

ARBITRATIONS AND APPRAISALS IN THE MISSOURI COURTS

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INTRODUCTION

Arbitral proceedings recommend themselves in many circumstances because they can provide speedy, efficient and economical means of resolving private disputes. Where the parties accept and act upon the award rendered, these advantages usually obtain. Where, on the other hand, there is a refusal to go forward with the proceedings agreed upon, or a refusal to abide an award, a recourse to the courts is the probable next step, with the usual result that the advantages of speed and economy are greatly, if not altogether, dissipated.

A survey, then, of court opinions dealing with arbitration matters is primarily a study of breakdowns, real or alleged, in the arbitral arrangement. Such a study of appellate opinions necessarily presents a somewhat warped picture of Missouri arbitration because the emphasis is almost entirely upon the pitfalls of common-law or statutory rules relating to arbitration, or upon the failure of the parties or the arbitrators to abide those rules. Almost no emphasis is placed upon arbitrations which do work, quietly and efficiently, and are accepted by the parties.

The reception of the common law in Missouri at the outset brought with it the prevailing common-law views toward arbitration. These, in broadest outline, break down into two categories. First, the agreement to submit a dispute to arbitration had little standing in court; either party was free to revoke the submission agreement at any time prior to rendition of the award; the other party could not compel specific performance; and the revoking party was not answerable in damages for his revocation. Second, the award was entitled to considerable standing once it was rendered; the award could be made the subject of an action, and a judgment entered upon it; the award could be pleaded in bar to an action upon the same matter; and the finality of the award could be avoided both at law and equity only by a limited number of defenses which went primarily to defects in procedures followed by the arbitrators.

The earliest Missouri arbitration statute appeared in 1825.¹ It was, on the whole, a loosely drafted and primitive affair. In substance it provided that the parties could file their submission agreement in circuit court, have it made a rule of court, and an award rendered under such a submission could thereafter be entered as a judgment of

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1. Mo. REV. STAT. p. 137 *et seq.*, §§ 1-7 (1825).

the circuit court on the motion of the prevailing party. Whether the statute intended to make the submission irrevocable, once made a rule of court, does not appear. The award rendered under such a submission was "void" when procured by "corruption or undue means."

The Act of 1825 was replaced a decade later by a more elaborate statute² when the Legislature adopted "substantially, the New York revised act."³ The Act of 1835 has undergone only one important change since that time: the addition in 1909 of the section now entitled, "Agreement to arbitrate no bar to suit."⁴ Otherwise, statutory arbitrations in Missouri rock along in a vehicle new in the Jacksonian Era, good so far as it goes, but accomplishing only half the job done by its modern counterparts in other states. It is reasonably abreast of present-day legislation in so far as it provides a summary motion practice for modifying, vacating or confirming a statutory award and entering judgment upon it. But it leaves expressly in force the common-law rule that agreements to submit to arbitration are revocable, a rule which modern statutes have flatly reversed by providing that agreements to submit present or future disputes are specifically enforceable through summary motion proceedings.

The Missouri statute does not abolish common-law arbitrations. The parties may elect either the common-law or statutory proceeding, the difference being primarily that the statute imposes more stringent procedural formalities as the price paid for the greatly simplified motion practice for testing finality of the award and entering judgment upon it. Whether a particular submission agreement contemplates a statutory or a common-law proceeding is not always clear, and this question has been a subject of frequent litigation.

And finally, the Missouri arbitration statute is silent on the subject of appraisals. Like the common-law arbitration, the appraisal is also a creature of the common law. None of the legal distinctions between appraisals and arbitrations is wholly satisfactory. Agreements which the courts have denominated as appraisals occur most frequently where the matter referred to third parties for determination is (a) the fixing of a value for property transferred under a contract to purchase and sell; (b) the periodic adjustment of rent under a long-term lease or upon renewal of the lease; and (c) the evaluation of loss or damage under a fire policy.

Conflicting reasons have been asserted for setting these categories apart as appraisals, with the result that more or less comparable

2. MO. REV. STAT. p. 71 *et seq.*, §§ 1-25 (1835).

3. The quoted language is that of the Missouri Supreme Court in *Bridgman v. Bridgman*, 23 Mo. 272, 274 (1856). A comparison of the 1835 Missouri Act with the then existing New York statute supports the court's observation. See 2 N.Y. REV. STAT. p. 541 *et seq.*, §§ 1-25 (1829).

4. MO. REV. STAT. § 868 (1909); now MO. REV. STAT. § 435.010 (1949).

fact situations in one case may be treated as an appraisal, and in another as an arbitration. Upon two points, however, the cases uniformly agree: (a) an appraisal is "something less than an arbitration";⁵ and (b) the procedural rules regulating arbitrations do not apply to appraisals.⁶

The leading Missouri case on appraisals, *Dworkin v. Caledonian Ins. Co.*,⁷ concludes that the "fundamental difference" between appraisals and arbitrations "lies in the procedure to be followed, and appraisals and arbitrations "lies in the procedure to be followed, and the effect of the findings." This rule was to be applied by ascertaining from the contract entered into by the parties whether it was intended that arbitration procedures were to be followed, or merely the less formal procedures of an appraisal. The rule is easy enough to apply where the contract sufficiently stipulates the procedures intended, but is virtually useless where the contract merely indicates that there shall be an "arbitration" or an "appraisal." This is particularly true in view of the occasional tendency to use the words "appraisal" and "arbitration" more or less interchangeably in opinions in which the procedural distinctions between the two are not regarded as material to the outcome of the case.⁸

THE SUBMISSION AGREEMENT

An agreement to arbitrate a dispute is a contract, and a party seeking to enforce an award under it has the burden of pleading and proving ". . . not only the award, but also the submission."⁹

The submission agreement may serve a number of purposes, chief among them being (a) to define the dispute submitted; (b) to determine the number of arbitrators and name or fix the mode of selecting them; (c) to establish particular procedures desired by the parties during the arbitral hearing, *e.g.*, right to be represented by counsel, or to cross-examine witnesses; (d) to determine the number of arbitrators who must concur in the award rendered (and if an umpire is to be called, in the event of disagreement among the arbitrators, to define his role); and (e) if a statutory proceeding is contemplated, to designate the particular court in which judgment is to be rendered upon the award.

Common-Law and Statutory Submissions Distinguished. If the submission is oral, the arbitration will be governed by common-law

5. *Zallee v. The Laclede Mut. Fire & Marine Ins. Co.*, 44 Mo. 530, 532 (1869).

6. *Dworkin v. Caledonian Ins. Co.*, 285 Mo. 342, 226 S.W. 846 (1920).

7. *Ibid.*

8. See *Tureman v. Altman*, 361 Mo. 1220, 239 S.W.2d 304 (1951), where the submission agreement spoke of "appraisers" and an "appraisement," and *Orr v. Hail Ins. Co.*, 356 Mo. 372, 201 S.W.2d 952 (1947), where the submission provided for an "arbitration."

9. *Thatcher Implement & Mercantile Co. v. Brubaker*, 193 Mo. App. 627, 634, 187 S.W. 117, 120 (1916).

rules, since the Missouri arbitration statute requires that the submission be "by instrument of writing."¹⁰ Some earlier cases held any written submission to be within the statute,¹¹ but later cases have recognized particular written agreements as lying outside the statute, and hence to be governed by common-law rules.

Thus, to be a written agreement within the statute, it must be signed by both parties, and where only one party has signed the agreement, it has been held to be a common-law submission.¹² But where each party signed a separate bond, agreeing to submit a defined dispute, and gave his bond to the other party, the bonds have been read together as constituting a written submission within the statute.¹³

The statute provides that the parties "may" designate in their submission agreement a particular court in which judgment may be rendered upon the award,¹⁴ and therefore the failure to make such a designation does not take a written submission outside the statute.¹⁵

At least one case has suggested that where an arbitral proceeding under a written submission, fails to conform to the procedural requirements of the statute, the validity of the award will be determined by common-law rules.¹⁶ In holding that a parol award rendered under a written submission was a bar to a subsequent suit involving the same dispute, the Court said in *Dickens v. Luke*: "It is conceded that the arbitration was not had according to the law providing for a statutory arbitration; hence we shall proceed on the theory that the arbitration was a common-law arbitration."¹⁷ The court did not develop its reason for ruling as it did, and the result could be justified either on the theory that the parties revoked their written submission and entered a new parol agreement, or that they waived the procedural requirements of the statute.

What Causes May Be Submitted. A valid common-law submission is limited to controversies existing when the agreement to arbitrate

10. MO. REV. STAT. § 435.020 (1949) provides as follows:

All persons except infants and persons of unsound mind, may, by instrument of writing, submit to the decision of one or more arbitrators any controversy which may be existing between them, which might be the subject of an action, and may, in such submission, agree that a judgment of any circuit or other court having jurisdiction of the subject matter, to be designated in such submission, shall be rendered upon the award made pursuant to such submission.

11. *Valle v. North Missouri R.R.*, 37 Mo. 445 (1866); *Bridgman v. Bridgman*, 23 Mo. 272 (1856).

12. *Williams v. Perkins*, 83 Mo. 379 (1884).

13. *Reeves v. McGlochlin*, 65 Mo. App. 537 (1896).

14. MO. REV. STAT. § 435.020 (1949). See note 10 *supra*, for full text.

15. *Wolfe v. Hyatt*, 76 Mo. 156 (1882). *Contra*: *Finley v. Finley*, 11 Mo. 624 (1848).

16. *Dickens v. Luke*, 2 S.W.2d 161 (Mo. App. 1928).

17. *Ibid.*

is entered into, and an agreement made at a time when no dispute exists is not a good common-law submission.¹⁸

The statute provides that the parties may submit “. . . any controversy which may be existing between them, which might be the subject of an action. . . .”¹⁹ This calls for the dual requirement (a) that only existing controversies may be submitted under the statute; and (b) that the controversy be one which might be taken cognizance of by the courts. There is no requirement at the common law that the controversy submitted be one which would otherwise constitute a cause of action.

The distinctions just made are well developed in *Continental Bank Supply Co. v. International Brotherhood of Bookbinders*.²⁰ In that case, the parties attempting to negotiate a contract of employment had been unable to agree upon the terms to be included, and they agreed in writing to submit their dispute to arbitration. It was held that because the courts cannot make a specific contract for the parties where none existed, the controversy was not one which could become the subject of an action, and hence the submission, although in writing, was not within the statute. The agreement was held valid as a common-law submission, the court saying that “. . . any civil controversy, whether constituting a cause of action or not, can be submitted to arbitration [at the common law]. . . .”²¹

Although under the statute the controversy submitted must be one which might be the subject of an action, this has not been limited to money claims. Thus, where the controversy involved a dispute over the construction of a term in a contract existing between the parties, an agreement in writing to arbitrate the disputed question of construction was held to be a submission within the statute; the award rendered was confirmed in a statutory proceeding; and the parties were bound by the arbitrators' construction in a subsequent action brought on the disputed contract itself.²²

Parol submissions at the common law are limited by the statute of frauds. In the early case of *Hamlin v. Duke*²³ the court laid down the following rule: “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.”²⁴ Subse-

18. *Zallee v. Laclede Mut. Fire & Marine Ins. Co.*, 44 Mo. 530 (1869); *Curry v. Lackey*, 35 Mo. 389 (1865); *Garred v. Macey & Doniphan*, 10 Mo. 161 (1846). *Hinkle v. Harris*, 34 Mo. App. 223 (1889) *semble*.

19. Mo. REV. STAT. § 435.020 (1949). See note 10 *supra*, for full text.

20. 239 Mo. App. 1247, 201 S.W.2d 531 (1947).

21. *Id.* at 1253, 201 S.W.2d at 534.

22. *E. E. Souther Iron Co. v. Laclede Power Co. of St. Louis*, 109 Mo. App. 353, 84 S.W. 450 (1904).

23. 28 Mo. 166 (1859).

24. *Id.* at 168.

quently, the rule was narrowed to apply only to such parol agreements lying wholly outside the statute of frauds and a parol submission and award were held invalid where the controversy submitted involved the alleged breach of a contract voidable, but not void, under the statute.²⁵ But where a tenant under a lease for a term of years had disputed the share of the crop owing the landlord for a particular year, and this controversy was orally submitted to arbitration, the parol award rendered was held valid for the reason that no question involving the term of the lease had been submitted.²⁶

Pending court actions may also be submitted under the statute. The submission agreement may then be entered as a rule of court with provision that judgment will be entered upon the award. Such a submission of a pending action works a dismissal of the suit whether an award is rendered thereafter or not.²⁷ Such a submission which is made a rule of court is merely a plea in abatement of the then pending action, and for purposes of confirming, modifying or vacating the award under statutory procedures the original action may be reopened and judgment entered.²⁸ But while the submission operates as a dismissal of the original action, it is not a bar to new action on the same matter unless a valid award has been made.²⁹ And the unsuccessful party to the award is not confined to statutory motions to modify or vacate the award; he may bring a new action to set aside the award on equitable grounds provided such action is begun prior to the filing of a motion to confirm the award by the successful party.³⁰

Revocability and Court Action After Revocation of Submission. Common-law agreements to submit to arbitration are revocable ". . . at any time before the award is announced. . . ."³¹

Until 1909 the Missouri arbitration statutes had been silent on the question whether statutory submissions to arbitration were revocable. In that year the legislature passed an act providing that contracts to arbitrate shall not preclude filing of suit.³² Interestingly, the act was not adopted as an amendment to the existing arbitration statute, but rather as an amendment to ". . . chapter 10 of the Revised Statutes of Missouri, 1899, relating to contracts and promises. . . ."³³ In the Revised Statutes of 1909, however, the act was added as a new sec-

25. *Bunnell v. Reynolds*, 205 Mo. App. 653, 226 S.W. 614 (1920).

26. *Donnell v. Lee*, 58 Mo. App. 288 (1894).

27. *Bowen v. Lazalere*, 44 Mo. 383 (1869).

28. *Shawhan v. Baker*, 167 Mo. App. 25, 150 S.W. 1096 (1912).

29. *Hyatt v. Wolfe*, 22 Mo. App. 191 (1886).

30. *Shawhan v. Baker*, 167 Mo. App. 25, 150 S.W. 1096 (1912).

31. *Donnell v. Lee*, 58 Mo. App. 288, 297 (1894).

32. Mo. Laws 1909, p. 347.

33. *Ibid.*

tion to the chapter on arbitration,³⁴ and not as an amendment to the chapter on contracts and promises.³⁵

A summary of cases dealing with revocability which had been decided prior to the 1909 act will perhaps explain in part the reasons for its adoption. *King v. Howard*³⁶ stated the general rule thus:

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.³⁷

And this rule, refusing specific performance of the submission agreement, was followed in later cases which made no attempt to distinguish between common-law and statutory submission agreements.³⁸

One case, *Black v. Rogers*,³⁹ stands alone for the proposition that specific performance of an agreement to arbitrate would be allowed. The controversy there began as a proceeding in ejectment. While the suit was pending, the parties entered a compromise agreement under which the land was to be taken by one party and the other was to be paid an amount to be determined by arbitration. Black filed a bill in equity reciting the compromise agreement and Rogers' refusal to arbitrate. The trial court decreed that title to the land was in the defendant, ordered the parties to proceed to arbitration, and provided further that if arbitrators were not appointed, the value of the land should be fixed by court-appointed commissioners. The decree was affirmed on appeal. The supreme court conceded that as a general rule agreements to arbitrate were not specifically enforceable but said that an exception exists:

This exception occurs when the essence of the agreement does not consist in the fixing of a value by arbitrators, but the fixing of such value is merely subsidiary or auxiliary to the principal agreement.⁴⁰

The kind of problem posed by *Black v. Rogers*, *supra*, had long vexed the Missouri courts when it came to the question of applying the rule that agreements to arbitrate were revocable. In the run-of-the-mill case, revocation by one of the parties prior to rendition of an award worked no substantial hardship; if the controversy were one which could be made the subject of an action, either party was free to take the dispute to court after revocation; or he could revoke simply by bringing an action prior to rendition of an award.

34. MO. REV. STAT. § 868 (1909).

35. See "Chapter 29. Contracts and Promises," MO. REV. STAT. §§ 2769-2780 (1909).

36. 27 Mo. 21 (1858).

37. *Id.* at 25-26.

38. *City of St. Louis v. Gaslight Co.*, 70 Mo. 69 (1879); *Hug v. Van Burkleo*, 58 Mo. 202 (1874); *Biddle v. Ramsey*, 52 Mo. 153 (1873).

39. 75 Mo. 441 (1882).

40. *Id.* at 449.

On the other hand, there did exist a more or less limited area in which substantial hardship would result by holding the submission agreement wholly revocable. Typical of these were provisions in leases under which the lessor promised to pay at the end of the term for improvements made by the lessee, the parties agreeing in advance that the value of the improvements was to be fixed by arbitrators. If the lessor were permitted to revoke the submission, there would be no way left under the contract for determining the value of the improvements, and thus a forfeiture would be worked against the lessee. To prevent this, a court of equity could compel the taking of an account, although it refused relief in the form of compelling the parties to proceed to arbitration.⁴¹

While such a solution denied specific performance of the submission agreement, it was not without its logical difficulties. The parties had entered a contract to buy and sell, leaving to third parties the task of determining a material term of the agreement in a particular way, and court intervention to fix the price did so in a manner altogether different from the fashion in which the contract provided. Thus, where a contract to buy and sell at a price to be fixed by arbitrators remained wholly executory when equitable relief was sought, the court refused to intervene on the grounds that, the agreement remaining executory, no contract existed until arbitrators had fixed the price.⁴²

But in other cases involving submission of the question of value, the courts freely intervened when the arbitration provision failed. They did so where leases with renewal options provided that rental under the renewed lease was to be fixed by disinterested third parties, and arbitration failed.⁴³ In *Keating v. Korfhage*,⁴⁴ the value of a party wall was fixed in an equitable proceeding. And willingness was expressed to fix rental values under long-term leases where the parties had agreed to adjust the rent periodically by arbitration,⁴⁵ but equitable intervention was refused in the absence of a showing of fraud where in the long-term lease it was provided that the rent was to continue at the old rate until arbitration was had.⁴⁶

In another context, unrelated to the question of revocability, the courts were confronted with the problem whether agreements to submit questions as to value of property were, in a technical sense,

41. *Hug v. Van Burkleo*, 58 Mo. 202 (1874).

42. *City of St. Louis v. Gaslight Co.*, 70 Mo. 69 (1879).

43. *Biddle v. Ramsey*, 52 Mo. 153 (1873); *Arnot v. Alexander*, 44 Mo. 25 (1869).

44. 88 Mo. 524 (1885).

45. *Holmes v. Shepard*, 49 Mo. 600 (1872); *Strohmaier v. Zeppenfeld*, 3 Mo. App. 429 (1877). See *Tureman v. Altman*, 361 Mo. 1220, 239 S.W.2d 304 (1951), for a recent application of the same principle.

46. *Biddle v. McDonough*, 15 Mo. App. 532 (1884). *Bales v. Gilbert*, 84 Mo. App. 675 (1900) *semble*.

arbitrations at all. Because of the rule earlier discussed that only existing controversies could be submitted under the statute or at common law, some agreements in leases or contracts to buy and sell providing that the price or value of the property involved shall be fixed by third parties were held not to be submissions to arbitration for the reason that no controversy existed when the contract or lease was agreed upon.⁴⁷ If the particular agreement in each case was not an arbitration, what was it? *Zallee v. The Laclede Mut. Fire & Marine Ins. Co.*,⁴⁸ gave it a name: "an appraisal only . . . something less than an arbitration."⁴⁹

But not every agreement to have third parties fix price or value could be distinguished as an "appraisal" by the test that no controversy existed when the agreement was made, and other distinctions were found. The *Zallee* case, *supra*, pointed out that the submission of the question of loss sustained by fire did not embrace the ultimate question of the insurer's liability under a fire policy, and that such an "award" as to fire damage did not merge with the cause of action; hence no action could be brought on the award itself, but rather upon the contract of insurance, with the award being conclusive as to the question of loss. Elsewhere, agreements to have value fixed by third parties were distinguished as appraisals on the ground that value was merely incidental to the main purpose of the contract, and left open the matter of liability under the contract itself, hence differing from an arbitration in that it did not oust the courts of jurisdiction over the controversy.⁵⁰

None of the distinctions just discussed is altogether satisfactory in setting appraisals apart from arbitrations, and the distinctions between the two categories is not made clearer in many of the cases just cited by the fact that the courts themselves used the words "arbitration" and "appraisal" more or less interchangeably in discussing a particular agreement held not to be an appraisal in the technical sense. Indeed, the court in *Black v. Rogers*⁵¹ appeared to be discussing what other decisions had termed "appraisals" when it referred to the fixing of value by "arbitrators" as merely "secondary or auxiliary to the principal agreement."

Thus, there existed by the middle 1890's a body of decisions involving agreements that third parties were to fix value, price or damage as one of the incidents of a contract of sale, or lease, or insurance.

47. *Leonard v. Cox*, 64 Mo. 32 (1876); *Zallee v. The Laclede Mut. Fire & Marine Ins. Co.*, 44 Mo. 530 (1869); *Garred v. Macey & Doniphan*, 10 Mo. 161 (1846).

48. 44 Mo. 530 (1869).

49. *Id.* at 532.

50. *McNees v. The Southern Ins. Co.*, 61 Mo. App. 335 (1895); *Strohmaier v. Zeppenfeld*, 3 Mo. App. 429 (1877).

51. 75 Mo. 441 (1882).

While the identity of these agreements to fix value was not too clearly defined, they were regarded as something other than agreements to arbitrate in a statutory or common-law sense. And these "appraisals" were revocable in that the parties were free to take the dispute as to value to court when the arbitral proceeding failed. True, the isolated case of *Black v. Rogers*⁵² had held one agreement to fix value irrevocable and had decreed specific performance of the agreement, but the case has never since that time been followed in this point. And in *City of St. Louis v. Gaslight Co.*⁵³ the court had refused to intervene and fix value where a contract to sell at a price to be determined by arbitrators remained wholly executory. Otherwise, the "appraisal agreements" were no bar to a suit.

On the other hand, another line of cases, never regarded as arbitrations, had held that provisions requiring certificates of approval from architects or engineers were conditions precedent to suit on the contract.⁵⁴ It was, apparently, the fire insurance policy which brought over this "condition precedent" doctrine into the area more commonly regarded as arbitration or appraisal. The possibilities which the doctrine afforded for cutting down the revocability of agreements to fix value by arbitration or appraisal were obvious. If the insured could be barred from suit until third parties had ascertained the amount of loss sustained, he would be bound by the amount thus fixed and the issue of loss would thereby be kept from the jury. It provided an indirect means of compelling the insured to go through with the arbitral proceeding, enforced by depriving him of the right to sue on the policy until he had done so.

The first cases squarely presenting the question of revocability of conditions in fire policies requiring submission of the question of loss in event of disagreement were the companion cases of *Murphy v. Northern British & Mercantile Co.*,⁵⁵ and *McNees v. Southern Ins. Co.*,⁵⁶ handed down the same day by the Kansas City Court of Appeals. Both cases involved suits by the insured on fire policies which provided that ". . . no suit or action on this policy (shall be sustained) until after full compliance . . . with all the foregoing require-

52. 75 Mo. 441 (1882).

53. 70 Mo. App. 69 (1879).

54. *St. Joseph Iron Co. v. Helverson*, 48 Mo. App. 383 (1892); *Roy v. Boteler*, 40 Mo. App. 213 (1890). But compare *Williams v. Chicago, Santa Fe & California Ry.*, 112 Mo. 463, 20 S.W. 631 (1892), where the court, speaking of the finality of an engineer's certificate, observed that:

By such a stipulation, the parties constitute the engineer an arbitrator, and the provision is held, if anything, more binding than an ordinary submission, for the reason that it enters into, and becomes a part of the consideration of the contract, without which it would not in all probability have been made.

Id. at 487, 20 S.W. at 637.

55. 61 Mo. App. 323 (1895).

56. 61 Mo. App. 335 (1895).

ments. . . .”⁵⁷ It was one of those requirements that “. . . in the event of disagreement as to the amount of loss, the same shall . . . be ascertained by two competent and disinterested appraisers . . . [who shall] appraise the loss. . . .”⁵⁸ Although the policy spoke of appraisers instead of arbitrators, the court responded in the *Murphy* case in the following language of arbitration:

By the provisions of this policy, whenever the parties to the contract failed to agree on the amount of the loss, then it was to be settled by arbitration. The provision is absolute and mandatory. And such contracts being in the interest of amicable adjustments of disputes which must otherwise become the subject of vexatious controversy and litigation, are upheld by the courts. [Citations of cases from Minnesota, Michigan and Illinois omitted.] “*It was, therefore, . . . a condition precedent to a liability by defendant to plaintiff that there should have been an adjustment by arbitration of the sum due plaintiff.*”⁵⁹ [Italics added.]

The companion *McNees* case, *supra*, placed a limitation upon the condition precedent doctrine by confining its operation to amount of loss or damage, and stating that the doctrine did not apply where “. . . all matters pertaining to the cause of action. . . .” are submitted to arbitration.⁶⁰

Even limiting the *Murphy* and *McNees* cases to the determination of amount of loss or value, as distinguished from arbitration of an entire cause of action, it seems clear that agreements to arbitrate a particular class of disputes were bestowed a new vitality. True, the rule did not grant specific performance of the submission agreement, but indirectly it did compel the parties to arbitrate the loss or stay out of court.

The doctrine, on the other hand, was not enlarged to incorporate an agreement to arbitrate an entire cause of action. In *White v. Farmer's Mut. Fire Ins. Co.*,⁶¹ the Kansas City Court of Appeals which had decided the *Murphy* and *McNees* cases, refused, eight years later, to apply the condition precedent doctrine in a case where a condition in a fire policy prohibited the insured from going to court and required him to submit all questions of liability to arbitration. Curiously, however, the result was not grounded on the limitation of the *McNees* case against applying the condition precedent doctrine where the entire cause of action was submitted to arbitration, but rather on the proposition that the insurer's charter expressly provided that the company could sue and be sued.

57. *Murphy v. Northern British & Mercantile Co.*, 61 Mo. App. 323, 329 (1895).

58. *Id.* at 328.

59. *Id.* at 329.

60. *McNees v. Southern Ins. Co.*, 61 Mo. App. 335, 340 (1895).

61. 97 Mo. App. 590, 71 S.W. 707 (1903).

The condition precedent doctrine was, however, extended to cover agreements to arbitrate the value of improvements to the leasehold upon expiration of the lease in *Bales v. Gilbert*,⁶² where it was held that the mere failure to reach an "award" without showing fault on the part of the lessor was not sufficient to constitute a waiver of the condition precedent upon the lessee's right to sue.

Promising as the condition precedent rule appeared to be as a means of compelling arbitration (or appraisal) in insurance cases, it proved to be of little practical value. From the decisions of the *Murphy* and *McNees* cases in 1895 through 1908, the year before passage of the revocability statute,⁶³ only one⁶⁴ of the twenty-two appellate cases found involving the condition precedent question in cases on fire insurance policies actually held that the insurer had not waived the condition. Under a broad policy of strict construction of conditions against the insurer, one waiver exception after another was engrafted on the condition precedent doctrine, and the insured was permitted to bring his action on the policy. Indeed, after remand, both the *Murphy* and *McNees* cases came back and were sustained on the ground that the insurer had waived the condition.⁶⁵

About the only real effect of the doctrine in these years was to make much more cumbersome the trial of actions on fire policies. And in any event, the doctrine had not in that period been expanded to reach submission agreements other than those involving the determination of loss as part of a larger contract.

It appears almost certain, therefore, that the legislature had in mind the reversal of the *Murphy* and *McNees* cases in adopting what became Section 868 of the Revised Statutes of 1909. This conclusion is strengthened by comparing the language of the statute with that of the court in the *Murphy* case. In the *Murphy* case, the court had stated:

It was, therefore . . . a *condition precedent* to a liability by defendant to plaintiff that there should have been an *adjustment by arbitration* of the sum due plaintiff.⁶⁶ [Italics added.]

The language of the Act of 1909 follows:

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

62. 84 Mo. App. 675 (1900).

63. See note 32 *supra*.

64. *Stevens v. Norwich Union Fire Ins. Co.*, 120 Mo. App. 88, 96 S.W. 684 (1906).

65. *Murphy v. North British & Mercantile Ins. Co.*, 70 Mo. App. 78 (1897); *McNees v. Southern Ins. Co.*, 69 Mo. App. 232 (1897).

66. *Murphy v. Northern British & Mercantile Co.*, 61 Mo. App. 323, 329 (1895)

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.⁶⁷ [Italics added.]

As earlier indicated, the Act was made a part of the arbitration statute,⁶⁸ and in 1920, a divided supreme court held, in *Dworkin v. Caledonian Ins. Co.*,⁶⁹ that the statute applied only to arbitrations in a technical sense, and not to appraisals.

Dworkin had brought an action to recover under a fire insurance policy for loss sustained. The trial court had instructed the jury that Dworkin was not “. . . required to enter into an appraisal with the defendant as to the amount of loss.”⁷⁰ The insurer objected to this instruction on the ground that the revocability provision in the arbitration statute applied only to arbitrations, and not to appraisals.

On appeal, the court considered the various distinctions suggested in earlier cases as separating appraisals from arbitrations, viz., that no controversy existed when the agreement to fix value was made; that the fixing of value left open the ultimate question of liability under the contract; that fixing value merely settles a matter subsidiary or incidental to the contract. Each of these was rejected as the true distinction between appraisals and arbitrations for the reason that no one of the above distinctions was common to every situation in which submission agreements were held to be appraisals. The court then went on to lay down what it regarded as the true distinction:

In our opinion the fundamental difference between the two proceedings lies in the procedure to be followed, and the effect of the findings. An agreement to arbitrate is really an agreement between parties who are in a controversy, or look forward to the possibility of being in one,⁷¹ to substitute a tribunal other than the courts of the land to determine their rights. Arbitrators, like a judicial tribunal, must give notice to the parties of the time and place of the hearing of the controversy, and must listen to and decide upon the evidence offered by the parties; and the original cause of action becomes merged with the award, which may be declared upon at common law as a new demand, or, under our statute, judgment may be entered upon it by the court designated. In the case of a simple appraisal of values or amount of loss, the appraisers, if they wish, may hear what others have to say on the question they are to determine but unless the reference so provides, they are not bound to take testimony and may decide

67. Mo. Laws 1909, p. 347.

68. See text at note 34 *supra*.

69. 285 Mo. 342, 226 S.W. 846 (1920).

70. *Id.* at 353, 226 S.W. at 847.

71. This statement suggests that in Missouri, agreements to submit future controversies are valid. No case found so holds. See text to notes 18 and 19 *supra*.

from their own knowledge or opinion. Neither does their award create a new cause of action, but the liability of one party to the other is still upon the contract.⁷²

Under the distinction that the difference lies in the "procedures to be followed and the effect of the findings," it is a question of the *intention* of the parties, to be determined from the submission agreement they make. Holding that the parties to the contract of insurance in the *Dworkin* case did not intend to submit the determination of loss to either a common-law or statutory arbitration, the court concluded that the provision in the policy called for an appraisal instead.

The question then was whether the provision in the arbitration statute annulling any clause for "an adjustment by arbitration" applied to appraisals. And this was answered by holding that the statute applied only to what were, in a technical sense, arbitrations, and not to appraisals. Hence the instruction to the jury that the insured did not have to comply with the appraisal clause in the policy was held in error.

Thus, the *Dworkin* case restored the validity of the condition precedent doctrine by holding that appraisals were unaffected by the statute. But few insurance policy cases thereafter raised the condition precedent question. In *Lance v. Royal Ins. Co.*,⁷³ a suit by the insured on the policy was barred for failure to comply with the appraisal clause; but in other cases where the condition precedent rule was re-affirmed, the cases themselves actually held that the insurer had waived the condition.⁷⁴ And in *McManus v. Farmers Mut. Hail Ins. Co.*,⁷⁵ where the policy called for "arbitrators" to fix the amount of loss or determine "whether there was any loss at all," the *Dworkin* case was distinguished and the parties were held to have intended to "arbitrate" the loss, thus making the condition in the policy revocable under the statute.

In summary of matters dealing with revocability of submission agreements, the following conclusions appear warranted: Common-law submissions to arbitration have been traditionally regarded as revocable by notice or action prior to rendition of a valid award. Although the arbitration statute was silent on the point prior to 1909, statutory submissions were understood throughout that earlier period to be similarly revocable; and since 1909 they have been expressly so. The *Dworkin* case, by setting appraisals apart, has limited the

72. *Dworkin v. Caledonian Ins. Co.*, 285 Mo. 342, 356, 357, 226 S.W. 846, 848 (1920).

73. 259 S.W. 535 (Mo. App. 1924).

74. *Schusterman v. Hartford Fire Ins. Co.*, 253 S.W. 85 (Mo. App. 1923); *Security Printing v. Hartford Fire Ins. Co.*, 245 S.W. 1089 (Mo. App. 1922); *Security Printing v. Conn. Fire Ins. Co.*, 209 Mo. App. 422, 240 S.W. 263 (1922).

75. 239 Mo. App. 882, 203 S.W.2d 107 (1947).

revocability of submissions for appraisal of value or loss by keeping alive the condition precedent doctrine. That doctrine, almost exclusively confined to insurance cases which expressly made the appraisal clause a condition precedent to suit, apparently has not spread to other types of submissions which might have been regarded as appraisals under the *Dworkin* rule. And in the recent case of *Tureman v. Altman*,⁷⁶ where a provision in a long-term lease called for "appraisers" to make periodic "appraisement" of the rent, equitable relief was granted when the trial court which had fixed the rental value was sustained after efforts at appraisement failed. The opinion left quite unclear whether the agreement was an appraisal or an arbitration, and made no reference to cases in actions at law in which submission to appraisal had been held conditions precedent to suit.

THE ARBITRAL PROCEEDING

Arbitrators and Appraisers: Agents, or Disinterested Judges? As will appear more fully below, both arbitrators and appraisers are expected to act as fair and impartial observers in deciding the matter submitted to them. But if from the outset both parties to the controversy choose to treat the arbitrators they have selected as their personal agents in settling the dispute, neither will be permitted thereafter to object to the partiality of the arbitrator selected by the other party, and a statutory award thus rendered will not be set aside on a motion to vacate for this reason.⁷⁷ The net effect of such a choice by the parties is, of course, to leave the burden of the decision on the third arbitrator chosen by the first two.

The Missouri arbitration statute lists the following as causes for which an award may be vacated:

(1) That such award was procured by corruption, fraud or undue means;

(2) That there was evident partiality or corruption on the part of the arbitrators, or any one of them;

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

(4) That the arbitrators exceeded their powers, or that they so imperfectly executed them that a mutual, final and definite award on the subject matter was not made.⁷⁸

76. 361 Mo. 1220, 239 S.W.2d 304 (1951).

77. *Pope Construction Co. v. Highway Comm.*, 230 Mo. App. 502, 92 S.W.2d 974 (1936).

78. MO. REV. STAT. § 435.100 (1949).

The gist of the statutory rules just stated is that the arbitrators must act in good faith in carrying out the task appointed them under the submission agreement.

In this respect, the rule as to statutory and common-law arbitrators is the same, the statute being looked upon as merely incorporating the rules under which the courts of equity had traditionally set aside awards.⁷⁹ And it was traditionally the view that only equity could relieve from an award,⁸⁰ so that in actions at law upon an award prior to recognition of equitable defenses the plaintiff was entitled to recover upon pleading and proving the making of the submission agreement and the award.⁸¹

Because arbitrators are not presumed to know the law, the fact that in good faith they drew incorrect conclusions as to the facts or law of the matter before them does not provide a basis for setting aside the award at equity or under the statute.⁸² The rule is sometimes stated that the award would be set aside where an error of law or fact could be established on the face of the award without resort to extrinsic evidence.⁸³ From the rules just stated, it follows that an objection cannot be raised that the arbitrators heard evidence inadmissible in a court,⁸⁴ or that the award rendered was not supported by evidence.⁸⁵ On the other hand, refusal to hear pertinent and material evidence may be probative of misconduct or partiality on the part of the arbitrators.⁸⁶

General allegations of fraud, partiality, or corruption are not enough; the facts upon which the objections are based must be stated specifically.⁸⁷ While it early was said that an award would be set aside for partiality only if it were "strikingly unjust," or "grossly offensive,"⁸⁸ the rule laid down in *Bennett's Adm'r. v. Russell*,⁸⁹ that the misbehavior or corruption must imply "an intention to do wrong," has been the rule followed. Thus, without more, an intention to do

79. *Shawhan v. Baker*, 167 Mo. App. 25, 150 S.W. 1096 (1912).

80. *Finley v. Finley*, 11 Mo. 624 (1848).

81. *Thatcher Implement & Mercantile Co. v. Brubaker*, 193 Mo. App. 627, 187 S.W. 117 (1916).

82. *Cochran v. Bartle*, 91 Mo. 636, 3 S.W. 854 (1887); *Bennett's Adm'r. v. Russell*, 34 Mo. 524 (1864); *Bridgman v. Bridgman*, 23 Mo. 272 (1856); *Newman v. Labeaume*, 9 Mo. 30 (1845); *Thatcher Implement & Mercantile Co. v. Brubaker*, 193 Mo. App. 627, 187 S.W. 117 (1916).

83. *Cochran v. Bartle*, 91 Mo. 636, 3 S.W. 854 (1887); *Vallee v. North Mo. R.R.*, 37 Mo. 445 (1866); *Beckett v. Wigglesworth*, 178 S.W. 898 (Mo. App. 1915).

84. *Bennett's Adm'r. v. Russell*, 34 Mo. 524 (1864); *Vaughn v. Graham*, 11 Mo. 575 (1848); *Beall v. Board of Trade of Kansas City*, 164 Mo. App. 186, 148 S.W. 386 (1912).

85. *Fernandes Grain Co. v. Hunter*, 217 Mo. App. 187, 274 S.W. 901 (1925); *Mitchell v. Curran*, 1 Mo. App. 453 (1876).

86. See quoted portion of arbitration statute, paragraph (3), at note 78 *supra*.

87. *Pope Construction Co. v. Highway Comm.*, 230 Mo. App. 502, 92 S.W.2d 974 (1936).

88. *Newman v. Labeaume*, 9 Mo. 30 (1845).

89. 34 Mo. 524 (1864).

wrong is not shown where the arbitrators called back counsel for one of the parties to ask him to point to the place in the record where there could be found a point referred to in the counsel's brief;⁹⁰ or where the arbitrator resided at the home of the opposing party while conducting the arbitration;⁹¹ or where the request to cross-examine witnesses was refused;⁹² or where the request that the parties be represented by counsel during the arbitral proceeding was refused.⁹³

If at any time prior to rendition of the award, a party becomes aware of facts constituting partiality or corruption on the part of one of the arbitrators, he must take care that his conduct thereafter does not amount to a waiver of objection on this point. Thus, where a party, armed with knowledge that one arbitrator had been employed by the other party until just prior to the arbitral hearing, makes no objection to the partiality of that arbitrator until after the award is rendered, the objection comes too late.⁹⁴ Nor is it sufficient to allege a want of knowledge of partiality at the time of entering the submission agreement; such an allegation does not foreclose the possibility that knowledge of this partiality was acquired prior to, or during, the arbitral proceeding, and waived.⁹⁵

On the other hand, where knowledge of partiality was not acquired until after the award was rendered, the party is free to raise this objection at any time prior to confirmation of the award.⁹⁶ But where the unsuccessful party learns after the award is rendered of the arbitrator's partiality, his subsequent ratification and adoption of the award cures any defect arising out of the alleged partiality.⁹⁷

In general, the same standards of fair play required of the arbitrator are also required of the appraiser. There is, however, one significant difference recognized in the cases: unless the submission agreement calls for it, the appraiser does not need to give the parties a hearing.⁹⁸ Appraisers are not "required or expected to hear testimony"; rather, appraisers are experts who are ". . . chosen because of their peculiar knowledge to view and value the property

90. *Neely v. Buford*, 65 Mo. 448 (1877).

91. *Allen v. Hickam*, 156 Mo. 49, 56 S.W. 309 (1900).

92. *Penn. Iron Works v. East St. Louis Ice Co.*, 96 Mo. App. 563, 70 S.W. 903 (1902).

93. *Ibid.*; *Fernandes Grain Co. v. Hunter*, 217 Mo. App. 187, 274 S.W. 901 (1925).

94. *Pope Construction Co. v. Highway Comm.*, 230 Mo. App. 502, 92 S.W.2d 974 (1936).

95. *Ledlie v. Gamble*, 35 Mo. App. 355 (1889).

96. *Hyeronimus v. Allison*, 52 Mo. 102 (1873).

97. *Stone v. Johnston*, 167 Mo. App. 456, 151 S.W. 987 (1912).

98. *Dworkin v. Caledonian Ins. Co.*, 285 Mo. 342, 226 S.W. 846 (1920); *Curry v. Lackey*, 35 Mo. 389 (1865); *Sholz v. Mills*, 176 Mo. App. 352, 158 S.W. 696 (1913); *Harmon v. The Stuyvesant Ins. Co.*, 170 Mo. App. 309, 156 S.W. 87 (1913); *Kent & Purdy Paint Co. v. Aetna Ins. Co.*, 165 Mo. App. 30, 146 S.W. 78 (1912).

and estimate the damage, conducting their proceedings in a fair and business-like, but informal, manner."⁹⁹

While appraisers are not required by law to conduct a hearing, if the submission agreement stipulates a hearing or the appraisers decide to conduct one, refusal to hear evidence offered may indicate partiality, but only upon a showing that the evidence refused was material or pertinent.¹⁰⁰

Because the action is brought upon the contract of which the agreement to appraise is a part (and not upon the appraisal itself, as in an arbitral award), there has been a tendency to measure the appraiser's action by his compliance with the terms of the submission agreement. Thus, it has been said that the appraiser's duty to act fairly arises by "clear and necessary implication" from the contract sued upon, and failure to comply with the submission voids the appraisal.¹⁰¹ This failure of compliance need not imply fraud or partiality on the part of the appraisers, and hence where one of the appraisers was unaware of what the submission required him to do, the appraisal was set aside in an equitable proceeding.¹⁰² Failure of the appraisers to comply with the submission agreement is also a defense at law for the reason that the party insisting upon the validity of the appraisal must make a prima facie showing that the appraisal was made in substantial compliance with the submission agreement.¹⁰³ Under the rule of construing conditions strictly against the insurer, the failure of appraisers to fix the loss in the precise manner required by the submission will void the appraisal,¹⁰⁴ and it also operates as a waiver of the condition precedent.¹⁰⁵

From what has just been said, it follows that partiality of an appraiser resulting in prejudice to the rights of the complaining party is a breach of the implied duty to act fairly in settling the question of value submitted. Thus, an appraisal is void where the appraiser for the successful party dominates the proceeding,¹⁰⁶ or has

99. *Kent & Purdy Paint Co. v. Aetna Ins. Co.*, 165 Mo. App. 30, 48, 146 S.W. 78, 83 (1912).

100. *Leonard v. Cox*, 64 Mo. 32 (1876).

101. *Kent & Purdy Paint Co. v. Aetna Ins. Co.*, 165 Mo. App. 30, 146 S.W. 78 (1912).

102. *Ibid.*

103. *Security Printing Co. v. Westchester Fire Ins. Co.*, 204 Mo. App. 390, 221 S.W. 430 (1920).

104. *Blaetz v. National Fire Ins. Co.*, 293 S.W. 504 (Mo. App. 1927); *Mound City Roofing Tile Co. v. Springfield Fire & Marine Ins. Co.*, 218 Mo. App. 395, 277 S.W. 349 (1925); *Elliott v. Fidelity-Phenix Fire Ins. Co.*, 267 S.W. 441 (Mo. App. 1924).

105. *Schusterman v. Hartford Fire Ins. Co.*, 253 S.W. 85 (Mo. App. 1923); *Security Printing Co. v. Conn. Fire Ins. Co.*, 209 Mo. App. 422, 240 S.W. 263 (1922).

106. *Jones v. Orient Ins. Co.*, 184 Mo. App. 402, 171 S.W. 28 (1914).

an economic interest in the outcome of the appraisal,¹⁰⁷ or where his conduct amounts to fraud of any kind.¹⁰⁸ And an action of deceit will lie against the parties who procured the fraudulent appraisal.¹⁰⁹

Requirement of an Oath. At common law, neither the arbitrators nor witnesses had to be sworn, according to the earlier Missouri cases.¹¹⁰ That question today is in some doubt. In *Rickman v. White*,¹¹¹ a common-law award was sustained on the ground that the parties had waived the oath which the court said was required of arbitrators and witnesses in common-law arbitrations. Four years later the Springfield Court of Appeals, which had decided the *Rickman* case, sustained another common-law award arising out of proceedings described by the court as "informal in the extreme"; from the few facts stated in the opinion it appears quite unlikely that either arbitrators or witnesses were sworn; and the opinion makes no reference to any requirement of an oath, or of waiver.¹¹² And *dicta* in the relatively recent case of *Continental Bank Supply Co. v. International Brotherhood of Bookbinders*¹¹³, restates the older view that an oath was not required in common-law proceedings.

Arbitrations under the statute, however, require the arbitrators to be sworn "before proceeding to hear any testimony."¹¹⁴ Since the statute also empowers arbitrators to administer oaths,¹¹⁵ it has been construed as requiring witnesses to be sworn as well.¹¹⁶ And where the only written evidence that witnesses were sworn consisted of a statement in the award that the arbitrators had heard "testimony" of witnesses, this alone was held sufficient to support the presumption that the witnesses were sworn.¹¹⁷

Numerous early cases took the view that statutory proceedings were completely invalid if the arbitrators or witnesses were not sworn.¹¹⁸ But this gradually gave way. In *Tucker v. Allen*,¹¹⁹ it was held that the requirement of an oath could be expressly waived by

107. *Orr v. Farmer's Mut. Hail Ins. Co.*, 356 Mo. 372, 201 S.W.2d 952 (1947); *Schwartzman v. London & Lancashire Fire Ins. Co.*, 318 Mo. 1089, 2 S.W.2d 593 (1928).

108. *Non-Royalty Shoe Co. v. Phoenix Assurance Co.*, 277 Mo. 399, 210 S.W. 37 (1919); *Young v. Penn. Fire Ins. Co.*, 269 Mo. 1, 187 S.W. 856 (1916).

109. *Holt v. Williams*, 210 Mo. App. 470, 240 S.W. 864 (1922).

110. *Williams v. Perkins*, 83 Mo. 379 (1884); *Mahan v. Perry*, 5 Mo. 21 (1837).

111. 266 S.W. 997 (Mo. App. 1924).

112. *Dickens v. Luke*, 2 S.W.2d 161 (Mo. App. 1928).

113. 239 Mo. App. 1247, 201 S.W.2d 531 (1947).

114. MO. REV. STAT. § 435.030 (1949); *Toler v. Hayden*, 18 Mo. 399 (1853).

115. MO. REV. STAT. § 435.040 (1949).

116. *Cochran v. Bartle*, 91 Mo. 636, 3 S.W. 854 (1887).

117. *Reeves v. McGlochlin*, 65 Mo. App. 537 (1896).

118. *Fassett v. Fassett*, 41 Mo. 516 (1868); *Walt v. Huse*, 38 Mo. 210 (1866); *Frissell v. Fickes*, 27 Mo. 557 (1858); *Bridgman v. Bridgman*, 23 Mo. 272 (1856); *Toler v. Hayden*, 18 Mo. 399 (1853).

119. 47 Mo. 448 (1871).

the parties; and in *Grafton Quarry Co. v. McCully*,¹²⁰ it was held that no express agreement need be found to constitute a waiver of the oath. The rule finally evolved that a party present and aware of the failure to administer the oath was held to have waived it unless he made timely objection.¹²¹ But if an oath is administered to arbitrators by one later found to be without authority to do so, this does not operate as a waiver, the parties being presumed to have intended that the arbitrators be properly sworn.¹²²

Appraisers, unless the submission requires it, are under no duty to be sworn; nor, since as a matter of law they are not even required to hold hearings, is there any necessity to swear witnesses if the appraisers choose to hear them.¹²³

Notice and Opportunity to Be Heard. Parties to a common-law submission have a right to notice of the arbitral hearing and to be heard by the arbitrators; and an award rendered against a party denied these rights is void. In *Tiffany v. Coffey*,¹²⁴ a common-law award unanimously rendered by three arbitrators was held void against a party who had no notice of the appointment of a third arbitrator, and who had been deprived of the right to be heard by him. In the *Tiffany* case the court made this observation:

It is said that the submission did not provide for notice or a hearing. This, however, will be implied. To arbitrate the difference between two or more disputants, from the very nature of the duty imposed, necessarily carries along with it the necessity of a hearing; and this, in turn, carries along with it the necessity of notice in order that there may be a hearing.¹²⁵

But where a party gives his assent to an award, with knowledge that one of the arbitrators heard none of the evidence, he will not be allowed thereafter to challenge the validity of the award.¹²⁶

Similarly, under the arbitration statute the parties are entitled to notice and an opportunity to be heard, since the statute provides that the arbitrators ". . . shall appoint a time and place for the hearing and notify the parties thereof . . ." ¹²⁷ The statute does not fix the amount of time in advance of the hearing that the parties must be given notice, and the question appears not to have been litigated.

120. 7 Mo. App. 580 (1879).

121. *Allen v. Hickam*, 156 Mo. 49, 56 S.W. 309 (1900); *Pope Construction Co. v. Highway Comm.*, 230 Mo. App. 502, 92 S.W.2d 974 (1936); *Beckett v. Wiglesworth*, 178 S.W. 898 (Mo. App. 1915); *Karapschinsky v. Rothbaum*, 177 Mo. App. 91, 163 S.W. 290 (1914).

122. *Redman v. St. Joseph Hay and Grain Co.*, 209 Mo. App. 682, 239 S.W. 540 (1922).

123. See text following note 98 *supra*.

124. 142 Mo. App. 210, 125 S.W. 1178 (1910). Compare *Rickman v. White*, 266 S.W. 997 (Mo. App. 1924).

125. *Tiffany v. Coffey*, 142 Mo. App. 210, 213, 125 S.W. 1178, 1179 (1910).

126. *Phillips v. Couch*, 66 Mo. 219 (1877).

127. Mo. REV. STAT. § 435.050 (1949).

It has, however, been held that a party who appears on the day appointed for the hearing and participates in it without objection will not be heard to complain thereafter that the notice given him was inadequate.¹²⁸

Apparently, once a party has received notice of the hearing, his subsequent failure to appear on the day set does not amount to a revocation of the submission agreement. Thus, a statutory award has been sustained over the objection that it was misconduct for the arbitrators to proceed with the hearing and the award in the absence of one of the parties.¹²⁹

The statute also requires "all" the arbitrators to hear ". . . all the proofs and allegations of the parties, pertinent or material to the cause. . . ." ¹³⁰ Thus, an award is void where only two of the three arbitrators participating in the award heard the evidence.¹³¹ But the requirement that "all" the arbitrators hear the evidence does not mean all those provided for in the submission agreement. If at the time of the arbitral hearing the parties agree to go ahead before fewer arbitrators than were called for in the submission agreement, an award rendered by those who heard the evidence will be valid.¹³²

Apparently, too, the submission agreement may stipulate away the requirement that those ultimately making the decision must hear the evidence. Thus, where the submission provides that an appeal may be taken from the arbitrators' award by having a "board of review" in a trade association review the evidence taken by the original arbitrators, an award subsequently rendered by the board of review, reversing the original award, has been held valid under the statute.¹³³

As earlier discussed, none of the provisions relating to notice and hearing apply to appraisers.¹³⁴

Forming the Award. At the common law, the unanimous concurrence of the arbitrators was required to form a valid award in the absence of a stipulation to the contrary in the submission.¹³⁵ This stipulation need not be express; majority concurrence to render a valid common-law award will be "inferred" where the submission provides for the appointment of a third arbitrator only in the event

128. *Price v. White*, 27 Mo. 275 (1858).

129. *Shroyer v. Barkley*, 24 Mo. 346 (1857); *Mitchell v. Curran*, 1 Mo. App. 453 (1876).

130. MO. REV. STAT. § 435.060 (1949).

131. *Bowen v. Lazalere*, 44 Mo. 383 (1869).

132. *Hinkle v. Harris*, 34 Mo. App. 223 (1889); *Sweeney v. Vaudry*, 2 Mo. App. 352 (1876).

133. *Mitchell v. Curran*, 1 Mo. App. 453 (1876). *Fernandes Grain Co. v. Hunter*, 217 Mo. App. 187, 274 S.W. 901 (1925) *semble*.

134. See text following note 98 *supra*.

135. *Continental Bank Supply Co. v. International Brotherhood of Bookbinders*, 239 Mo. App. 1247, 201 S.W.2d 531 (1947).

of deadlock between the first two arbitrators appointed.¹³⁶ *Caveat*: if the third arbitrator thus appointed has not heard the evidence, an award thereafter rendered may be invalid for that reason, unless the submission makes it clear that the third arbitrator will not be required to hear the evidence.¹³⁷

While the arbitration statute requires all the arbitrators to hear all the evidence, it also provides that ". . . every other act done by a majority of them shall be valid . . . [unless otherwise] expressly required in the submission."¹³⁸ Thus, it is unnecessary for all the arbitrators, after hearing the evidence, to sit down together thereafter, make the decision, and prepare the award; it is sufficient if this is done by a majority of them.¹³⁹

It is not clear from the cases whether the unanimous concurrence of appraisers is required in the absence of stipulation in the submission. In *Tureman v. Altman*,¹⁴⁰ the supreme court had before it an agreement providing for an "appraisement" by "appraisers" of rent under a long-term lease. The submission provided for the appointment of three "appraisers," but did not indicate whether all, or a majority, of them had to concur in the "appraisement." Without deciding whether the submission constituted an appraisal within the *Dworkin* rule, *supra*, the court apparently assumed in making its decision that unanimous agreement of the "appraisers" was necessary. Where, however, the submission for appraisal stipulates that a majority is sufficient to act, the fact that two of the appraisers, without contacting the third, proceeded to fix the amount of loss under a fire policy has been held insufficient to upset the appraisal without a further showing of partiality.¹⁴¹

In fashioning the award, arbitrators are bound by the terms of the submission agreement. As previously noted, statutory awards may be vacated on the grounds, among others: "That the arbitrators exceeded their powers, or that they so imperfectly executed them that a mutual, final and definite award on the subject matter was not made."¹⁴² The rule here stated is understood to apply as well to common-law awards.¹⁴³

Because the submission agreement defines the controversy which the parties wish determined, the scope of the arbitral hearing can not be enlarged, over the objection of one of the parties, to include mat-

136. *Fleming v. KCKN Broadcasting Co.*, 233 S.W.2d 815 (Mo. App. 1950).

137. *Tiffany v. Coffey*, 142 Mo. App. 210, 125 S.W. 1178 (1910). See note 124 *supra*.

138. Mo. REV. STAT. § 435.060 (1949).

139. *Higgins-Wall-Dyer v. St. Louis*, 331 Mo. 454, 53 S.W.2d 864 (1932).

140. 361 Mo. 1220, 239 S.W.2d 304 (1951).

141. *Pierce's Loan Co. v. Netherlands Fire and Ins. Co.*, 200 S.W. 120 (Mo. App. 1918).

142. Mo. REV. STAT. § 435.100(4) (1949).

143. See text to note 79 *supra*.

ters not submitted, and the award, therefore, can not embrace matters outside the submission.¹⁴⁴ Thus, where the parties agreed to submit "divers matters of dispute between us," the unsuccessful party may introduce parol evidence to show that matters not in dispute when the submission was agreed on had been included in the award.¹⁴⁵ On the other hand, if matters not included in the submission are heard by the arbitrators without objection by the parties, it is proper for the award to embrace these, and the unsuccessful party can not protest that the award covered matters not originally submitted.¹⁴⁶ And if a party manifests his assent to an award which he knows embraces matters not submitted, he will not be allowed thereafter to object that the award touches on matters not originally submitted.¹⁴⁷

Whether an award covering matters outside the submission is wholly invalid, or merely invalid as to those matters outside the submission, is not altogether clear. In *Squires v. Anderson*,¹⁴⁸ an action had been brought upon an award rendered under a submission calling for a balance of account between two former partners. The controversy centered around the inclusion in the award of an item charged against the defendant, which item was larger than the whole award rendered in the plaintiff's favor. Stating the rule to be that if the arbitrators ". . . assume to act on questions not submitted, or fail to follow the directions in the submission in a material point, their award in reference to such matters will not be binding, either on questions of law or of fact . . ." ¹⁴⁹ the item was held to be outside the submission agreement. Thus, a judgment for the defendant was sustained because, with that item excluded, the award was no longer in the plaintiff's favor.

Ten years after it decided the *Squires* case, the supreme court held, in *Ellison v. Weathers*,¹⁵⁰ that if portions of the award were separable, those relating to matters properly submitted would stand.

Six years later, in *Hinkle v. Harris*,¹⁵¹ the St. Louis Court of Appeals cited the *Squires* case for the proposition that "if the arbitrators assume to act on questions or matters not submitted, their award will not be binding,"¹⁵² and struck down an entire award without considering the question of severability. No other case found

144. *Hinkle v. Harris*, 34 Mo. App. 223 (1889).

145. *Ibid.*

146. *Price v. White*, 27 Mo. 275 (1858); *McClure v. Shroyer*, 13 Mo. 104 (1850).

147. *Ellison v. Weathers*, 78 Mo. 115 (1883).

148. 54 Mo. 193 (1873).

149. *Id.* at 197.

150. 78 Mo. 115 (1883).

151. 34 Mo. App. 223 (1889).

152. *Id.* at 232.

rules squarely on the point, although the rule quoted above from the *Squires* case has been repeated in dicta.¹⁵³

The question as to validity of an award where the arbitrators failed to consider all matters submitted has apparently been litigated only to the extent of holding that the unsuccessful party can not object to an award where the omitted matter would have been favorable to the other party, and not himself.¹⁵⁴

The arbitrators must fashion an award which is clear and definite. Thus, where the award gave the successful party the option of two possible solutions, it was held too indefinite in that it failed to resolve the controversy.¹⁵⁵ But an award, indefinite because it fails to settle the controversy, may be cured when the parties thereafter agree upon one of the alternatives, and thus resolve the uncertainty.¹⁵⁶

Arbitrators may, in making the award, charge the costs of arbitration against the unsuccessful party.¹⁵⁷ These costs may include fees payable to the arbitrators, but in the absence of a stipulation to the contrary, the statute fixes the arbitrator's fee at \$2.50 a day,¹⁵⁸ and a statutory award will be modified where the arbitrators, without express authority to do so, charge fees in excess of the statutory amount.¹⁵⁹ And it has been held that in awarding damages for trespass in removing trees from property, arbitrators cannot award treble damages in the absence of a stipulation to that effect in the submission.¹⁶⁰

The award, if in writing, must be signed by the arbitrators agreeing to it, whether it is a proceeding at common law¹⁶¹ or under the statute.¹⁶² The statute adds the further requirement that the award must also be attested by a subscribing witness.¹⁶³ Until attested, the statutory award is incomplete, and arbitrators are not rendered *functus officio* by delivering copies of the award to the parties. The arbitrators may, therefore, recall the award thus delivered for purposes of having it attested.¹⁶⁴ But a motion to enter judgment upon the award will be denied where the award has been filed with the court prior to attestation and the prevailing party, without a court

153. *Thatcher Implement and Mercantile Co. v. Brubaker*, 193 Mo. App. 627, 187 S.W. 117 (1916).

154. *Beckett v. Wiglesworth*, 178 S.W. 898 (Mo. App. 1915).

155. *Pitman v. Irby*, 181 S.W. 590 (Mo. App. 1916).

156. *Ellison v. Weathers*, 78 Mo. 115 (1883); *Dickens v. Luke*, 2 S.W.2d 161 (Mo. App. 1928).

157. Mo. REV. STAT. § 435.230 (1949); *McClure v. Shroyer*, 13 Mo. 104 (1850).

158. Mo. REV. STAT. § 435.280 (1949).

159. *Beckett v. Wiglesworth*, 178 S.W. 898 (Mo. App. 1915).

160. *Frissell v. Fickes*, 27 Mo. 557 (1858).

161. *Continental Bank Supply Co. v. International Brotherhood of Bookbinders*, 239 Mo. App. 1247, 201 S.W.2d 531 (1947).

162. Mo. REV. STAT. § 435.070 (1949).

163. *Ibid.*

164. *Newman v. Labeaume*, 9 Mo. 30 (1845).

order, removes it to have it attested; his proper remedy would have been a motion to modify and correct the award filed together with the motion to confirm.¹⁶⁵ But even though a motion to confirm the award has been denied for want of attestation, the award, if later attested, will be a bar to a suit brought on the same matter.¹⁶⁶

Once, however, the award has been made, signed, attested and delivered, the arbitrators are *functus officio*, and without obtaining fresh authority from the parties they can not later issue a "corrected" award.¹⁶⁷ More or less comparable is the case of *Inman v. Keil*,¹⁶⁸ where three common-law arbitrators viewed the property in dispute, advised one of the parties to pay all but \$300 of the contract price immediately and suggested that the balance could be decided upon later. When, seven or eight months after this, the arbitrators sought to render an award as to the balance without notifying the parties or hearing further evidence, they were held to be without authority to make such an award.

Appraisers avoid for the most part the problem of whether their appraisements touch upon matters not submitted to them; on the other hand, appraisers are held quite strictly to the terms and implications of the submission.¹⁶⁹

ENFORCEMENT OF THE AWARD

If both parties to an arbitral proceeding are content to abide the award and consider the matter over and done with, there is no real reason why anything further be done after the award has been rendered.

The traditional method at the common law, when one of the parties refused to accept the award, was to bring an action based upon the award itself. The theory behind this was that the original cause of action submitted had merged with the award, and the award thereafter created a new cause of action.¹⁷⁰ The defenses at law to an action on the award were few. It was a question of law for the court whether the award covered matters outside the submission.¹⁷¹ About the only questions conceivably presenting issues for the jury dealt with whether a submission agreement had been entered and an award rendered.¹⁷²

Relief from the award, if any, was confined to equity. And even equity would not set aside an award for errors of fact or law in the

165. *Field v. Oliver*, 43 Mo. 200 (1869).

166. *Tucker v. Allen*, 47 Mo. 488 (1871).

167. *Brown and Moore v. Durham*, 110 Mo. App. 424, 85 S.W. 120 (1905).

168. 206 S.W. 403 (Mo. App. 1918).

169. See text to notes 101-105 *supra*.

170. *Searles v. Lum*, 81 Mo. App. 607 (1899).

171. *Ellison v. Weathers*, 78 Mo. 115 (1883).

172. *Thatcher Implement & Mercantile Co. v. Brubaker*, 193 Mo. App. 627, 187 S.W. 117 (1916).

absence of partiality or corruption on the part of the arbitrators.¹⁷³ There was, of course, no jury trial at equity.

As noted in the Introduction, the existing Missouri arbitration statute was enacted in what is substantially its present form in 1835. By requiring that arbitrators and witnesses be sworn, that a decision by a majority rather than all of the arbitrators is all that is necessary for a valid award, and that the award be attested by a subscribing witness, the statute did introduce some procedural changes unknown in common-law arbitrations. But the biggest change introduced by the statute was what has been described as "a quick bill in equity."¹⁷⁴ This consisted of a summary motion practice—to confirm, vacate, modify or correct an award—with the provision that judgment could be entered immediately thereafter upon an award confirmed or modified, and further providing that an appeal could be taken from that judgment, or from an order vacating the award.¹⁷⁵ The grounds available in equity for setting aside an award were carried over into the statute to provide the basis for a motion to vacate the award. Proof under these motions was to be by affidavit, and there was no jury trial on the motion proceedings.¹⁷⁶ The advantages of the new system were speed and simplicity.

The statute expressly provided that nothing therein shall impair the authority of the court of equity over the awards of arbitrators.¹⁷⁷ And the statute has uniformly been construed as furnishing a remedy concurrent with that of common-law arbitrations.¹⁷⁸

Common-law arbitrations and awards continue to exist. For the same reason that an action may be brought on a common-law award, an award may also be pleaded as a bar to an action on the same matter.¹⁷⁹ And when an action is brought upon the award, it is no defense that the cause of action originally submitted to arbitration is barred by the statute of limitations at the time the action is brought on the award.¹⁸⁰ The defendant, however, is free to set up any valid counterclaims when an action is brought against him on an award.¹⁸¹ Presumably, with the full merger of law and equity into one form of action,¹⁸² the defendant may set up as a defense against an action on an award any grounds which might have been sufficient to set the award aside for corruption or partiality in equity, although no cases so deciding have been found.

173. See text to notes 78-97 *supra*.

174. *Koerner v. Leathe*, 149 Mo. 361, 51 S.W. 96 (1899).

175. *Mo. Rev. Stat.* §§ 435.080-435.200 (1949).

176. *Koerner v. Leathe*, 149 Mo. 361, 51 S.W. 96 (1899).

177. *Mo. Rev. Stat.* § 435.240 (1949).

178. *Fleming v. KCKN Broadcasting Co.*, 233 S.W.2d 815 (Mo. App. 1950).

179. *Hamlin v. Duke*, 28 Mo. 166 (1859).

180. *Searles v. Lum*, 81 Mo. App. 607 (1899).

181. *Pearce v. McIntyre*, 29 Mo. 423 (1860).

182. *Mo. Rev. Stat.* § 506.040 (1949).

Since the arbitration statute expressly leaves equitable jurisdiction unimpaired, presumably it is still open to a party to bring a civil action, equitable in nature, to set an award aside.

A successful party to a statutory award has a number of courses open to him. If the award is accepted by the other party, and the matter is settled, he may wish to let it go at that. If, for the record, he wishes to have the award confirmed and a judgment entered upon it, he must first serve a copy of the award and the motion upon the other party at least fifteen days prior to filing the award in court.¹⁸³ The statute has been construed as permitting the filing of the award in court at any time within one year of publication of the award; the motion need not have been ruled upon in that time.¹⁸⁴ If the motion to confirm is not filed within a year, this simply deprives the prevailing party of the statutory procedure; the award remains a subsisting thing, and an action comparable to that which may be maintained upon a common-law award may be brought.¹⁸⁵ So, too, if the other party brings an action on the same matter, prior to confirmation of the award, the award may be set up as a bar to the action and the defendant may also file a motion to confirm at that time if the suit is brought within a year of publication of the award.¹⁸⁶

The unsuccessful party to the award has a number of courses open as well. He could, of course, bring an action on the subject matter of the award, thus creating the suit described in the last sentence of the above paragraph, and if the defendant files a motion to confirm the award in connection with pleading the award as a bar to the action, the plaintiff is free, by way of reply, to file a motion to vacate, provided he can do so within the time fixed by the statute for filing a motion to vacate.¹⁸⁷ The statute requires that a motion to vacate, or a motion to modify or correct the award, be filed at the next term of court following the publication of the award, provided this may be done and still give the other party a ten-day notice of the motion.¹⁸⁸ The situation has occasionally developed that a party in whose favor the award is rendered has postponed filing a motion to confirm the award until after the time allowed for filing a motion to vacate the award has run. When this occurs, a motion filed to vacate the award after the time fixed by statute must be overruled.¹⁸⁹

183. Mo. REV. STAT. § 435.090 (1949).

184. Kirby v. Heaton, 315 Mo. 338, 286 S.W. 76 (1926).

185. Beall v. Board of Trade of Kansas City, 164 Mo. App. 186, 148 S.W. 386 (1912).

186. Redman v. St. Joseph Hay and Grain Co., 209 Mo. App. 682, 239 S.W. 540 (1922).

187. *Ibid.*

188. Mo. REV. STAT. § 435.120 (1949).

189. Shores v. Bowen, 44 Mo. 396 (1869); Reeves v. McGlochlin, 65 Mo. App. 537 (1896).

While the motion to vacate under these circumstances has been overruled, there is at least one case in which the unsuccessful party was permitted to file a pleading essentially equitable in nature to the prevailing party's motion to confirm.¹⁹⁰

The unsuccessful party to the award is not confined to a motion to vacate a statutory award, and even if such a motion has been filed, it is not, until it has been ruled on, a bar to bringing an action in equity to vacate the award.¹⁹¹ But a separate equitable proceeding will stay a ruling on a motion to confirm only if the equitable proceeding is begun before the motion to confirm is filed.¹⁹² And while in terms of vulnerability of the award the equitable proceeding and the motion to vacate are equivalent, the advantage asserted for the equitable remedy is that it permits a final adjudication of the parties' rights, where a motion to vacate simply sets the award aside and compels the parties to start over.¹⁹³

Because both the motion to vacate and the corresponding equitable remedy raise essentially the question of partiality or bad faith on the part of one or more of the arbitrators, it may be pertinent to observe that once an arbitrator has joined in signing the award, his testimony or affidavit is inadmissible for purposes of impeaching the award.¹⁹⁴ But where an arbitrator neither assists in making the decision, nor signs the award, his testimony is admissible to show acts of misconduct on the part of the other arbitrators.¹⁹⁵

The finality of appraisements has been tested primarily in actions brought on the contract, or policy of fire insurance, or lease, of which the appraisal was a part. To this end, the test of the appraisal has been whether it was made in compliance with the submission agreement, and, by finding in the contract an implied duty on the part of the appraiser to make the valuation "in a fair and business-like, but informal, manner,"¹⁹⁶ it gradually became possible to raise the issue of the appraiser's alleged partiality in an action at law on the contract. But an action on the contract at law is not the sole remedy available to a party aggrieved by an appraisal; equitable proceedings as well are available to set appraisements aside.¹⁹⁷

190. *Shores v. Bowen*, 44 Mo. 396 (1869).

191. *Pacific Lime & Gypsum Co. v. Mo. Bridge & Iron Co.*, 286 Mo. 112, 226 S.W. 853 (1920).

192. *Shawhan v. Baker*, 167 Mo. App. 25, 150 S.W. 1096 (1912).

193. *Ibid.*

194. *Ellison v. Weathers*, 78 Mo. 115 (1883); *Taylor v. Scott*, 26 Mo. App. 249 (1887).

195. *Continental Bank Supply Co. v. International Brotherhood of Bookbinders*, 239 Mo. App. 1247, 201 S.W.2d 531 (1947).

196. *Kent & Purdy Paint Co. v. Aetna Ins. Co.*, 165 Mo. App. 30, 48, 146 S.W. 78, 83 (1912).

197. *Sholz v. Mills*, 176 Mo. App. 352, 158 S.W. 696 (1913).

CONCLUSIONS

While both arbitrations and appraisals are capable of performing numerous useful services under Missouri law as it presently stands, anyone seriously considering the use of either procedure will find useful an understanding of things which cannot, with certainty, be accomplished by them.

The sweeping force of the revocability doctrine, applicable alike to common-law and statutory arbitrations, renders uncertain at the outset the effectiveness of arbitration as a means of settling disputes. So long as either party is free to revoke the submission agreement at any time during the arbitral hearing, there exists always the likelihood that a party, watching the accumulation of events during the hearing, may see the handwriting on the wall and revoke the submission. Once this is done, the entire affair is at an end, and the parties are left where they began—with their dispute still unresolved. In short, whether an agreement to arbitrate is consummated by a binding award primarily rests upon the good faith of the parties in standing by the method they have selected for resolving their disputes.

In the past thirty years or so, numerous other states have seen fit to adopt legislation making submission agreements irrevocable and specifically enforceable through summary motion practice comparable to that now used in Missouri for confirming or vacating awards. New York, whose 1829 arbitration statute provided the model upon which the present Missouri legislation was patterned, has been a leader in shaping this more modern view of arbitration, and its present arbitration statute but little resembles its legislation of a century and a quarter ago.¹⁹⁸

A further limitation upon the utility of common-law and statutory arbitrations in Missouri is the requirement that only controversies in existence when the submission is agreed upon are proper subjects of arbitration. It must be admitted that this is not an unendurable hardship because the parties are, of course, under present Missouri arbitration law, perfectly free to submit particular controversies after each arises. But the present rule does deny the parties the opportunity of including in their contracts a provision that all disputes arising under the contract shall be submitted to arbitration under a prescribed set of standards.

Such provisions can be of considerable convenience to parties who visualize continuing contractual relations over a period of years. For them, economic necessity often commands prompt decision of disagreements, and for this reason, a decision—any decision reasonably

198. N.Y. CIV. PRAC. ACT §§ 1448-1469.

arrived at—is often more valuable economically than an answer arrived at months or years later after costly and time-consuming litigation. True, as already indicated, they could enter individual submission agreements to handle each new matter, but this is manifestly less convenient than a more or less standardized submission clause in each contract. In this instance, too, the more modern statutes have corrected this by permitting submission of present or future controversies.

Still another limitation is imposed upon statutory arbitrations by the requirement that only matters which might be the subject of an action may be submitted. As pointed out in the *Continental Bank Supply Co.* case,¹⁹⁹ common-law submissions are not so limited, and thus where parties seeking to negotiate a contract, wish to submit disagreements over terms to be included in the contract, they must resort to common-law submissions. As a matter of logic, there seems no reasonable basis for denying them the use of summary motion procedure for judicial enforcement of the award.

The two limitations last suggested—viz., that only existing disputes may be submitted, and that under the statute the controversy must be one which might be the subject of an action—do not bar the parties from entering such submissions, but if they choose to do so, it must be in recognition of the fact that ultimate enforcement of the award will have to rest upon something other than court action.

Even conceding the existence of these more or less important limitations upon Missouri arbitrations, it none the less remains true that things which can be done by arbitration in Missouri at present make that procedure a useful and relatively inexpensive means of settling many kinds of controversies. And there is an important role which the bar may play in helping to make arbitration under the present rules a more effective device for settling disputes.

Every practicing attorney is aware of the widespread use of out-of-court settlements impelled in part at least by crowded court dockets and high costs of litigation. In many such situations, arbitration may be an effective and desirable device for handling such problems; and this is not to suggest that the attorney's role in arbitration is unimportant.

Submission agreements drafted by competent legal craftsmen could have obviated many of the disputes litigated in the foregoing cases. If the parties seeking to fix the rental value under a long-term lease, or the price of property to be transferred in a contract of sale, had intended that the appraisers should fix the value without hearing evidence of the parties, the submission agreement could have said so.

199. See text to notes 20 and 21 *supra*.

And if it had been intended that an umpire, brought in only after disagreement arose between the arbitrators, was not required to hear the evidence, the submission could have stated this, too. And so, likewise, with the question of whether the arbitrators or witnesses were required to take an oath.

The attorney, too, can greatly aid a client in the preparation of material for the arbitral hearing, and if the parties wish it, they may stipulate in their submission the right to be represented by counsel in the arbitral hearing.

With respect to formation of the award, if doubt arises as to whether particular findings were authorized by the original submission, legal guidance may assist in shaping an award in which these findings are sufficiently separable that the remainder of the award may stand in the event certain matters are later held to have been outside submission.

For the arbitral process to be effective, however, the parties themselves must have confidence in arbitration as a method. They must recognize and accept the fact that the proceedings are informal, not governed by rules of evidence and procedure followed by the courts; that errors of law in ruling on matters of substance are occasionally to be expected, since the arbitral process visualizes reaching a reasonable result and not one which must conform strictly to the rules of substantive law followed by the courts.

Where this is done, as the cases discussed reflect, arbitration is an effective, inexpensive and prompt method of resolving disputes.

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