to be determined by the company's engineer; the State Board of Mediation and Arbitration; statutory arbitration provided for in the formation of new school districts.

VALIDITY OF COMMON LAW AWARDS AS DISTINGUISHED FROM STATUTORY AWARDS

The first case dealing with arbitration, which has come to the attention of the writer, was one in which an action of assumpsit was allowed on an award. Common law awards are still held to be valid. However, an oral submission and an oral award thereunder are not valid in all cases. It was stated in Hamlin v. Duke that, "By the common law when the subject matter is such that a parol agreement between the parties would be valid, a verbal submission and award will be binding upon them." However, it has been held that "by the common law," as used above, does not mean that an oral submission upon a subject which is within the statute of frauds is valid, on the ground that the statute of frauds is not a common law statute since the Statute of Frauds in England was enacted after the fourth year of the reign of Jame I.

17. Williams v. The Santa Fe Ry., 112 Mo. 463, 20 S.W. 631 (1892).
19. State ex rel. Berkley v. McClain, 187 Mo. 409, 86 S.W. 135 (1905); State ex rel. Rose v. Job, 205 Mo. 1, 103 S.W. 493 (1907); State ex inf. Richeson v. Cummins, 114 Mo. App. 93, 89 S.W. 74 (1905); State ex rel. School District No. 1 v. Denny, 94 Mo. App. 559, 72 S.W. 467 (1902).
20. Magoon v. Whiting, 1 Mo. 613 (1826).
21. This case held that the fact that the arbitrators testified that they were appointed by bond, when in fact the submission though in writing was not under seal, was not material when it was proved that the submission given in evidence was the one under which the arbitrators acted.
23. Bunnell v. Reynolds, 205 Mo. App. 653, 666, 226 S.W. 614 (1920). As to whether the award is void or voidable see id. at pp. 654-655.
an award under an oral submission was valid on a question of a dispute between a landlord and tenant as to crop rent for the first crop year in which the tenant held the land under an oral lease for two years. An action at law may be brought on a valid common law award; in such an action the burden of proof is on the plaintiff to prove the award and also the submission. It seems to be the law that, under a common law arbitration, all claims included therein are merged in the award. However, in order for the arbitration to effect a merger in the award, the award must be full and final on all points submitted. It was held that there was no merger by an award, under a submission of an open account, which award gave the purchaser the option of either taking the merchandise or paying a stated sum. In an action on the original contract, in which the arbitration and award were not presented in the pleadings, the plaintiff could not introduce evidence of a common law award; and it was error for the plaintiff's counsel to make references, in his argument to the jury, to the meeting of the arbitrators. It has been said by the Supreme Court of Missouri that in an action at law on a common law award the questions of fact were triable by a jury.

In order for a submission and an award thereunder to come under the requirements of a "statutory arbitration," the submission and award must be in writing. It is not essential that the submission should provide for the award to be made a judgment of a particular court. In Reeves v. McGlochlin there were two instruments, each signed by one of the parties, which were bonds to abide by the arbitration, but recited that since a controversy existed between the parties "we do therefore mutually agree

24. Donnell v. Lee, 58 Mo. App. 288 (1894). The court speaking through Gill, J., said at p. 295: "It is a sufficient answer to this point to say that any alleged claim the Lees might have had to another year's lease of the land did not enter into this arbitration and award. The evidence is conclusive that the arbitrators did not consider this as an element of damage; it was not treated as in the range of the submission."
29. Koerner v. Leathe, 149 Mo. 361, 51 S.W. 96 (1899).
31. 65 Mo. App. 537 (1896).
to submit said matters in controversy to . . . and . . . , as arbitrators."

Each of these instruments was headed "Submission to Arbitration." The court said that these instruments should be considered together and that omission of the names of the arbitrators would not be fatal. The court in the Reeves case distinguished the earlier supreme court case of William v. Perkins, 32 wherein it was held that there was no statutory submission in a case where only one of the bonds was in evidence, which bond recited "Whereas, they have this day submitted both their partnership affairs to G. F. Rothwell and W. A. Martin for settlement." There was dicta in the Perkins case to the effect that even if the other bond were in evidence the arbitration would not be under the statute. 33 Price v. White 34 held a submission which described the subject matter covered by the submission as "A matter of difference between the parties," to be within the statute.

**APPLICATION OF SECTION 15233 TO APPRAISALS**

As stated at the outset of this article, the addition made in 1909 of what is now the first section of the chapter of the Statute on Arbitration was one of the last changes in the statutory law on the subject. 35 This section is possibly the most significant section in the whole chapter.

The provisions of Section 15233 are as follows:

"Agreement to Arbitrate No Bar To Suit.—Any contract or agreement hereafter entered into containing any clause or provision providing for an adjustment by arbitration shall not preclude any party or beneficiary under such contract or agreement from instituting suit or other legal action on such contract at any time, and the compliance with such clause or provision shall not be a condition precedent to the right to bring or recover in such action."

Mr. Percy Werner states as follows with reference to this section: 36 "It is a blot upon our statute book. There is no reason, no sense, no excuse

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32. 83 Mo. 379 (1884).
33. The court speaking through Martin, C., said at page 385: "I will take the responsibility of adding here that, had such a paper been submitted in evidence, the two instruments together would not, in my opinion, have constituted a written submission controlling the subsequent arbitration and award for the reasons following: 1st. The recital in each instrument . . . on their face purport to be the separate bonds of the respective parties to abide the results of an arbitration, and their import to that effect is not changed by recitals relating to the partnerships and the submission by the parties which are in the nature of proper inducements to the bonds."
34. 27 Mo. 275 (1858).
36. 4 St. Louis L. Rev. 61, 66 (1919).
for it. . . . Why should we render void fair and honest efforts of parties to a contract to provide for a speedy, inexpensive and conciliatory settlement of differences arising under their contracts without resort to the courts or expense to the public? This section should not only be repealed, but, to the contrary, agreements to arbitrate should expressly be made irrevocable after they have once been fairly entered into.”

Does this section apply to contracts containing provisions for appraisals? The wording of the section provides that any contract “containing any clause or provision providing for an adjustment by arbitration” shall not bar other legal action thereon and compliance with such provision shall not be a condition precedent to the right to recover in such action. It seems clear that, prior to the enactment of this provision, compliance with a provision in a contract for an appraisal could be validly made a condition precedent to an action upon the contract.37 This section was discussed in the dicta of the court in the case of Young v. Pennsylvania Fire Insurance Co.38 This section did not affect the insurance policy in question in the Young case, because that contract was entered into in 1907 and the section only applied to contracts “hereafter entered into,” that is, after 1909. The court pointed out that in the laws of 1909 this section first appeared as an addition to chapter 10 of the Revised Statutes (1899) which was the chapter pertaining to “Contracts and Promises.” The court, speaking through Graves, P. J. said: “when we read the whole chapter, it will be noticed that it pertains solely to contracts and promises, and not especially to arbitrations. Why it was placed in Revised Statutes 1909 in chapter 7, under the head of ‘Arbitration,’ rather than in the more appropriate place of ‘Contracts and Promise’ we do not know.” The court then went on to say that it was the legislative intent for this section to apply to contracts containing provisions for appraisals under insurance policies. This dicta was followed by the court of appeals in at least one case.39 However, the supreme court in Dworkin v. Caledonian Insurance Co.40 held that the section here in question did not apply to appraisals in

38. 269 Mo. 1, 187 S.W. 856 (1916).
insurance policies. The majority opinion by Goode, J., said that the general statute with reference to technical words being given their technical meaning should apply here. It was pointed out that this section used the word "arbitration" and not "appraisal," and that in the use of the phrase "adjustment by arbitration" the non-technical word, "adjustment," did not change the result. With reference to the legislative intent discussed in the Young case, the court said: "The legislative purpose in passing the law under examination is not to be conjectured, but must be ascertained from the act itself." Judge Graves dissented. The ruling of the Dworkin case has been followed.41

It is possibly well to note here that there are several situations in which an action may be brought on an insurance policy containing provisions for an appraisal even though an appraisal is not had. The policies usually provide for an appraisal in the case of disagreement, and it seems clear that when the insurance company denies all liability an appraisal is not necessary.42 However, if the denial by the insurance company is only to be found in the pleadings, the appraisal provisions must be complied with.43 If there is a refusal by the insurance company to submit to appraisers,44 or a refusal of the appraiser selected by the insurance company to agree upon an umpire,45 an appraisal is not a condition precedent to the action upon the policy. Further, in an action on the policy, when the defendant pleads a valid submission and the plaintiff shows that the appraisal did


not comply with the submission, the defendant cannot complain that the plaintiff should have had a valid appraisal, and, therefore, cannot recover on the policy.46 Under the valued property statute, an appraisal is not a prerequisite to an action upon the policy when the loss is total.47 It is held that whether the loss is total or not is a question for the jury.48 An appraisal may be set aside for fraud, and the question of fraud is one for the jury and not for the court to determine.49

**Effect of a Submission to Arbitration of a Matter Then in Litigation**

What is the effect of a submission to arbitration, after suit is brought, of the cause of action then in litigation? It was stated in *Bowen v. Lazalere*50 that the submission to arbitration of the subject matter of a pending suit “may be made to work a dismissal of the suit.” It has been said by the Missouri Supreme Court that this is a minority view.51 If the submission provides that it shall only act as a stay of all actions, then there will not be a dismissal but simply an indefinite stay of proceedings.52 A submission to arbitration of the cause in litigation, as well as the award thereunder, in order to avail the party relying thereon either to dismiss, continue or as a bar to the action, must be set up in the pleadings by amended or supplemental pleadings or plea *puis darrein* continuance.53 However, an unaccepted offer to arbitrate by one of the parties to the suit will not be a bar to the suit nor will it be grounds for a dismissal or continuance.54 The basis for the rule that such a submission is ground for a

50. 44 Mo. 383, 386 (1869); Thompson v. Turney Bros., 114 Mo. App. 697, 89 S.W. 897 (1905).
51. Ferrell v. Ferrell, 253 Mo. 167, 161 S.W. 719 (1913).
53. Springfield & Southern Ry Co. v. Calkins, 90 Mo. 538, 3 S.W. 82 (1887).
stay of proceedings is that a new tribunal has been selected. "It is not necessary that there be an award, for the consent to arbitrate is in itself a selection of another tribunal and an agreement to transfer the cause to that tribunal, which agreement the court will carry into effect whenever it is properly brought to their notice. So far as its effect upon the pending action is concerned, it is equivalent to an agreement, for a good consideration, to dismiss an action brought to recover a debt. But such submission alone can not be pleaded in bar. It is no answer to the merits until there is a good and binding award." Thus if the submission is abortive for one reason or another, a new suit may be brought on the same cause of action. If the submission to arbitration is made a rule of the court in which the original action was pending, there can not be a discontinuance or non-suit. In Allen v. Hickam, while an action in ejectment was pending, the parties filed a stipulation to have the court appoint three commissioners to decide the case and report back to the next term of the court. After the commissioners reported, the plaintiff asked that the report be stricken or that he be allowed a new suit, which was denied. The court, through Brace, P. J., said "By the agreement and rule of court in pursuance thereof in this case, the issues thereof, whether of law or fact, were by the agreement of the parties submitted to the adjudication of a tribunal created by the parties under the sanction of the court. . . . And the rule seems to be general, that when the parties to an action have entered into an agreement, made a rule of court, submitting the action to arbitrators, upon whose award judgment is to be entered, neither party can rescind the rule, nor can the plaintiff discontinue the action pending the rule."

What May Be Submitted to Arbitration

Prior to 1919 married women were excluded, along with infants and persons of unsound mind, from submitting matters to arbitration under the statute. The revised statutes of 1855 did not contain the provision that the award could be made a judgment of any "other court having jurisdiction of the subject matter"; other than the above changes this section has remained the same since 1835. With reference to a common law submission it was said in Downing v. Lee, quoting from Morse on Arbitration and

55. Mowen v. Lazalere, 44 Mo. 383 at 386-387 (1869).
56. 156 Mo. 49, 56 S.W. 309 (1900).
Award, "To furnish a sufficient basis for entering into a submission, no legal cause of action in favor of either party need exist. That there is a dispute, controversy, or honest difference of opinion between them concerning any subject in which they are both interested, is enough." Section 15234 provides that parties may submit to arbitration "... any controversy which may be existing between them, which might be the subject of an action..." In the case of Continental Bank Supply Co. v. International Brotherhood an employer and a labor union, being unable to agree upon terms of employment, submitted the matter to arbitrators under a written submission. It was held that since there was no contract then existing between the parties nothing was submitted to arbitration "which might be the subject of an action," and therefore there was not a statutory submission but was a valid common law submission in writing.

It seems clear that a single matter of difference or dispute between the parties may be submitted to arbitration. It has been intimated that an illegal option contract would not be the proper subject for a submission to arbitration. Query as to whether a contract invalid under the Statute of Frauds could be validly submitted to arbitration?

NOTICE OF MEETING OF ARBITRATORS, POSTPONEMENT AND ADJOURNMENTS THEREOF

Under a common law submission the award thereunder was void if there was no notice to one of the parties. It will be observed that the statute does not prescribe any particular time or method by which the notice is to be given. Query as to what change the statute made in the common law rule? Arbitrators may validly meet on Sunday and hear unsworn statements of the parties and witnesses, but to hear sworn testimony and sign any award on Sunday are considered judicial acts in violation of Missouri Revised Statutes Annotated, Section 2027.

59. 201 S.W. 2d 531 (Mo. App. 1947).
60. Pearce v. McIntyre, 29 Mo. 423 (1850).
62. Donnell v. Lee, 58 Mo. App. 288 (1894); Tiffany v. Coffey, 142 Mo. App. 210, 125 S.W. 1178 (1910). In the Tiffany case an English case was cited as holding that the absence of notice was merely an irregularity and that the award could only be annulled by motion to set it aside or by a direct proceeding in equity to have it set aside. But the court decided in accordance with the numerous cases in other American jurisdictions, that the award was absolutely void.
64. Price v. White, 27 Mo. 275 (1858); Shroyer v. Barkley, 24 Mo. 346 (1857).
Section 15235, provides that “the arbitrators . . . shall adjourn the hearing from time to time as may be necessary, and, on the application of either party, and for good cause, may postpone the hearing to a time not extending beyond the day fixed in the submission for rendering the award.” This section would seem to leave certain practical problems in doubt. Must all of the arbitrators meet at the time and place originally appointed for the hearing? Are the arbitrators authorized to postpone a hearing without an application of a party and for good cause shown? Must the arbitrators be sworn before they can postpone or adjourn a hearing to a future time and place? It would seem clear that the provisions of Section 15236 which are that the arbitrators shall be sworn “before proceeding to hear any testimony” would not require the arbitrators to be sworn before an adjournment or postponement. The advisable procedure is to have the arbitrators subscribe to an oath prior to adjournment. The record of proceedings should show that adjournments or postponements are made either upon good cause shown by one of the parties or by consent of the parties. If all of the arbitrators are not present at the time and place set, those present should be sworn and notice should be given to the parties of the time and place of the next meeting.

OATHS OF ARBITRATORS

Under a common law submission in Missouri, as well as under the statute, an award is invalid unless the arbitrators subscribe to an oath.

66. See STURGES, COMMERCIAL ARBITRATION & AWARDS (1930) p. 434, note 34: “It seems probable that the arbitrators can also postpone a hearing on or before the date originally appointed without being convened in quorum and without such application and showing. It seems probable, in other words, that the foregoing provision of these statutes is designed to insure a right of postponement or adjournment to a party rather than to limit the power of arbitrators to postpone or adjourn.”

67. Rickman v. White, 266 S.W. 997 (Mo. App. 1924). In the Rickman case Cox, P.J., said at p. 998: “While in all arbitrations, whether at common law, which may be oral, or under the statute, which requires that the agreement and award be in writing, the arbitrators and witnesses must be sworn, yet that requirement may be waived, and a party who, with knowledge of the facts, proceeds without objection or request that oaths be administered, waives it.” However it is said in STURGES, COMMERCIAL ARBITRATION AND AWARDS (1930) § 208 at p. 454: “There is no common law requirement that the members of an arbitration board shall be sworn concerning the performance of their office. Presumably the parties may stipulate for an oath and prescribe its form.”


69. Tolar v. Hayden, 18 Mo. 399 (1853); Frissell v. Fickes, 27 Mo. 557 (1858); Walt v. Huse, 38 Mo. 210 (1866); Fassett v. Fassett, 41 Mo. 516 (1867). As to form of oath before amendment see Vaughn v. Graham, 11 Mo. 575 (1848).
It is not necessary that appraisers should subscribe to an oath. However, the oaths of the arbitrators may be waived by the parties to the submission. Whether there was a waiver or not is a question for the jury. In *Redman v. St. Joseph Hay & Grain Co.* the arbitrators were sworn by the secretary of the St. Joseph Grain Exchange, who was not authorized to administer oaths. The court through Bland, J., said, in holding that there was no waiver, "it is well recognized that in order for there to be a waiver the party who it is claimed has waived the matter must have had knowledge of the facts out of which the waiver grew. . . . We fail to find that plaintiff had such knowledge of the facts as would constitute the basis for a waiver. He thought that the arbitrators and witnesses were actually being sworn and had a right under the statute to require that they take an oath. He was deceived as much as anyone by the action of the secretary in assuming to have the power to administer oaths when the latter had none." It seems that the absence of the oaths is such a defect that must be objected to in the trial if it is to be of any avail and not complained of for the first time in the appellate court. If there are any irregularities relating to the oaths of the arbitrators the record should specifically state that the irregularity was waived by all the interested parties.

**Power of Arbitrators**

Closely allied with the previous section is the succeeding section in which the arbitrators are given similar powers as are conferred by statute on justices of the peace. Also, as above, the witnesses are required to be sworn under a common law submission, as well as under the statute.

70. Zallee v. The Laclede Mutual Fire & Marine Ins. Co., 44 Mo. 530 (1869); Curry v. Lackey, 35 Mo. 389 (1865).
72. 209 Mo. App. 682, 690, 239 S.W. 540 (1922).
74. Mo. REV. STAT. § 15237 (1939).
75. Rickman v. White, 266 S.W. 997 (Mo. App. 1924); see quotation from this case, note 66 *supra*. However, in *Sturges, Commercial Arbitration and Awards* (1930) § 215 at p. 486, it is said: "Apparently it is not necessary for witnesses to be sworn in a common law arbitration unless the parties require it. This matter is said to be in the discretion of the arbitrators." See also the statement of Justice Story in Tobey v. County of Bristol, 23 Fed. Cas. 13-13, 1321, No. 14,065 (C.C.D. Mass. 1845): "Now we all know, that arbitrators, at the common law, possess no authority whatsoever, even to administer an oath, or to compel the attendance of witnesses. They cannot compel the production of documents, and papers and books of account, or insist upon a discovery of facts.
An award has been enforced when the only evidence as to whether the witnesses were sworn or not was from the award itself, which said that the arbitrators met and heard "testimony." The court said this meant the statement of a witness under oath. It is not clear from the opinion whether this fact was objected to in the trial court, and it is submitted that possibly the decision could better be put upon the basis of waiver. It is clear that the omission of the swearing of the witnesses can be waived by the parties. Arbitrators appointed by the parties under the statute have the power under this section to "punish contempts committed in their presence during the hearing of the cause."

Number of Arbitrators That Shall Meet

The next section provides that "all the arbitrators must meet together, and hear all the proofs and allegations of the parties, pertinent or material to the cause. . . ." There is some dicta in Missouri cases that this was not the requirement at common law. However, in an action on a common law award in which two arbitrators heard all the evidence and, not being able to agree as to the damages, selected a third arbitrator to whom they related the evidence, the court instructed the jury that the burden was on the plaintiff to prove that the defendant agreed with the plaintiff to give the testimony to the two arbitrators, and that they should repeat it to the third arbitrator. The upper court held that the jury’s findings were controlling and affirmed the decision of the trial court.

By all the arbitrators is meant, of course, all the arbitrators chosen by the parties, and this need not be all the arbitrators named in the submission. Often there is considerable question as to just how many arbitrators are chosen by the parties. In Shores v. Bowen the submission was "To the

from the parties under oath. They are not ordinarily well enough acquainted with the principles of law or equity, to administer either effectually, in complicated cases; and hence it has often been said, that the judgment of arbitrators is but rusticum judicum."

Mahan v. Berry, 5 Mo. 21 (1837) was cited.

76. Wolfe v. Hyatt, 76 Mo. 156 (1882).
80. Shores v. Bowen, 44 Mo. 396, 401 (1869); Sweeney v. Vaudry, 2 Mo. App. 352 (1876).
82. Supra note 80.
Arbitrament of A, B, C, or any two of them," and it was held that it was essential that all three should hear the testimony. However, in *Sweeney v. Vaudry* the submission was to five named arbitrators, "or a quorum of them." One of the arbitrators was in Europe during all of the relevant proceedings, which fact was known to both parties and was not objected to at the hearings. It was held that the award thereunder should have been confirmed. Bakewell, J., said, in speaking of, the decisions in the cases of *Bowen v. Lazalere* and *Shores v. Bowen,* as follows: "If both parties had been present at the hearing; if at each hearing the same two arbitrators had acted; if the award had been signed by two—there can be no question, we think, that those two would have been the two arbitrators named in the submission, and the award would have been good.

"But the court held that a submission to three named arbitrators, or any two of them, in the absence of any further act of the parties designating which particular two, did not constitute any two who might happen to act as the arbitrators chosen by the parties, and that, therefore, all three must act, or none... To say, under these circumstances, that these four particular named men were not the particular arbitrators selected by the parties, and that, because a fifth was named in the submission—although the submission was to five or a quorum of five—all the arbitrators named did not hear the cause, and that the statute was not complied with, is technicality run mad."

It seems that the same result has been reached under the simple doctrine of waiver. Aside from any principle of waiver, if all the arbitrators are present when all the evidence adduced is heard, the mere fact that the two of the three met and discussed the matter does not invalidate the award. Clearly, as a general proposition, any change in the membership of the arbitrators selected during the progress of the hearings will invalidate the proceedings. A dispute was submitted to two persons, and if they could not agree they were authorized to appoint one or more persons as arbitrators. The original two arbitrators disagreed and appointed three persons, which three finally agreed to an award to which they subscribed. This was held to be a valid award. In *Fernandes Grain Co. v. Hunter,* a change in

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83. 2 Mo. App. 352 (1876).
84. Id. at 359.
86. Higgins-Wall-Dyer Co. v. City of St. Louis, 331 Mo. 454, 53 S.W. 2d 864 (1932).
87. Scudder v. Johnson, 5 Mo. 551 (1839).
the personnel of the arbitrators was made after the award but before a rehearing, and at the rehearing the plaintiff simply filed a prepared statement and declined to proceed further with the case. It was held that the award was valid. The court said "Had Fernandes remained and argued the motion, protesting all the while against the changed personnel of the committee, the question would present a far more serious aspect to this court." The same rules do not apply as to the presence of the appraisers.\(^8\)

Section 15238 provides that a majority of the arbitrators may make an award unless the concurrence of all of the arbitrators, or a certain number of them, is expressly required in the submission.

**Attestation of the Award**

It seems that the provisions of Section 15239 with reference to the signing and attesting the award must be complied with. That is, these provisions cannot be waived by the parties and still have the award enforced under the statute. If the award is not in writing, but is in accordance with the agreement of the parties, it will be a valid common law award. If the award is not attested, it may be modified under the provisions of Section 15243. The arbitrators, however, are still authorized to have the award attested after the unattested document has been submitted to the parties.\(^9\)

**Confirmation of the Award**

As stated above, it has been said that in order for a submission to be considered as statutory, it is not essential that the submission should provide that the award should be made a rule of any particular court. However, it is submitted that such an award could not be confirmed under Section 15240, which provides that the court designated in the submission confirm the award, etc. The writer has not found any Missouri authority bearing upon this question.

The fifteen day notice before filing the award provided for in Section 15241 must be complied with.\(^1\) It is submitted that this notice can be expressly waived by the parties. This section also provides that "no such motion shall be entertained after the expiration of one year from the publication of the award." It was held in *Kirby v. Heaton*,\(^2\) disapproving

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90. Newman v. Labeaume, 9 Mo. 30 (1845).
91. Springfield and Southern Ry. v. Calkins, 90 Mo. 538, 3 S.W. 83 (1886).
92. 315 Mo. 338, 286 S.W. 76 (1926).
Taylor v. Franklin,\textsuperscript{93} that this provision “should be construed to mean that the statute is complied with if the party in whose favor the award is made filed a motion to confirm within one year from the date of the publication of the award.” If an award under the statute is not confirmed it is still valid and may be sued on at law as a common law award.\textsuperscript{94}

Vacating Awards

There is no way at common law by which an award can be vacated or modified in a court of law. However, equity will grant relief under certain circumstances. The statute, in Sections 15242 and 15243, provides grounds on which an award may be vacated or modified, while Section 15256 provides that the equitable remedies shall not be impaired or diminished. In the early case of Vaughn v. Graham,\textsuperscript{95} the court said that “it has been held in the construction of a statute in its language similar to ours, that the terms misconduct and misbehavior, imply a wrongful intent, and not a mere error in judgment on the part of the arbitrators.” It has been held that the mere fact that, after all the testimony was heard, two of the arbitrators met to discuss the matter without the third arbitrator did not constitute “legal fraud.”\textsuperscript{96}

Pope Construction Co. v. State Highway Comm.\textsuperscript{97} is a case in which the matter of vacating an award is discussed at length. The action in the Pope case was an appeal from an order vacating an award, which order was reversed and remanded. At the outset, the court considered the grounds on which the motion to vacate was based. The grounds in the motion, numbered third to sixth inclusive, were in substance as follows: Third: the award was procured by undue means. Fourth: There was evident partiality and corruption on the part of one of the arbitrators. Fifth: The arbitrators were guilty of misconduct and misbehavior on account of which the construction company’s rights were prejudiced. Sixth: The arbitrators exceeded their powers and so imperfectly executed them that a mutual, final and definite award on the subject matter was not made. The court

\textsuperscript{93} 9 Mo. App. 589 (1880), Memo. opinion. However an excerpt from a certified copy of the opinion appears in the Heaton case \textit{supra} note 92.

\textsuperscript{94} Beall v. Board of Trade of Kansas City, 164 Mo. App. 186, 148 S.W. 386 (1912).

\textsuperscript{95} 11 Mo. 575, 577 (1848).

\textsuperscript{96} Higgins-Wall-Dyer Co. v. City of St. Louis, 331 Mo. 454, 53 S.W. 2d 864 (1932).

\textsuperscript{97} 230 Mo. App. 502, 92 S.W. 2d 974 (1936).
said these grounds set forth were too general for consideration by either the trial or the appellate court. The court further said: "In order to set aside an award the grounds upon which relief is asked should be specifically alleged and no other ground will be considered. It is upon the party objecting to the award to show affirmatively why it should not be enforced against him, and he must state specifically the facts on which his objections are based; general averments are insufficient." But it was held in an early case, in which there was filed a copy of a notice to the other party of intention to file a motion which notice specified with great particularity the grounds relied upon, that in the absence of an objection in the trial court, it would be considered as a motion in spite of its irregularity.

In the Pope case, it was held that the ground in the motion to the effect that the stenographer did not take down all the material testimony was not well taken. In this connection the court said: "The statute does not provide for a stenographer or that an award may be set aside on account of the incompetency or even the absence of a stenographer. . . . But however that may be, no objection was made by any of the agents of the construction company, who were present, to the stenographer or her incompetency, if any, and the matter was waived."

It was also contended by the Pope Construction Co. that Clelland, the arbitrator selected by the highway department, was partial. Clelland, up to the day prior to his appointment as arbitrator, has been an assistant construction engineer for the highway department. Clelland was very familiar with the case. The submission to arbitration in this case recited that the highway department appointed Clelland "as its representative and arbitrator." The same language, as quoted, was used as to the person appointed by the construction company. In holding that this was not a ground for vacating the award the court said: "Where, as here, each party appointed arbitrators to represent him and saw to it that he did so, there is no relief that the courts can or should try to give."

The case of Orr v. Farmers Mutual Hail Insurance Company was an action on a hail insurance policy. The company pleaded the award of arbitrators stating that there was no damage. The plaintiff objected to the

98. Bennett's Admr. v. Russell's Admx., 34 Mo. 524 (1864).
100. 201 S.W. 2d 952, 957 (Mo. 1947).
validity of the award on the ground that the arbitrator appointed by the company had been employed by the company on previous occasions as an appraiser. The company contended that this was not an agreement to arbitrate but merely an agreement to appraise the amount of damages. The court held the award or appraisal was void as a matter of law stating that it made no difference whether it was an agreement to arbitrate or for an appraisal. The court stated the rule as follows:

"So we find the law well settled that when parties sign agreements to submit their differences to arbitration, or to determine the amount of loss by appraisement, the persons selected as arbitra-
tors or appraisers must not be interested, biased or prejudiced."

It has been held that an award cannot be vacated on the ground that an arbitrator is a client of the attorney for the other party, where it further appeared that this arbitrator was personally solicited to act as an arbitrator by the objecting party; and this is so even though, at the time the arbitrator was solicited, the moving party did not know of the arbitrator’s relation with other side. It was intimated that the objecting party knew of this relationship before the hearing; and the court said that the qualification of the arbitrator should have been objected to at that time, just as in an action at law a juror’s qualifications must be objected to or waived.¹⁰¹

It has been held that the fact that one of the arbitrators was entertained by one of the parties to the submission was not misconduct.¹⁰² Neely v. Buford¹⁰³ held that the fact that one of the arbitrators asked an attorney for one of the parties to show him where in the books of one of the parties, which books had been poorly kept, a certain reference in his brief could be found, were not grounds to vacate the award. The court said: "It is apparent from all the authorities that arbitrators, under our statute, are not in the situation of juries, under the surveillance of an officer and without the power to hold an interview with anyone, except by leave of the court." In Shroyer v. Barkley¹⁰⁴ there was a motion to vacate the award on the ground that it was impossible due to high water for one party to be at the hearings before the arbitrators. The award was not vacated because it appeared that there was due notice and finding by the trial court that it was possible for the party to be present. The court said that this party

¹⁰² Koerner v. Leathe, 149 Mo. 361, 51 S.W. 96 (1899).
¹⁰³ 65 Mo. 448 (1877).
¹⁰⁴ 24 Mo. 346 (1857).
did not ask for a reopening of the case or for permission to offer his evidence, even if it were impossible. It has been held that it is proper for arbitrators to reopen a case and hear additional testimony.\textsuperscript{105}

There have been several cases arising under the fourth ground for vacating an award, that is, that the arbitrators “exceeded their powers.” It is submitted that an award under a common law submission could be set aside in equity upon this ground. With reference to the presumed validity of an award at common law it was said, in \textit{Thatcher Implement Co. v. Brubaker},\textsuperscript{106} “The same presumptions must be indulged in favor of an award that apply to judgments of courts of record and the party objecting to the award must show the fact of its illegality. . . . An award will be presumed to be within the submission unless the contrary expressly appears and to embrace all that was and nothing that was not submitted.” The case of \textit{Curry v. Lackey}\textsuperscript{107} is an example of how far the courts have gone in this regard.

It seems that this matter of scope of the submission may be gone into in an action on the award itself.\textsuperscript{108} “Whether the arbitrators had authority to act in reference to any particular subject matter, or whether their award conforms to the directions and powers given them by the submission, and the proper construction to be given to the award when made, are questions to be decided by the courts; and in construing either the terms of the submission, or the language of the award, they should be construed with reference to, and in the view of, all the surrounding facts in the case.”\textsuperscript{109} It should be noted that the last above cited cases are not ones in which the award was set aside on a motion to vacate, but it was rather in the nature of an equitable defense.

In \textit{Inman v. Keil}\textsuperscript{110} it was held that after persons were requested to act as arbitrators but failed to do so and finally disbanded, they could not reconstitute themselves as arbitrators, without any agreement of the parties or notice to them. Also, after an award is made, signed and delivered by the arbitrators, their authority is at an end and they are not at liberty to reopen

\textsuperscript{105.} Sweeney v. Vaudry, 2 Mo. App. 352 (1876).
\textsuperscript{106.} 193 Mo. App. 627, 187 S.W. 117 (1916).
\textsuperscript{107.} 35 Mo. 389 (1865) (Possibly a case of appraisement).
\textsuperscript{108.} Lorey v. Lorey, 60 Mo. App. 417 (1894); Squires v. Anderson, 54 Mo. 193 (1873).
\textsuperscript{109.} Squires v. Anderson, 54 Mo. 193 at 197 (1873).
\textsuperscript{110.} 206 S.W. 403 (1918).
the case and make a new award without the consent of the parties.\textsuperscript{111} However, if the award is not complete when delivered, such as not being attested, the arbitrators are still authorized to have the award attested.\textsuperscript{112}

Errors or mistakes of law are, in general, neither grounds to vacate an award nor are they grounds for relief in equity. A good statement of this principle was made by the court in the \textit{Thatcher} case,\textsuperscript{113} in which the court said: "A tribunal of this character is not supposed to know anything of law, and unless partiality or corruption, gross miscalculation in a matter of figures, or decisions in a matter not submitted, be shown, the courts cannot interfere, either at law or in equity."

It was stated in \textit{Mitchell v. Curran}\textsuperscript{114} as follows: "There are five grounds, and only five, upon which the courts will set aside an award." One of which is: "A mistake in fact or law . . ."

This rule was quoted by the court in \textit{Taylor v. Scott},\textsuperscript{115} after which the court said: "The only one of these grounds, upon which the award in the present case is challenged, is the second, that of a mistake in fact or law. It is sufficient to say, upon this point, that no such mistake is apparent upon the face of the award, and that neither affidavits, nor any other species of extrinsic evidence is admissible to show such a mistake."

There seems to be, in general, no right to cross examine witnesses. The courts say that this is a matter within the sound discretion of the arbitrators, and that the award will not be set aside unless it clearly appears that the defendant was prejudiced thereby.\textsuperscript{116} A similar rule obtains with regard to being represented by counsel.

The statute in Section 15243 provides grounds upon which an award may be modified. It is submitted that these matters, like those defects covered by the section with reference to vacating awards, could be dealt with by courts of equity in common law awards. However, if no action is

\begin{itemize}
\item \textsuperscript{111} Brown & Moore v. Durham, 110 Mo. App. 424, 85 S.W. 120 (1904).
\item \textsuperscript{112} Newmann v. Labeaume, 9 Mo. 30 (1845).
\item \textsuperscript{113} Thatcher Implement Co. v. Brubaker, 193 Mo. App. 627, 637, 187 S.W. 117 (1916).
\item \textsuperscript{114} 1 Mo. App. 453, 455 (1876).
\item \textsuperscript{115} 26 Mo. App. 249, 251 (1887).
\end{itemize}
taken toward modifying the award at the time the award is affirmed, the aggrieved party cannot later sue the party for the amount of the error.\footnote{117} It was said, “After the numerous adjudications on this point, it ought to be regarded as settled, that where a party to an action, being fully apprised of his rights, suffers judgment to go against him, when he might, by the exercise of reasonable diligence in making his defense, prevent a recovery of the amount claimed, either in whole or in part, he should not be allowed in a subsequent proceeding to reagitate questions which either were, or else would have been, adjudicated at the former trial, but for his inexcusable neglect.”\footnote{118}

As stated above, the omission of the attestation and an award may be remedied by a motion to modify.\footnote{119}

Section 15244 provides the time within which a motion to vacate or modify an award must be filed and the requisite notice therefor.\footnote{120} It has been held that in an action at law on the award a motion to vacate, though too late, would be taken as a good equitable defense.\footnote{121}

It has been held, in an action to confirm an award, that an equitable set-off will be allowed for the matters not included in the award.\footnote{122} But, as stated previously, after a judgment has been given on the award an action will not be allowed for any alleged error therein.\footnote{123}

The costs as awarded by the arbitrators will not be disturbed unless the arbitrators are expressly not allowed to determine the costs by the terms of the submission.\footnote{124}

Under Section 15254, in appealing from a judgment vacating the award, a motion for a new trial is necessary.\footnote{125}

This section does not authorize an appeal from an order of the circuit court sustaining a motion to strike from the files a motion to confirm an award. Neither does this section permit a writ of error from an order of the circuit court sustaining a demurrer to a motion to vacate an award.
and striking said motion to vacate from the files, the reason being that these orders are interlocutory and not final.\textsuperscript{126}

\textbf{POWERS OF COURTS OF EQUITY}

Under Section 15256 the powers of the courts of equity shall not be in any way limited or impaired. It was said in \textit{Pacific Lime \& Gypsum Co. v. Missouri Bridge \& Iron Co.}\textsuperscript{127} as follows: "Upon the grounds stated in the petition an award could not have been vacated at the common law; for example, matters extrinsic thereto, such as fraud, mistake or partiality in the arbitrator. Redress in such a case is in equity. While ordinarily the statutory remedy does not affect prior equitable jurisdiction, in the matter at bar the statute which authorizes the filing of a motion to vacate an award expressly provides that the statutory remedy shall not affect equitable jurisdiction."

It is submitted that, if the party has taken advantage of the legal remedies under the provisions of the statute, the party cannot then take advantage of the equitable remedy if the defect is one cognizable under the statute. However, if the defect is not cognizable under the statute but is under equity, it seems that the mere fact that the party has sought relief under the statute first will not prevent recovery in equity. It seems clear, that in cases where the jurisdiction of equity is sought to affect the validity of an award, the court can use extrinsic evidence to show the fraud, mistake or scope of the submission, and is not limited to the face of the award itself, as is the case under the statutory remedies.\textsuperscript{128} However, courts of equity will not go as far as to set aside an award on the ground that it is against the evidence in the case.\textsuperscript{129}

Under certain circumstances an award may be bad in part and good in part. With reference to a common law award it has been said: "If the award consists of several parts, one of which is complete in itself and wholly separable from and independent of the others, and that part is covered by the submission, it is valid and may be sustained while the

\begin{itemize}
  \item \textsuperscript{126} Missouri Bridge \& Iron Co. v. Pacific Lime \& Gypsum Co., 290 Mo. 170, 234 S.W. 797 (1921).
  \item \textsuperscript{127} 286 Mo. 112, 226 S.W. 853 (1920). See also Shawhan v. Baker, 167 Mo. App. 25, 150 S.W. 1096 (1912).
  \item \textsuperscript{128} Valle v. North Missouri R.R., 37 Mo. 445 (1866); Hinkle v. Harris, 34 Mo. App. 223 (1888).
  \item \textsuperscript{129} Mitchell v. Curran, 1 Mo. App. 453 (1876).
\end{itemize}
portions outside the submission will be rejected." With regard to a statutory award it has been said that, "nothing is clearer than that an award may be good in part and bad in part, and the bad part may be rejected when it is so unconnected with the residue that it may be seen that its rejection does not affect the justice or the correctness of that portion of the award which is retained."

Revocation of Submission

Under a common law submission, either party may withdraw from the arbitration at anytime before the award is announced. Section 15257 provides "whenever any submission to arbitrate shall be revoked by a party thereto before the publication of the award," the party revoking shall be liable for the costs, damages, etc. But the same section continues by saying "but neither party shall have power to revoke the powers of the arbitrators after the cause shall have been submitted to them upon a hearing of the parties for their decision." The first portion would seem not to change the common law rule. However, it is submitted that the section is controlled by the latter portion and there may be no revocation after the final submission to the arbitrators for their decision after the hearing.

Closely allied with the power to revoke a submission to arbitration is the question of whether a submission to arbitration can be specifically enforced. It has been generally held that a submission to arbitration cannot be specifically enforced. "Lord Eldon said: . . . that no instance is to be found of a decree for specific performance of an agreement to name arbitrators; and Mr. Justice Story, . . . notices the authorities, and in a lucid opinion states as his conclusion that an agreement to refer to arbitration can neither be set up as a bar to a suit at law or in equity. Nor can it be enforced in a court of equity when either party as plaintiff seeks it. An agreement for arbitration is, in its nature, revocable, and, though an award when made will be enforced, parties will not be compelled to submit a controversy to arbitrators, nor will they be compelled to perform an agreement for that purpose after they have made it. How could the court compel the parties to select appraisers? And if even the parties selected them, the court could not require the appraisers to select a third person to act as umpire in the event of their disagreement; and if either

130. Ellison v. Weathers, 78 Mo. 115, 122 (1883).
131. Price v. White, 27 Mo. 275, at 278 (1858).
party should refuse to name an appraiser, the court has no authority to appoint or substitute any other person."

There are cases of appraisement in which the courts say that, when the contract has been performed on one side and when the determination of valuation by appraisers is a subsidiary part of the agreement, specific performance will be granted. These cases may be explained on a theory of granting relief to prevent unjust enrichment. There is some language in one case that mandamus should be the proper remedy to compel a party to appoint appraisers.

There seems to be some conflict in the cases on the question of whether a membership on a board of trade can be conditioned upon the member submitting all his controversies to arbitration. This conflict is discussed by Werner in his article in the St. Louis Law Review.

Section 15260 provides that arbitrators shall receive two dollars and fifty cents per day for their services unless otherwise agreed on by the parties. Such arbitrators will be allowed this per diem amount for the day on which they meet and draw up and sign their award.

CONCLUSION

Arbitration affords a means of settling disputes which in many instances will prove both speedier and less expensive to the parties involved. In order to derive these benefits from this procedure the submission to arbitration should be very carefully drawn, the proceedings conducted with particularity and the award properly confirmed.

The submission should specifically set out just exactly what is to be included. If the submission is vague there is the possibility of litigation afterwards on the ground that the arbitrators exceeded their powers. The submission should also plainly state how the arbitrators are to be selected.

133. King v. Howard, 27 Mo. 21, 25-26 (1858).
134. Black v. Rodgers, 75 Mo. 441 (1882); Bales v. Gilbert, 84 Mo. App. 675 (1900).
135. City of St. Louis v. St. Louis Gas Light Co., 70 Mo. 69 (1879).
136. 4 St. Louis L. Rev. 61 (1919). The writer there compared Kennedy v. Merchants Exchange, 2 Mo. App. 96 (1876) and Farmer v. Board of Trade, 78 Mo. App. 557 (1899). Also see Moffatt v. Board of Trade of Kansas City, 111 S.W. 894 (Mo. App. 1908). It is submitted that this case agrees with the Farmer case and is the better view.
137. Beckett v. Wiglesworth, 178 S.W. 898 (Mo. App. 1915). See also Bates v. East St. Louis & Suburban Ry., 297 S.W. 179 (Mo. App. 1927) as to what a reasonable fee per day is in St. Louis. Evidence was introduced showing fees from $50.00 to $1000.00 per day.
and the exact number who are to act, how many must sign the award and the fees they are to receive. The submission should provide for the confirmation of the award.

The proceedings themselves should be conducted with great particularity. The arbitrators must be sworn by one authorized to administer oaths, notice of the time and place for the hearing must be given and the witnesses must be sworn. All of the arbitrators must be present at all proceedings and the award must be attested. If at any time during the hearing any of the terms of the submission or the provisions of the statute are deviated from the parties should stipulate in writing that this deviation is agreed to by all the parties.

After the award is properly attested it should be made a rule of the court designated in the submission after 15 days notice and within one year after the publication of the award.

An examination of the cases cited herein discloses that most of the litigation arising from arbitration is due to the fact that insufficient care was taken by the representatives of the parties at the time the proceedings were being held. Therefore, if the steps set out above are carefully observed arbitration can accomplish the purpose for which it was designed and the ends of justice be better served thereby.