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ARBITRATION AT COMMON LAW IN INDIANA

EDWIN M. S. STEERS*

ORIGIN AND NATURE

The settlement of controversies by arbitration is an ancient practice at common law, and since the common law has been, from the beginning, in force in the State of Indiana, except where modified by statute, such practice from early times has been resorted to in this state for the settlement of differences.¹ And in this connection it has been specifically held that the provisions of the statute on the subject of arbitration do not repeal the common law in relation thereto, nor prohibit parties from submitting their controversies to arbitration thereunder, but that the statute is merely cumulative.² By common law we mean the law created by the decisions of the courts of England and the acts of Parliament in aid thereof, prior to the fourth year of James I., with certain specified exceptions, which are of a general nature and not local, and not inconsistent with the constitution of the United States or of the State of Indiana, or the acts of Congress or statutes of this state.³

The main distinction between a statutory and a common law arbitration is that in a statutory arbitration it is absolutely necessary that the agreement to arbitrate provide that the submission be made a rule of court while at common law it should not so provide.⁴ As was said in one case, "The criterion by which

* See p. 207 for biographical note.
¹ Titus v. Scantling, 4 Blackf. 89, 91, 92.
³ Shroyer v. Bash, 57 Ind. 349, 353, 354.
⁴ Fargo v. Reighard, 13 App. 39, 44; Coffin v. Woody, 5 Blackf. 423, 424; Hawes v. Coombs, 34 Ind. 455, 458; Estep v. Larsh, 16 Ind. 82, 83.
to distinguish the one from the other, as recognized in the rulings of this court heretofore made, depends on the fact whether the parties have or have not agreed to make the submission a rule of court.’’ In a statutory arbitration the agreement of submission and procedure must follow the statute, while at common law the submission and procedure is controlled wholly by the terms of the agreement between the parties, and since the settlement of controversies by arbitration is encouraged by the courts, awards will be favored by indulging in their support every reasonable presumption, and technical objections will be disregarded.

At common law any person qualified to contract might agree to submit an existing matter of difference to arbitrators and it was not necessary that a suit be pending. In fact, it was not necessary nor is it now that a legal cause of action really exist in favor of a party to a submission to arbitration in order that the award shall be binding. It is sufficient that there be a dispute, controversy or honest difference of opinion between the parties concerning any subject in which they are both interested enough, nor indeed is it necessary they should have come to the actual point of dispute, for a matter simply in doubt may be submitted.

Also at common law in addition to existing disputes parties could agree to submit to arbitration future disputes which might arise out of and in connection with matters in which they were interested, and provide the procedure for determining such disputes the same as in existing disputes. However, while in agreements to arbitrate existing disputes it was competent for the parties to provide that the award of the arbitrators should

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5 Hawes v. Coombs, 34 Ind. 455, 458.
6 Francis v. Ames, 14 Ind. 251, 252; Fargo v. Reighard, 13 App. 39, 44, 45; Coffin v. Woody, 5 Blackf. 423, 424.
11 Millhollin v. Millhollin, 71 App. 477, 480, 481.
12 The Supreme Council of the Order of Chosen Friends v. Forsinger, 125 Ind. 52, 55-60; Maitland v. Reed, 37 App. 469, 470-472.
be conclusive on the parties, and even without any such agreement the award was conclusive, yet it was not competent to so provide in connection with the arbitration of future disputes, it being the law that parties could not provide by contract for the conclusive settlement of questions before such questions arose and thus by contract attempt to oust the jurisdiction of the courts. One reason given for this distinction was that parties to an arbitration have the right to revoke the agreement to submit and appeal to the courts for redress, and this right was one that could not be abridged by an agreement made before either party could know what the nature of the controversy would be.

**Submission**

Parties have the right to elect between a submission at common law and one under the statute, but after making their election by beginning under one they must pursue that one to the end, unless a deviation be agreed to by both parties. While this is true it has not always been easy to determine the exact nature of the arbitration proceedings and for that reason it has been necessary for our courts, in deciding the question, to lay down certain rules for their guidance. Therefore, it has been held that where an agreement to arbitrate does not meet the requirements of the statute, including an agreement to make the submission a rule of court, it must be considered an arbitration at common law, and the mere act of the parties.

Under a general submission at common law the parties are presumed to have submitted both the law and the fact and the arbitrators are fully empowered to determine both conclusively. The agreement for submission may be either by parol, or in writing or by a sealed or unsealed instrument or by mutual bond, the cases holding that a submission without any writing

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13 Rice v. Loomis, 23 Ind. 399, 400, 404, 407; Smith v. Stewart, 5 Ind. 220, 223.
14 Fargo v. Reighard, 13 App. 39, 45; Dilks, Adm. v. Hammond, 86 Ind. 563, 566.
15 The Supreme Council of the Order of Chosen Friends v. Forsinger, 125 Ind. 52, 55, 56.
16 Francis v. Ames, 14 Ind. 251, 252, 253.
17 Fargo v. Reighard, 13 App. 39, 44, 45; Goodwine v. Miller, 32 Ind. 419, 421; Hays v. Miller, 12 Ind. 137, 191; Titus v. Scantling, 4 Blackf. 89, 92; Smith v. Kirkpatrick, 58 Ind. 254, 258.
18 Goodwine v. Miller, 32 Ind. 419, 421, 422.
19 Titus v. Scantling, 4 Blackf. 89, 91; Carson v. Earlywine, 14 Ind. 256, 258; Estep v. Larsh, 16 Ind. 32, 83.
is just as binding and enforceable as one in writing.\textsuperscript{20} Also it has been held that the submission need not necessarily cover a matter between the immediate parties to it but that a party may submit to an arbitration and be answerable for the obedience of another person to the award. Thus it is the law that a parent may enter into a submission which will bind him personally that his child shall perform the award.\textsuperscript{21} Although as a general rule an award should not extend to anyone who is not a party to the agreement to submit, however an award may be made in favor of a person not a party to the award if the person in whose favor the award is made is contemplated in the submission and the person may maintain an action for the sum awarded.\textsuperscript{22}

A corporation, by and through its proper officers, has authority to execute an arbitration agreement and bond.\textsuperscript{23} But one partner can not bind his co-partners by a submission to arbitration of a partnership matter without their assent; nor will an award rendered under such circumstances bar a joint action by the firm for the same matter or cause of action which was submitted to and passed upon by the arbitrators, although the submitting partner is held to be liable for the performance of the award.\textsuperscript{24}

While the courts favor the settlement of disputes by arbitration still an agreement of submission to arbitrate future matters will be held invalid when its effect would be to oust the jurisdiction of the courts.\textsuperscript{25} And since of course it is necessary to have a valid submission before there can be a valid award, as it is the submission which confers jurisdiction, if the validity of the submission be successfully attacked, then the jurisdiction is wanting, and the award must fall.\textsuperscript{26}

Parties may submit a pending cause to arbitration and in such connection it is held that such a submission does not have the effect of discontinuing the action,\textsuperscript{27} and that the arbitrators

\textsuperscript{20} Dilks v. Hammond, 86 Ind. 563, 566; Griggs v. Seeley, 8 Ind. 264, 269; Carson v. Earlywine, 14 Ind. 256, 258; Webb v. Zeller, 70 Ind. 408, 410, 411; Kelley v. Adams, 120 Ind. 340, 343, 344; Miller v. Goodwine, 29 Ind. 46, 47.

\textsuperscript{21} Smith v. Kirkpatrick, 58 Ind. 254, 259, 260.

\textsuperscript{22} Searce v. Searce, 7 Ind. 286, 287, 288.

\textsuperscript{23} The Madison Insurance Company v. Griffin, 3 Ind. 277, 280, 281.

\textsuperscript{24} Woody v. Pickard, 8 Blackf. 55, 56.

\textsuperscript{25} Kistler v. The Indianapolis and St. Louis Railroad Company, 88 Ind. 460, 464; The Supreme Council of the Order of Chosen Friends v. Foreinger, 125 Ind. 52, 55; Maitland v. Reed, 37 App. 469, 471.

\textsuperscript{26} Rice v. Loomis, 28 Ind. 399, 405-407.

\textsuperscript{27} Kelley v. Adams, 120 Ind. 340, 344.
have authority to make an award concerning costs that have accrued in the cause though the submission is silent on the subject.\textsuperscript{28}

At common law either party may revoke a submission at any time before the completion of the award\textsuperscript{29} even though the agreement of submission provides that it can not be revoked,\textsuperscript{30} as an agreement of submission is held to be simply an executory contract.\textsuperscript{31} However, such revocation is a breach of the arbitration bond.\textsuperscript{32} A revocation to be effectual must be express, positive and unconditional,\textsuperscript{33} and by authority equal to that which made the submission, that is, a submission by deed must be revoked by deed, and a written submission revoked by a written revocation.\textsuperscript{34} To this end, therefore, it has been held that where the secretary of a corporation under authority from a board of directors entered into a submission to arbitration, a subsequent revocation of the submission by the president and secretary was ineffectual in the absence of special authority to revoke.\textsuperscript{35} The death of one of the parties after a submission and before an award also, at common law, revoked the submission. However, it has been held that the death, resignation or removal of a trustee of an express trust did not necessarily work a revocation of the submission.\textsuperscript{36}

While what has been said above with reference to the revocation of submissions to arbitration is now the law in this state, still, however, it does not apply to building or other contracts where by the very provisions of the contracts future disputes are to be determined, by an architect or other arbitrators in the manner and form provided for in the contract. This can be seen from the language used by the court in the case of Memphis

\textsuperscript{28} Bird v. Routh, 88 Ind. 47, 51.
\textsuperscript{29} Shroyer v. Bash, 57 Ind. 349, 356; Grand Rapids, etc., R. Co. v. Jaqua, 66 App. 113, 122; Dilks v. Hammond, 86 Ind. 563, 566.
\textsuperscript{30} Heritage v. State, ex rel., 43 App. 595, 600.
\textsuperscript{31} Shroyer v. Bash, 57 Ind. 349, 353.
\textsuperscript{32} Bash v. Christian, 77 Ind. 290, 293.
\textsuperscript{33} Grand Rapids, etc., R. Co. v. Jaqua, 66 App. 113, 119, 120, 122; Goodwine v. Miller, 32 Ind. 419, 420, 421; Dilks v. Hammond, 86 Ind. 563, 566.
\textsuperscript{34} Shroyer v. Bash, 57 Ind. 349, 356; Mand v. Patterson, 19 App. 619, 623; The Madison Insurance Co. v. Griffin, 3 Ind. 277, 282.
\textsuperscript{35} The Madison Insurance Co. v. Griffin, 3 Ind. 277, 281, 282.
\textsuperscript{36} Citizens Insurance Company of Evansville v. Coit, Trustee, 12 App. 161, 162, 163.
Trust Co., et al. v. Brown-Ketchum Iron Works, 166 Fed. Rep. 398, and especially on page 403 where it is said in part:

"It is, however, now too well settled to admit of controversy that provisions in a building contract such as exist here, by which a given architect is expressly clothed with the broad authority to determine finally all matters in dispute under the contract, and by which final settlement is to be had and payments made upon architects' certificates, do not create a mere naked agreement to submit differences to arbitration. Nor are such provisions for arbitration merely collateral to and independent of the other provisions of the contract; but they are, on the other hand, of its very essence, and such agreement is not subject to revocation by either party, but actual or tendered compliance with the terms of the contract is a necessary condition precedent to recovery upon it; and an award made by virtue of such contract provision, in the absence of fraud or of such gross mistake as would imply bad faith or a failure to exercise honest judgment, is binding upon both parties thereto, so far as it is confined to disputes actually subsisting and open to arbitration."

The views of the Federal Court expressed above have been fully sustained by the decisions in this state. In fact in one case the court states that "a provision in a building contract by which an architect or engineer becomes the arbitrator is, if anything, more binding than an ordinary submission to arbitration for the reason that it becomes a part of the consideration of the contract."

ARBITRATION BONDS

In connection with arbitrations at common law it was often a practice of the parties at the time of the execution of the agreement of submission to give mutual bonds providing that the parties would perform and abide by the award. These bonds, as the cases indicate, from the statements of facts given therein, were either included in and a part of the agreement of submission or were by separate instruments, and were either with or without sureties. As to form and contents, common

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38 Lake Michigan Water Co. v. U. S. Fidelity, etc., Co., 70 App. 537, 542.
law arbitration bonds were to all intents and purposes the same as statutory arbitration bonds, the only difference being that statutory bonds provided for a rule of court while common law bonds were not.\textsuperscript{41} And apparently a simple provision which bound the parties to each other, "faithfully to abide and carry out the award of the arbitrators" was sufficient to create a common law bond.\textsuperscript{42}

There is an advantage in having an arbitration bond even if only signed by the parties themselves, as it is the law that although a party to an arbitration agreement may revoke the submission at any time before the completion of the board, still, however, such revocation would be a breach of the arbitration bond, and of course an action therefor could be maintained.\textsuperscript{43} A bond also provides an additional remedy to that of a suit on the award, for by a refusal of either party to comply with an award the other party may sue either on the award or on the bond,\textsuperscript{44} and he has his choice as to the order in which he may bring them; that is, he may sue, in the first instance either upon the award or arbitration bond,\textsuperscript{45} or he may sue upon both at the same time.\textsuperscript{46} However, if a party brings suit on the award first he can not thereafter in a suit on the bond recover the fees paid his attorney for prosecuting the suit to recover on the award nor can he recover for his costs in defending suits brought by the defendant on notes included in and settled by the award as there is no principle of law justifying such a recovery.\textsuperscript{47} Sometimes the arbitration bond specified the time within which the award was to be made, and unless made within the time the bond was not enforceable. However, our court has held where, before the time expired within which an award was to be made according to the conditions of the arbitration bond, the parties by written agreement written on the bond, extended the time for making the award, that suit would lie upon the bond for non-performance of an award made within the enlarged time.\textsuperscript{48} If,

\textsuperscript{41} Titus v. Scantling, 4 Blackf. 89, 92.
\textsuperscript{42} Miller v. Hayes, 26 Ind. 380, 381.
\textsuperscript{43} Bash v. Christian, 77 Ind. 290, 293.
\textsuperscript{44} Titus v. Scantling, 4 Blackf. 89, 91, 92; Shroyer v. Bash, 57 Ind. 349, 358.
\textsuperscript{45} Shroyer v. Bash, 57 Ind. 349, 358.
\textsuperscript{46} Springer v. Spooner, 6 Blackf. 545.
\textsuperscript{47} Miller v. Hays, 26 Ind. 380, 381.
\textsuperscript{48} Springer v. Spooner, 6 Blackf. 545, 546.
however, no time is specified in the bond for making an award, it may be made any time and it will be good.\textsuperscript{49}

**Arbitrators**

At common law there can be one or more arbitrators\textsuperscript{50} and in order to render a valid award it is not necessary that they be sworn.\textsuperscript{51} Their powers are co-extensive with the agreement of submission and it will be presumed that they have acted within the scope of their authority unless the contrary appears,\textsuperscript{52} and to that end their language will be fairly and liberally construed.\textsuperscript{53} It is the duty of arbitrators to determine what matters are embraced in the submission to them and therefore it is competent where matters submitted are matters of dispute between partners for them to determine what are and what are not partnership matters, \textsuperscript{54} and it is within their powers to employ other persons to assist them.\textsuperscript{55} Arbitrators must act fairly, but their intercourse with parties or strangers on the subject of arbitration before them, untainted with unfairness or fraud can not affect their award,\textsuperscript{56} so it has been held that in the absence of proof relative to the proceedings before the arbitrators it must be presumed that they acted in good faith.\textsuperscript{57}

A party to an arbitration must act fairly with the arbitrators for if he attempts to corrupt or improperly influence one or more of them to make an award in his favor, he will not be heard to say that such act or acts on his part were ineffectual to accomplish the purpose designed or that he was impotent to accomplish what he sought and to raise an issue thereon, for if the conduct of such party had a tendency to affect improperly the decision of the arbitrator or arbitrators in the matter in issue, it will be held to be sufficient to invalidate the award, without inquiring as to whether the conduct or act in question actually produced any harmful results to the complaining party.\textsuperscript{58}

\textsuperscript{49} Saunders v. Heaton, 12 Ind. 20, 28.
\textsuperscript{50} Kelley v. Adams, 120 Ind. 340, 344.
\textsuperscript{51} Dickerson v. Hays, 4 Blackf. 44, 46; Forqueron v. Van Meter, 9 Ind. 270, 272.
\textsuperscript{52} McCullough v. McCullough, 12 Ind. 487, 490; Russell v. Smith, 87 Ind. 457, 466.
\textsuperscript{53} Fargo v. Reighard, 13 App. 39, 46.
\textsuperscript{54} Goodwine v. Miller, 32 Ind. 419, 421.
\textsuperscript{55} Moore v. Barnett, 17 Ind. 349, 351, 352.
\textsuperscript{56} Flatter v. McDermitt, 25 Ind. 326, 327.
\textsuperscript{57} Smith v. Stewart, 5 Ind. 220, 223.
\textsuperscript{58} Insurance Co. of North America v. Hegewald, 161 Ind. 631, 647, 648.
The power of arbitrators does not cease until an award has been made and until that time they have full power to act. But where the arbitrators complete their work and an award has been made and published, the official duties of the arbitrators are ended and they cannot thereafter change the award; and an award will be deemed so made and published as soon as the arbitrators have declared their first decision and notified the parties. Therefore, any modification which is attempted to be made thereafter in the award, even though the award be defective, is a nullity and can not in any way affect the relative rights of the parties and so far as the controversy is concerned the arbitrators are strangers to it.

In many arbitration agreements there are provisions giving the arbitrators specifically appointed the power, in case of a disagreement, to select a third party to assist in deciding the question in dispute. This third party may be either an arbitrator or an umpire according to the terms of the agreement of submission, and since there is a vast difference in the powers and duties of each it is important that we have the distinctions between them in mind. An umpire is one who has full power to decide a matter in case of a disagreement of the arbitrators, while a third arbitrator is one who only has authority to join with the other two in deciding the matter in dispute. Therefore, it has been held, that even though a submission agreement provides for the appointment of an umpire in case of a disagreement by the arbitrators, still, however, if it further provides that after the appointment they or a majority of them should make the award, that the person so selected is merely an arbitrator and not an umpire. An umpire, as has been said, is fully empowered to decide all questions submitted and so it is not necessary nor perhaps proper in form for the arbitrators after calling in an umpire to act in returning an award, for in order to make the award valid it is only necessary that it be made and signed by the umpire, as the signatures of the arbitrators are immaterial, and this is so even though the umpire acts upon a narration by the arbitrators without evidence.

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59 Fargo v. Reighard, 13 App. 39, 46, 47.
60 Mand v. Patterson, 19 App. 619, 622; Fargo v. Reighard, 13 App. 39, 47; Baltes v. The Bass Foundry and Machine Works, 129 Ind. 185, 192.
61 Cones v. Vanosdol, 4 Ind. 248, 251; Kile v. Chapin, 9 Ind. 150, 151, 152.
62 Cones v. Vanosdol, 4 Ind. 248, 251.
63 Kile v. Chapin, 9 Ind. 150, 151; Sanford v. Wood, 49 Ind. 165, 167.
But in order for the third arbitrator or an umpire to have any authority to act the original arbitrators must have been authorized by the submission to make a selection, as arbitrators have no inherent powers to make such selections.\(^6\)

An arbitrator has the right to compensation for his services on the same ground as that on which any employe is entitled to recover for services rendered and he can recover the reasonable value of his services in an action brought by himself, without joining the other arbitrators as co-plaintiffs as his claim is several and not joint. His action may be brought against one or all of the parties to the submission and if not against all, the fact that one not a party to the action was jointly liable can only be taken advantage of by plea in abatement, as each party is liable for the whole amount. Nor can the terms of the submission agreement concerning the payment of expenses in any way affect his right to compensation for he is neither a party or privy to said agreement.\(^6\)

**Arbitration Hearings**

The agreement of the parties to arbitrate may fix the time and place of hearing, and the manner in which notice may be given the parties, but when it is silent on the questions of notice the duty to give notice is implied from the agreement to submit, unless it is waived, and without notice the award is a nullity.\(^6\)

However, where a party has been represented by an attorney at an arbitration meeting, he cannot afterwards object that the notice of the meeting of the arbitrators was not given him.\(^6\)

Since the parties to an arbitration proceedings are bound to bring before the arbitrators all matters in dispute which, by the agreement of submission, are to be passed upon, it will be presumed that they were before them and passed upon,\(^6\) and if either party neglects to bring forward before the arbitrators any demand he may have against the other party, which is within the scope of the submission, he cannot thereafter present said demand.\(^6\)

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\(^{64}\) *Kile v. Chapin*, 9 Ind. 150, 152.

\(^{65}\) *McMahan v. Spinning*, 51 Ind. 187, 191.


\(^{67}\) *Shively v. Knoblock*, 8 App. 433, 437.

\(^{68}\) *The Madison Insurance Company v. Griffin*, 3 Ind. 277, 282.

\(^{69}\) *McCullough v. McCullough*, 12 Ind. 487, 490.

\(^{70}\) *Stipp v. The Washington Hall Company*, 5 Blackf. 473, 477; *McCullough v. McCullough*, 12 Ind. 487, 490.
ARBITRATION AT COMMON LAW

AWARDS

An award derives its force from the voluntary agreement of the parties\textsuperscript{71} and the rules of the common law with reference thereto are such that any form of words which amounts to a decision of the question submitted is good as an award, since no technical expressions are necessary nor are any introductory recitals. An award should be construed liberally and the main consideration for the court should be to ascertain whether or not the matter submitted has been substantially considered and finally passed upon by the arbitrators.\textsuperscript{72} The award, the same as the submission, may be wholly by parol,\textsuperscript{73} and the award, if in writing, is valid though not attested by a witness,\textsuperscript{74} and though copies of it are not furnished to the parties by the arbitrators.\textsuperscript{75} Further it is not necessary to a valid award that it recite the submission or in any manner show that it was submitted,\textsuperscript{76} nor it is even necessary that an award on its face purport to be an award.\textsuperscript{77} Of course, it is essential to an award that it should be certain for it is a well settled rule of law that uncertainty in an award renders it void.\textsuperscript{78} However, this certainty does not necessarily have to be shown on the face of the award for although an award be uncertain on its face yet if certainty can be obtained by something outside the award the objection may be cured by averment.\textsuperscript{79} This, we feel, is the law although we find a statement without citation of authority apparently to the contrary in a decision of our Supreme Court.\textsuperscript{80} The validity of an award is not affected by its having appended to it the explanation of a matter not acted upon by the arbitrators, nor embraced in the submission.\textsuperscript{81} In fact, it is a maxim

\textsuperscript{71} Rice v. Loomis, 28 Ind. 399, 404.
\textsuperscript{72} Saunders v. Heaton, 12 Ind. 20, 24, 25; Russell v. Smith, 87 Ind. 457, 466.
\textsuperscript{73} Kelley v. Adams, 120 Ind. 340, 344; Sanford v. Wood, 49 Ind. 165, 168; Forqueron v. Van Meter, 9 Ind. 270, 272.
\textsuperscript{74} Carson v. Earlywine, 14 Ind. 256, 258.
\textsuperscript{75} Carson v. Earlywine, 14 Ind. 256, 258; Boots v. Canine, 58 Ind. 450, 455; Fargo v. Reighard, 13 App. 39, 45.
\textsuperscript{76} Miller v. Goodwine, 29 Ind. 46, 48.
\textsuperscript{77} Saunders v. Heaton, 12 Ind. 20, 23.
\textsuperscript{78} Parker v. Eggleston, 5 Blackf. 128, 129; Hays v. Hays, 2 Ind. 28, 30; Hollingsworth v. Pickering, 24 Ind. 435, 438.
\textsuperscript{79} Saunders v. Heaton, 12 Ind. 20, 23, 24.
\textsuperscript{80} McCullough v. McCullough, 12 Ind. 487, 490.
\textsuperscript{81} Stipp v. The Washington Hall Company, 5 Blackf. 16, 17.
of the law never to raise a presumption for the overturning of
an award, but on the contrary to make every reasonable intend-
ment in its support, the legal presumption being, unless the
contrary appears, that the arbitrators decided all matters which
were submitted to them and only those, and that the award
was the result of such adjustment. Even when the words of
an award are so comprehensive that they may take in matters
not within the submission, yet it will be presumed that nothing
beyond it was awarded unless the contrary be expressly shown.
However, where a part of the award relates to matters not sub-
mitted the whole award is void unless it appears that the con-
sideration of the unauthorized part was so disconnected from
the residue as to have no influence upon it. An award to be
valid must be final on all matters submitted, but it is not nec-
essary that it be final on matters not submitted although mentioned
in connection with the award. Failure to give notice of an
award does not affect its validity unless notice be required by
the submission for it is the settled law that when the agreement
for submission to arbitration does not provide that notice of the
award should be given to the parties, that no notice is required,
and that they are bound to take notice thereof. Nor is it neces-
slary that an award be made at any particular time where no
time is specified for under such circumstances it may be made
at any time and be good.

Where an award has been made, and that is when the arbi-
trators complete their work and finally separate it is conclu-
sive on the parties, and the question in controversy is as fully
determined and the right transferred and settled as it could
have been by agreement of the parties or a judgment of court.

82 Hays v. Miller, 12 Ind. 187, 190.
83 McCullough v. McCullough, 12 Ind. 487, 490; Hawes v. Coombs, 34
Ind. 455, 460.
84 Hawes v. Coombs, 34 Ind. 455, 460.
85 Hays v. Miller, 12 Ind. 187, 190.
86 McCullough v. McCullough, 12 Ind. 487, 490; Carson v. Earlywine,
14 Ind. 256, 257, 258; Beber v. Bevan, 50 Ind. 31, 36.
87 McCullough v. McCullough, 12 Ind. 487, 490.
88 Stipp v. The Washington Hall Company, 5 Blackf. 16, 17.
89 Russell v. Smith, 87 Ind. 457, 470; Fargo v. Reighard, 13 App. 39, 45.
90 Saunders v. Heaton, 12 Ind. 20, 28.
91 Baltes v. The Bass Foundry and Machine Works, 129 Ind. 185, 192.
92 Smith v. Stewart, 5 Ind. 220, 223.
93 Fargo v. Reighard, 13 App. 39, 45.
And where the award covers the whole ground of controversy it is not competent to inquire into the reasons or method by which the award was made or insist that it did not include all causes of action and dispute submitted to them,\(^9\) for an award works an estoppel, the same as a judgment, \(^9\) upon the principle of public policy, that "a man shall not be twice vexed for the same cause."\(^6\) Therefore, an award either written or parol is a bar to a suit on the original claim,\(^9\) though there be no performance,\(^9\) and though the award be pursuant to a parol submission.\(^9\) In other words a party will not be permitted to ignore the decision of the arbitrators merely because he does not approve of their findings.\(^1\) Neither will a party be permitted to impeach an award or assert it is a nullity after he has treated it valid by setting it up as a defense or by acting under it.\(^2\)

An award is not invalid because it is contrary to law,\(^3\) or that there has been a mistake of law,\(^4\) or because of a mistake in judgment on the part of the arbitrators concerning a matter over which they have been made judges,\(^5\) or in drawing conclusions from the facts or observation, or because the arbitrators adopted erroneous rules of law or theories of natural philosophy.\(^6\) Neither is an award invalid for errors in ruling upon evidence by the arbitrators,\(^7\) nor invalid because of partiality, interest or relationship on the part of an arbitrator if the party complaining had knowledge of the facts when he agreed to submit the cause to arbitration or in time to revoke the submission.

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\(^9\) Baltes v. The Bass Foundry and Machine Works, 129 Ind. 185, 191; Myers v. Gibson, 147 Ind. 452, 457.
\(^9\) Shively v. Knoblock, 8 App. 433, 437; Rice v. Loomis, 28 Ind. 399, 406.
\(^9\) Rice v. Loomis, 28 Ind. 399, 406.
\(^7\) Kelley v. Adams, 120 Ind. 340, 344; Indiana Insurance Co. v. Brehm, 88 Ind. 578, 583.
\(^8\) Walters v. Hutchins' Admx., 29 Ind. 136, 137; The Terre Haute and Logansport Railroad Co. v. Harris, 126 Ind. 7, 9.
\(^9\) Smith v. Stewart, 5 Ind. 220, 223.
\(^2\) Dilks v. Hammond, 86 Ind. 563, 566.
\(^1\) Ogden v. Rowley, 15 Ind. 56, 58; Stipp v. The Washington Hall Company, 5 Blackf. 473, 478; Forqueron v. Van Meter, 9 Ind. 270, 272.
\(^3\) Hayes v. Miller, 12 Ind. 187, 191; Goodwine v. Miller, 32 Ind. 419, 421, 422.
\(^4\) Carson v. Earlywine, 14 Ind. 256, 258; Conrad v. Johnson, 20 Ind. 421, 425.
\(^5\) Russell v. Smith, 87 Ind. 457, 468.
\(^6\) The Indiana Central Railway Company v. Bradley, 7 Ind. 49, 55.
\(^7\) Goodwine v. Miller, 32 Ind. 419, 421, 422.
before the award, for by going on after the facts came to his knowledge he is estopped from setting them up to defeat the award even though the result may have been injurious to him.\(^8\) Nor is the validity of an award affected by misconduct in rejecting evidence unless such misconduct is affirmatively shown, since the presumption is that there was no misconduct,\(^9\) nor can an award be impeached collaterally for irregularities or for misconduct of the arbitrators of the opposing party.\(^10\) Nor can it be avoided by a party on the grounds that the adverse party obtained it by misrepresenting the facts at an adjourned meeting of the arbitrators, in absence of any valid excuse given for his non-attendance at such meeting.\(^11\) However, an award will be held invalid where one of the arbitrators was bribed by one of the parties to the agreement and the fact that a majority of the arbitrators were uncorrupted makes no difference.\(^12\) An award will also be set aside where it was agreed that it was to be made by two competent disinterested appraisers, and one of the parties selected an arbitrator who was in his employ.\(^13\) In fact, any conduct on the part of a party to an arbitration proceedings which has a tendency to affect improperly the decision of the arbitrator or arbitrators in the matter in issue will be held sufficient to invalidate an award regardless as to whether the conduct in question actually produced any harmful results to the complaining party.\(^14\) Partiality or favoritism of the arbitrator constitutes misconduct for which an award may be set aside as will misconduct in rejecting evidence if it appear that the arbitrator knew, not merely the legal effect of the evidence he was asked to take, but that the evidence was stated to the arbitrator.\(^15\) An award will also be held a nullity where made without notice of the hearings of the arbitrators to the objecting party, unless notice be waived,\(^16\) and where the submission is invalid and not binding upon a party because of fraud.\(^17\)

\(^8\) Indiana Insurance Company v. Brehm, 88 Ind. 578, 582.

\(^9\) Russell v. Smith, 87 Ind. 457, 467, 468.


\(^12\) Worley v. Moore, 77 Ind. 567, 575.

\(^13\) Insurance Co. of North America v. Hegewald, 161 Ind. 631, 646, 648.

\(^14\) Insurance Co. of North America v. Hegewald, 161 Ind. 631, 647.

\(^15\) Russell v. Smith, 87 Ind. 457, 467, 468.

\(^16\) Shively v. Knoblock, 8 App. 433, 436, 437.

\(^17\) Rice v. Loomis, 28 Ind. 399, 405-407.
An award at common law to be valid must be concurred in by all of the arbitrators unless it is otherwise provided by the parties.\textsuperscript{18} However, it has been held that where several arbitrators have been appointed and one refuses to act, award of the other arbitrators will be valid, as the law will not put it in the power of one arbitrator to defeat the submission by withdrawing from the trust;\textsuperscript{19} but this rule is limited to where the agreement of submission provides that the award may be made by a majority of the arbitrators,\textsuperscript{20} for otherwise all of the arbitrators must meet, hear the proofs and sign the award in order to render it valid.\textsuperscript{21} Yet it is the law, that although an agreement to submit to arbitration does not specifically provide for a decision by a majority of the arbitrators, such authority will be inferred by a provision for the selection of a third arbitrator who is authorized to act only upon a disagreement of those originally appointed, and that it is only necessary for all of the arbitrators to join in an award where all of the arbitrators were appointed in the first instance without authority to select another in case of disagreement.\textsuperscript{22} It is the law also that where a majority award is authorized that the resignation of one of the original arbitrators does not dissolve the board nor invalidate the award subsequently returned by the other two, since, although the granting of authority to render a majority award does not dispense with the operation of the rule giving the parties a right to the presence and effect of argument, experience and judgment of each arbitrator during the whole proceedings, such rule only means that a majority may not act separately or secretly without giving the minority a reasonable opportunity to participate in all proceedings.\textsuperscript{23}

While it is the usual practice that a written award be signed by the arbitrators before delivery to the parties still where no time is specified within which an award must be made it does not invalidate the award though it is delivered to one of the parties when signed by only one of the arbitrators for it may be afterwards signed by the other arbitrators and be good.\textsuperscript{24}

\textsuperscript{18} The Jeffersonville Railroad Company v. Mounts, 7 Ind. 669, 671.
\textsuperscript{19} Kile v. Chapin, 9 Ind. 150, 152; Grand Rapids etc., R. Co. v. Jaqua, 66 App. 113, 124.
\textsuperscript{20} Baker v. Farmbrough, 43 Ind. 240, 244, 247.
\textsuperscript{21} Baker v. Farmbrough, 43 Ind. 240, 244, 247; Byard v. Harkrider, 108 Ind. 376, 381.
\textsuperscript{22} Grand Rapids, etc., R. Co. v. Jacqua, 66 App. 113, 125.
\textsuperscript{23} Saunders vs. Heaton, 12 Ind. 20, 28.
Nor is an award invalid where it is made in favor of a person not a party to the award if the person in whose favor the award is made is contemplated in the submission.25

ENFORCEMENT OF AWARDS

At common law a party had his choice of remedies and as to the order in which he would pursue them; that is he might sue in the first instance either upon the award or upon the arbitration bond,26 or he might sue upon both27 at the same time.28 He was also entitled to a trial by jury as the right to trial by jury exists in an action on a common law award.29 His remedy, however, was limited to an action only and he did not have the right to file the award in court and get a rule to show cause why the rule should not be made a judgment of court as could be done in a statutory arbitration,30 nor on the other hand did a party who had attempted to arbitrate a matter under the statute but had failed in some essential requirement, have the right to enforce the award as a common law award.31

The material allegations of a complaint in a suit to enforce a common law award are, "(1) the existence of differences between the parties to the action; (2) an agreement to submit the matters in dispute to arbitration; (3) the substance of agreement of submission if oral and if written the agreement must be made a part of the complaint; (4) that an award was made in accordance with the terms of said submission; (5) the substance of the award if oral, the award itself or a copy if written; (6) that defendant had failed to abide by or perform such award."32 The complaint need not allege service of a copy of the award on the defendant, 33 but if the award is in writing a copy must be filed with the pleading.34 Nor is it necessary to aver or prove notice of the award when the making of the award did not lie more properly in the knowledge of one party than

25 Scearce v. Scearce, 7 Ind. 286, 287, 288.
26 Shroyer v. Bash, 57 Ind. 349, 358.
27 Titus v. Scantling, 4 Blackf. 89, 91, 92.
28 Springer v. Spooner, 6 Blackf. 545.
29 Goodwine v. Miller, 32 Ind. 419, 420.
30 Titus v. Scantling, 4 Blackf. 89, 92; Coffin v. Woody, 5 Blackf. 423, 424; Webb v. Zeller, 70 Ind. 408, 411.
31 Estep v. Larsh, 16 Ind. 82, 83.
32 Mand v. Patterson, 19 App. 619, 621.
33 Boots v. Canine, 58 Ind. 450, 455.
34 Sanford v. Wood, 49 Ind. 165, 167.
in the other, and where neither party had required notice from the arbitrator,\textsuperscript{35} nor to aver a performance or tender of performance by the plaintiff, except when the part awarded to be done by him is void and it becomes necessary to so aver to prevent objection to the whole award for want of mutuality, and except where by the terms of the award performance on the part of the plaintiff is a condition precedent to that on the part of the defendant.\textsuperscript{36}

Where an award has been made in favor of a person not a party to the award but who was contemplated in the submission the person may maintain an action for the sum awarded.\textsuperscript{37} Also where a party agrees to be bound personally for the performance of an award that might be rendered against another he is the proper party defendant.\textsuperscript{38}

In a suit on an arbitration bond the party bringing the suit can not recover the fees paid his attorney for prosecuting a suit to recover on the award or for defending suits brought by the defendant on matters included in and settled by the award,\textsuperscript{39} but he is entitled to recover in a suit on an award interest, upon the amount found due and payable in the award, from the date of the signing of the award by the arbitrators to the date of the finding of the court.\textsuperscript{40}

**DEFENSES TO ACTIONS ON AWARDS**

Mistake, misconduct and fraud on the part of arbitrators at common law under the old system of practice was unavailable as a defense. To avail themselves of such grounds of objection the party was compelled to go to chancery.\textsuperscript{41} Under the present practice in Indiana, however, all objections that could have been successfully urged either in law or chancery against an award may now be made in a suit upon it.\textsuperscript{42}

In an action on an award it is no defense that there has been a mistake of law\textsuperscript{43} or that it is against the law, for if the arbi-

\textsuperscript{35} Russell v. Smith, 87 Ind. 457, 470.
\textsuperscript{36} Hawes v. Combs, 34 Ind. 455, 460.
\textsuperscript{37} Scearce v. Scearce, 7 Ind. 286, 287, 288.
\textsuperscript{38} Smith v. Kirkpatrick, 58 Ind. 254-260.
\textsuperscript{39} Miller v. Hays, 28 Ind. 380, 381.
\textsuperscript{40} Russell v. Smith, 87 Ind. 457, 465, 470.
\textsuperscript{41} Carson v. Earlywine, 14 Ind. 256, 258; Hough v. Beard, 8 Blackf. 158; The White Water Valley Canal Company v. Henderson, 3 Ind. 3, 7, 8.
\textsuperscript{42} Carson v. Earlywine, 14 Ind. 256, 258.
\textsuperscript{43} Carson v. Earlywine, 14 Ind. 256, 258; Conrad v. Johnson, 20 Ind. 421, 425.
tators chosen by the parties erroneously decide a question of law the court will abide the decision. Neither are errors in judgment and finding on matters of fact nor errors in ruling upon evidence by arbitrators any defense. And it has been held in an action to recover on a common law award it was no defense to allege facts showing that it was intended that the arbitration should be statutory and the submission be made in writing, yet it had not been made in accordance with the requirements of the statute nor had the submission been made in writing, and also held that objections which might be fatal to a statutory award are not necessarily so to a common law award. Nor is an answer in an action on an arbitration bond, which admits that an award was made in two of three cases submitted but avers that no award was made in the third, a defense to the award rendered on the two cases.

An award can not be impeached collaterally for irregularities, or for misconduct of the arbitrators of the opposing party, as it is considered conclusive if the arbitrators had jurisdiction. However, if the arbitrators had no jurisdiction then the award may be so attacked. Therefore, it is a valid defense in an action on an award that the submission was procured by fraud, for it is the submission which confers jurisdiction, and also a valid defense that the arbitrators failed to give notice of their hearings to the objecting party. An answer in order to constitute a good defense to a suit on an award for misconduct of the arbitrators in rejecting evidence should allege facts to show that the arbitrators were informed, not merely as to the supposed legal effect of the evidence which they were asked to take but that the evidence was stated to the arbitrators. An answer drawn on the theory of a revocation of an agreement to arbitrate in order to withstand a demurrer must not only show an express

44 Hays v. Miller, 12 Ind. 187, 191; Goodwine v. Miller, 32 Ind. 419, 421.
45 Goodwine v. Miller, 32 Ind. 419, 421.
46 Boots v. Canine, 58 Ind. 450, 453, 455, 456.
47 Saunders v. Heaton, 12 Ind. 20, 23.
49 Shively v. Knoblock, 8 App. 433, 437; Rice v. Loomis, 28 Ind. 399, 407, 412.
50 Rice v. Loomis, 28 Ind. 399, 407.
52 Russell v. Smith, 87 Ind. 457, 467, 468.
and positive revocation, but also allege that notice thereof was
given to the arbitrators.\textsuperscript{53}

Where a building contract or a contract of any other nature
provides no action shall be maintained upon it until after an
award then the award becomes a condition precedent to a right
of action and any action brought on the contract before an
award is made may be abated by the filing of an answer stating
the facts.\textsuperscript{54} However, when no such condition is expressed in
the contract or can not be necessarily implied from its terms,
the provision for submitting a matter to arbitration is collateral
and independent and while a breach of such conditions will sup-
port a separate action, it cannot be pleaded in bar to an action
on the principal contract.\textsuperscript{55}

A valid award either written or parol may be pleaded in bar
to an action on the original claim\textsuperscript{56} and it is not necessary to
aver a performance.\textsuperscript{57} But in order to present the matter the
award must be specially pleaded for it can not be shown under
a general denial.\textsuperscript{58}

\textbf{Evidence}

To support an action to enforce a common law award proof
must be made of the submission\textsuperscript{59} as well as the award,\textsuperscript{60} but
it is not necessary to prove that the parties agreed to be bound
by the award as the agreement to submit to arbitration implies
an agreement to abide by the decision of the arbitrators.\textsuperscript{61} Nor
is it necessary to prove a demand for the performance of the
award where no demand is required by the submission and by
the award one of the parties is required to pay money uncondi-
tionally, nor is it necessary to prove notice of the making of

\textsuperscript{53} Grand Rapids, etc., R. Co. v. Jaqua, 66 App. 113, 119, 120.
\textsuperscript{54} Munk v. Kanzler, 26 App. 105, 107-110; The Supreme Council of the
Order of Chosen Friends v. Forsinger, 125 Ind. 52-59.
\textsuperscript{55} Munk v. Kanzler, 26 App. 105, 110; Manchester Fire Assurance Com-
\textsuperscript{56} Kelley v. Adams, 120 Ind. 340, 344; Indiana Insurance Company v.
Brehm, 88 Ind. 578, 583; Smith v. Stewart, 5 Ind. 220, 223.
\textsuperscript{57} Walters v. Hutchins' Admx., 29 Ind. 136, 137; The Terre Haute and
Logansport Rd. Co. v. Harris, 126 Ind. 7, 9.
\textsuperscript{58} Brown v. Perry, 14 Ind. 32, 34.
\textsuperscript{59} Boots v. Canine, 58 Ind. 450, 456, 457.
\textsuperscript{60} Mihollin v. Mihollin, 71 App. 477, 484; Rice v. Loomis, 28 Ind.
399, 407, 408.
\textsuperscript{61} Dilks v. Hammond, 86 Ind. 563, 566.
the award where neither party has required notice. Where an award covers matters not submitted it is incumbent on plaintiff in order to recover to establish by proof, the part of the award not covered by the submission, that such part can be so distinguished as to leave the other part upon which the plaintiff relies standing, after it has been rejected and that the consideration of that portion rejected has no influence on the valid part, because of the want of connection therewith. An award can be conclusive evidence only of those matters in respect of which the parties from whom it derives its validity and effect have made it evidence. Therefore, it is proper to show that the submission was not in writing although the award stated it was, for such a statement in an award is not a material part thereof, and parol evidence is admissible to contradict the recital. It is not error for a court to reject parol testimony where its purpose is to show a revocation of a written submission, for a written submission required a written revocation. At common law extrinsic evidence may be introduced to prove and explain an award, and also to raise objection thereto. It is also competent in an action on an award for an arbitrator to testify as to what was said and done at the arbitration hearings. However, it is not proper for the court where a claim was tried by arbitrators, to consider on a trial of the action on the award whether or not it was a just and reasonable claim.

62 Russell v. Smith, 87 Ind. 457, 470.
63 McCullough v. McCullough, 12 Ind. 487, 491.
64 Boots v. Canine, 94 Ind. 408, 409, 410.
65 Mand v. Patterson, 19 App. 619, 623.
66 Saunders v. Heaton, 12 Ind. 20, 27.
68 Milhollin v. Milhollin, 71 App. 477, 484.
69 Dilks v. Hammond, 86 Ind. 563, 567.