THE LAW

IN RELATION TO THE

LEGAL LIABILITIES OF ENGINEERS, ARCHITECTS, CONTRACTORS, AND BUILDERS,

INCLUDING THE

LAW OF CONTRACTS, ARBITRATIONS, MASTERS AND WORKMEN,

AND

COMBINATIONS OR STRIKES.

BY

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PREFACE.

THE object of this Work is to place before the professions to which it is addressed, the legal liabilities that members of those professions incur in their various relations as employed and employers; it is not, therefore, one which is exclusively intended for the legal practitioner in the actual practice of the law, but has more especial reference to persons engaged in engineering and architectural pursuits and operations. The Work indicates the rocks and shoals by which those, so engaged, are surrounded in the daily transaction of their matters of business; and it seeks to be a guide to them in the several legal liabilities arising in the practice of their profession. "*He that does the first wrong is answerable for all consequential damages*," is a fundamental principle of law which cannot be too strongly impressed upon those for whose especial use this Work is designed.

The Work treats of

1. Contracts generally.
2. Contracts with corporations.
3. Extra works.
4. Party walls and injuries to buildings
5. Arbitrations.
6. The relation of architects and surveyors to employers.
7. The liability of contractors for damage done to works.
8. The liability of masters for injuries to servants in the course of their employment, and other persons.
9. Differences between masters and workmen.
10. Combinations of masters and of workmen, strikes, &c.
11. The Truck System.

Under each of these divisions, the law, as contained in the Statute Book, and as expounded by the Courts, will be found fully set forth and explained.

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ADDENDUM.

SINCE the sheets of this Work were printed off, judgments have been given by the Courts of Queen's Bench and Exchequer in a recent case relating to the law of combinations or strikes; and as it is one of considerable importance and has created much public interest, the facts of it are here stated, in order that they may be read in connexion with the chapter of this Work on Combinations of Masters and of Workmen, *post*, page 116. One William Perham had been convicted by one of the metropolitan police magistrates under the 6 Geo. 4. c. 129, § 3, of having, within six calendar months before the complaint, "unlawfully, by threats endeavoured to force one W. J., who was then and there a workman, hired in his trade and business of a mason by T. P. and W. P., to depart from his said hiring, contrary to the Statute;" and committed to the House of Correction at Coldbath-fields for the space of two calendar months. Upon appeal to the Middlesex Sessions, the conviction was affirmed; and, subsequently, the Court of Queen's Bench was moved to issue a writ of *habeas corpus* to bring up the body of W. Perham, with a view to quashing the conviction. It was urged by the defendant's counsel, 1st. That the conviction should have set out the threats, in order that the Court might judge whether they were of such a nature as to be within the Statute. And, 2ndly. That the conviction did not follow the words of the Statute, and did not state that the threats were made to W. J., or to any other person. But it was held that, inasmuch as the offence was stated in the words of the Statute declaring the offence, the conviction was good under the Metropolitan Police Act, 2 & 3 Vict. c. 71, § 48; and further that, independently of that Act, the offence was sufficiently stated.[1]

[1] *In re* William Perham, 5 Jur. (N. S.) 1212; 1 L. T. (N. S.) 91.

The information upon which this conviction proceeded was in writing, and the informant stated as follows:—"I live, &c., and am in the employ of Messrs. P., &c. On Saturday night, the 1st October instant, I was in a beer-shop in the Goswell-road with W. J., and fifteen or sixteen other workmen, all engaged by Messrs. P. as workmen. W. Perham was there,—he came in; he said to the men, 'If you dare work we shall consider you as blacks, and when we go in we shall strike against you, and strike against you all over London;' he followed us all the way to my house." Upon an application to the Court of Exchequer for a writ of *habeas corpus*, that Court not only concurred with the Court of Queen's Bench in the grounds upon which it refused the writ, but affirmed the conviction, and held that the information sufficiently stated facts which constituted an offence under the Statute.[1] The offence, the Court said, is not the threat, but the forcing or endeavouring to force a workman to depart from his employment; and all questions as to whom the supposed threats were addressed, and whether they were of the description calculated to produce the effect mentioned in the Statute, are only matter of evidence; so that if the magistrate is satisfied of those facts by the evidence, he may draw up the conviction in the very language of the Act. The above case also shows that the information of an offence against the Act having been committed need not be in writing, and that if all the parties appear before the magistrate without any previous information, and he then hears the case, the conviction will be supported.

[1] Reg. *v.* Perham, 5 Jur. (N. S.) 1221; 1 L. T. (N. S.) 106.

THE LAW IN RELATION TO THE

Legal Liabilities

OF

ENGINEERS, ARCHITECTS, BUILDERS, AND WORKMEN.

I.

CONTRACTS.

1. *Generally.*

A CONTRACT or agreement is composed of two parts, imposing reciprocal obligations upon each of the parties to it in order to compel each to perform his part of the agreement; and it imports two considerations, that is to say, the performance of the agreement on either side is the consideration for the performance of the agreement on the other side. These may be stated as the general nature and constituent elements of a contract.

Generally, with regard to contracts it is further necessary to state that the essence of a contract is that it be made without fraud; that is, that there be no circumstances concealed by either party to the contract which it was essential for the other to know at the time of entering into it. If a contract be tainted by fraud or by such a concealment of facts within the knowledge of one of the parties to the contract as would amount to fraud, the contract cannot be enforced. What amount of concealment will make a contract fraudulent, would be a question for the Court, if proceedings be taken to enforce it. Cases, however, have frequently occurred in which, upon entering into contracts, misrepresentations made by one party have not been in any degree relied on by the other party. If the party to whom the representations were made, himself resorted to the proper means of verification before he entered into the contract, it may appear that he relied on the result of his own investigation and inquiry, and not upon the representation made to him by the other party; or if the means of investigation and verification be at hand, and the attention of the party receiving the representations be drawn to them, the circumstances of the case may be such as to make it incumbent on a court of justice to impute to him a knowledge of the result, which, upon

due inquiry, he ought to have obtained, and thus the notion of reliance on the representations made to him may be excluded. When the Court is endeavouring to ascertain what reliance was placed on representations, it must consider them with reference to the subject matter and the relative knowledge of the parties. If the subject is capable of being accurately known, and one party is, or is supposed to be, possessed of accurate knowledge, and the other is entirely ignorant, and a contract is entered into after representations made by the party who knows, or is supposed to know, without any means of verification having been resorted to by the other, it may be presumed that the ignorant man relied on the statements made by him who was supposed to be better informed: but if the subject is in its nature uncertain; if all that is known about it is matter of inference from something else; and if the parties making it and receiving representations on the subject have equal knowledge and means of acquiring knowledge, and equal skill, it is not to be presumed that the representations made by one would have much or any influence upon the other.[1] Moreover, a collateral statement made at the time of entering into a contract, but not embodied in it, in order to invalidate the contract, on the ground of its being a fraudulent statement, must be shown not only to have been false, but to have been known to be so by the party making it, and that the other party was thereby induced to enter into the contract.[2] Again, it has been held that a party who holds out a fact as true, and induces another party to act on the belief of the fact, is precluded from afterwards denying the fact which he held out as being true.[3]

If a contract be entered into under fraudulent representations, so soon as the fraud is discovered, the contract should be repudiated; as if it be not, and, notwithstanding the fraud, be executed, payment for the value of the work actually performed cannot be claimed. Thus, where a person was engaged to convey away certain rubbish at a specified sum under a fraudulent representation by the employer as to the quantity of the rubbish which was to be conveyed, it was held in an action for the value of the work actually done, that the contractor could recover only according to the terms of the special contract; although, when he discovered the fraud, he might have repudiated the contract and sued the employer for deceit.[4]

[1] Clapham v. Shillito, 7 Bea. 146.
[2] Moens v. Heyworth, 10 Mee. and W. 147.
[3] Pickard v. Sears, 6 A. and E. 469.
[4] Selway v. Fogg, 5 Mee. and W. 83.

With regard to entering into contracts generally, the following observation of Lord St. Leonards in a recent case in the House of Lords may be quoted; referring to the case of Tawney *v.* Crowthe,[1] and Lord Thurlow's judgment thereon, he said that it is an authority for this:—"That if terms be reduced to writing, and a man says that he will abide by those terms, and will sign the agreement, although he does not sign, he is bound by that agreement; that is what the case amounts to as an authority; and it is a very important case. There are besides," he said, "several cases in which a single note written by one party to a solicitor to draw an agreement independently of the agreement, has been held perfectly valid. I will just mention the names of three; Western *v.* Russell;[2] Thomas *v.* Dering;[3] and Gibbins *v.* the Board of the Metropolitan Asylum.[4] These cases," he added, "settled the matter."[5]

A tender of a specification of contract for scavenging docks which concluded with an engagement "to execute a contract on the preceding conditions within fourteen days," was held not to bind the person tendering to produce the contract for execution, as it would be the duty of the party to whom the tender was made to prepare the contract; and in the same case it was held that a contract for scavenging the docks was not within any of the exceptions to the general rule, that a corporation aggregate can only be bound by contract under seal, as to which see *post*.[6]

When a building contract or contract for the execution of works of any kind is of considerable magnitude, the parties to it before concluding the contract by the affixing of their respective signatures, will of course act under the advice of their solicitors. Tradesmen connected with the building trade, however, sometimes are found to enter into contracts almost without having a knowledge of their contents, and without reading them, or even understanding the conditions which they undertake to fulfil, and without a duplicate contract being made to be retained in their possession. Such persons cannot be too earnestly cautioned to use the utmost circumspection in this respect, and not to enter into a contract without an examined duplicate of it, duly signed, being left in their possession. On the other hand, the employer should be careful, on his part, to see that in respect of the work contracted

[1] 3 Bro. C. C. 161.
[2] 3 V. and B. 187.
[3] 1 Kee. 729.
[4] 11 Beav. 1.
[5] Ridgway *v.* Wharton, 4 Jur. (N. S.) 173, 178.
[6] London Dock Company *v.* Sinnott, 8 El. and Bl. 347; 27 L. J. Q. B. 129; 4 Jur. (N. S.) 70.

for, he does not waive any of the conditions of the contract; for if the work be badly done, he may find that, owing to his waiver of a material condition of the contract—as the certificate of the architect or surveyor being given before payment for the work—he is without any remedy.

2. *By Letters or Correspondence.*

In order to constitute an agreement by letters, the answer to the written proposal must be a simple acceptance of the terms proposed, without the introduction of any new or different terms;[1] and in order to form a contract by letter, of which the court will decree a specific performance, nothing more is necessary than that the amount and nature of the consideration to be paid on one side and received on the other, should be ascertained, together with a reasonable description of the subject matter of the contract.[2] In every contract there must be mutuality, otherwise specific performance will not be decreed;[3] and if it be signed by one party only, it will be good to charge him within the statute of frauds;[4] and it may be enforced in equity against him; but by filing a bill for specific performance, it becomes binding on the other also.[5] Letters, however, may not in themselves constitute a complete contract. Therefore, where a letter signed by both parties specifying the prices to be charged for some work to be done, it was held not to be a complete contract; and that parol evidence was admissible of a contemporaneous agreement as to the period of payment.[6]

With regard to the acceptance of a contract by letter, it has been held, that a letter offering a contract does not bind the person to whom it is addressed to return an answer by the very next post after its delivery, or to lose the benefit of the contract, and that an answer posted on the day of receiving the offer is sufficient. A contract in such a case is accepted by the posting of a letter declaring its acceptance, and a person putting into the post-office a letter declaring his acceptance of a contract offered has done all that was necessary for him to do, and is not answerable for casualties occurring at the post-office.[7] This, it should be observed, was in affirmation of a judgment of the Court of Sessions in Scotland, with reference to a contract for the sale of iron, and in some de-

[1] Holland *v.* Eyre, 2 Sim. and S. 194.
[2] Kennedy *v.* Lee, 3 Mer. 441.
[3] Howell *v.* George, 1 Madd. 1.
[4] Seton *v.* Slade, 7 Ves. J. 289.
[5] Martin *v.* Mitchell, 1 J. and W. 426.
[6] Knapp *v* Harden, 1 Gale, 47.
[7] Dunlop *v.* Higgins, 1 H. L. Cas. 381; 12 Jur. 295.

gree had reference to the peculiar customs of the iron trade. It has, however, an important bearing on the subject of contracts generally.

Where an agreement has been commenced by letter, but in the course of the treaty an offer made by letter is verbally rejected, the party who has made the offer is relieved from his liability, unless he consent to renew the treaty. The party who has rejected the offer cannot afterwards, at his own option, convert it into an agreement by acceptance without a renewed offer from the other party.[1] A letter making an offer, and adding, "Send a reply by return of post," is conditional, and does not constitute a contract in the absence of a reply.[2]

3. *How Construed.*

Generally with regard to instruments in the nature of a contract, it is to be observed that in construing them the words are to be construed according to their strict and primary acceptation, unless from the context of the instrument and the intention of the parties to be collected from it, they appear to be used in a different sense, or unless in their strict sense they are incapable of being carried into effect; subject, however, to this, that the meaning of a particular word may be shown by parol evidence to be different in some particular place, trade, or business, from its proper and ordinary acceptation.[3]

4. *Stamps.*

It is important that contracts and agreements between parties should bear the proper stamps. If unstamped, or if bearing stamps which are not of the proper value, they cannot be enforced by either party until they are properly stamped. Moreover, if an agreement cannot be read in evidence for want of a stamp, the party seeking to enforce it cannot recover the value of the work and labour to which the agreement refers, although the other party to it may have had the benefit of such work and labour.[4] The Court cannot look at an unstamped contract to ascertain whether certain works are included in it or not.[5]

A specification referred to in an agreement, but not annexed

[1] Sheffield Canal Company *v.* Sheffield and Rotherham Railway Company, 2 Railway Cas. 121.

[2] Kirky *v.* Trotter, 1 F. and F. N. P. 544.

[3] Malan *v.* May, 13 Mee. and W. 511; 14 L. J. Exch. 48; 9 Jur. 19.

[4] Hughes *v.* Budd, 8 Dowl. P. C. 478.

[5] Vincent *v.* Cole, 3 C. and P. 481; M. and M. 257.

thereto, may be stamped as a separate instrument; and where several persons enter into a contract to do respectively certain different kind of works set forth in a specification, the contract so entered into is not joint, but several; and the part of the specification only which relates to the work to be done by any one of the contractors is part of the agreement of such contractor, and may be stamped accordingly by him.[1]

5. *Conditions Precedent.*

A condition precedent in a contract is a requirement that something shall be done either by one of the parties to the contract, or by some third party before the right to payment under the contract shall accrue; thus, a bill in Equity stated that the plaintiffs contracted with a corporation to perform certain works, and the corporation agreed to pay for them in a specified manner, with a proviso that no sum of money should be considered to be due and owing, nor should the plaintiffs make any claim against or demand upon the corporation for or on account of any work executed by them, unless the engineer of the corporation should certify the amount, and that the plaintiffs were reasonably entitled thereto; and that in cases of disputes or differences arising touching the works, or the construction of the contract, or concerning any certificate, order, or award which might have been made by the engineer, such disputes or differences should be referred to and decided by the engineer of the corporation; and that it should not be competent to the plaintiffs or the corporation to except, at law or in Equity, to any hearing before or determination of the engineer; nor should the engineer be made party to, or required to defend or answer any suit or proceeding at law or in Equity at the instance of the corporation or of the plaintiffs; nor should he be required or compellable by any proceedings whatsoever, either at law or in Equity, or otherwise, to answer or explain any matter touching or relating to any certificate made by him. The bill also stated that a portion of the works had been completed by the plaintiffs; but that the engineer, acting under the direction and in collusion with the corporation, withheld his certificate of such completion, and thereby prevented the plaintiffs from receiving payment therefor; and that he also, under the like direction, refused to certify the correctness of the plaintiffs' claim in respect of such work, or to deliver his award as arbitrator in respect thereof. The bill (which was filed against the corporation and their engineer) prayed that the with-

[1] Briggs *v.* Peel, 11 Jur. 611.

holding of the certificate by the engineer might be declared a fraud upon the plaintiffs, and that they might be declared entitled to receive such an amount of money for the work performed by them as they would have been entitled to if such certificate had been granted; and it was held by Stuart, *V. C.*, and Erle, *J.*, that it was of the very essence of the contract that no sum should be considered due and owing to the plaintiffs on account of any of the works executed by them, unless the engineer should certify the amount; and it appearing that the engineer had not refused to discharge his duty according to the contract, and had not done anything to disqualify himself, but that he was ready and willing to discharge the same according to the terms of the contract, but that the contractors declined to submit to his decision, the bill was dismissed, with costs, as against the defendants.[1]

This decision having been appealed against, it was affirmed by the Lord Chancellor on the ground that the certificate of the engineer was a condition precedent to the right of the plaintiffs to recover as well in Equity as in law.[2] In giving judgment his lordship said, "The plaintiffs are driven to sustain their bill by insisting that the accounts are so complicated, intricate, and voluminous, that they cannot be perfectly dealt with or disposed of by any action at law. . . . . I should always be disposed to regard the jurisdiction of the Courts of Law and Equity with respect to complicated accounts as so far concurrent that, where the parties have proceeded at law, I should be unwilling to withdraw the case from the court merely because a Court of Equity could more conveniently dispose of it; and I should not think myself at liberty to refuse the aid of this Court, when invoked, because a Court of Common Law could completely settle the whole of the disputed accounts. . . . I should not think therefore that the mere fact of the accounts being capable of settlement and adjustment in a Court of Law would have prevented the plaintiffs being entitled to an account, if there was no other objection in their way."

The following case further illustrates the bearing of the architect's certificate:—A building contract contained a proviso that the payments thereby agreed to be made to the builder should only be due, provided the certificate of the surveyor of the employer for the time being should first be obtained; and an action being brought for the balance alleged to be due on the contract, it was held that under the general issue the absence of the certificate of the surveyor was a good answer to the action; and that the plaintiff was

[1] Scott *v.* Liverpool Corporation, 27 L. J. Chanc. 641; 4 Jur. (N. S.) 402.
[2] Ib. 5 Jur. (N. S.) 105.

not at liberty to show that it was withheld fraudulently or collusively with the defendant.[1]

A condition in a contract to refer to arbitration any question which may arise out of the contract will be, if so stated, a condition precedent to the right to sue on the contract; but unless the condition expressly stipulate that, until arbitration had, no action shall be brought, its performance is not precedent to the right to sue on the contract. In cases where the condition is not precedent to the right to sue, if either party sue without offering to refer, it is open to the other party to apply for a reference under Section 11 of the Common Law Procedure Act, 1854.[2] Again, if a contract provide that disputes should be settled by the usual mode of arbitration, but that the contract should not be void on that account, the Court will, under the Common Law Procedure Act, 1854, stay proceedings on an action to recover damages for breach of warranty, if there be nothing on the record to show that any question of fraud could arise, and nothing in the affidavits to show such an alteration of circumstances as to induce it to withdraw the matter from the mode of investigation which the parties themselves had selected.[3]

Where a building is intended to be erected, or repairs done upon or alterations made to a building on a man's own land, under a special contract containing a condition precedent, which is unperformed by the contractor, the mere fact of the owner taking possession does not raise any inference of waiver of the condition precedent, or of entering into a new contract; and therefore an action will not lie either upon the special contract, or upon an implied contract to pay for the work done according to its value.[4] In a building contract it was provided that the contract should not be vacated by any additions or alterations, but that the price to be paid for such alterations should be settled by a surveyor, who was to be sole arbitrator in settling such price, and all disputes arising in or about the premises; and the employer agreed to pay certain proportions of the contract price upon receiving a certificate in writing signed by the surveyor, testifying that certain portions of the building had been done, and his approval thereof, and the balance that should be found due after deducting the previous payments, within two months after receiv-

[1] Milner *v.* Field, 20 L. J. Exch. 68.

[2] Roper *v.* Lendon, 28 L. J. (N. S.) Q. B. 260. See also Horton *v.* Sayer, 5 Jur. (N. S.) 989.

[3] Hirsch *v.* Jm. Thurn, 4 C. B. 569.

[4] Munro *v.* Butt, 4 Jur. (N. S.) 1231, Q. B.

ing the surveyor's certificate that the whole of the works had been completed to his satisfaction; and it was held that the surveyor's certificate was a condition precedent to the builder's right to sue upon the contract in respect of alterations. And where the architect checked the builder's charges and sent them to the defendant, it was further held that this did not amount to such a certificate of satisfaction as to enable the builder to sue the defendant, although the defendant had not objected to pay, on the ground that no sufficient certificate had been rendered.[1] Again, where work is not duly performed according to a special contract, and there is a common count in the declaration for work, labour, and materials, and also a common count for the same as well as a special count, it is open to the defendant at the trial to prove the inferiority of the work and materials; and in that case the plaintiff would only be entitled to recover on the common count for so much as the work, labour, and materials are worth.[2] Then where a specific contract has not been performed, a plaintiff cannot recover upon it on a general *indebitatus* count; and the defendant, therefore, on a plea of *non assumpsit* or *nunquam indebitatus*, may show that the work was done under a specific contract, and that such contract was not performed. Where, however, the plaintiff is entitled to recover a *quantum meruit*, the plea of *non assumpsit* or *nunquam indebitatus* to such a count puts in issue the quantum of the value; and if no value have been given, the plaintiff would not be entitled even to a nominal sum.[3]

If two persons enter into a contract in which there is a condition precedent of an act to be done by one of them within a certain time, which is omitted to be done, and after some delay the other party to the contract offers to renew the contract provided the act is done within a week, and the offer is not distinctly accepted, he is at liberty to retract the offer at any time before the other party has signified his acceptance of or acted upon the terms of it.[4]

Again, if a contract contain a condition precedent, and a party to it by his own act disables himself from fulfilling his contract, he thereby makes himself at once liable for a breach of it, and dispenses with the necessity of any request that he will perform it by the party with whom the contract is made.[5]

[1] Morgan *v.* Birnie, 3 M. and S. 76; 9 Bing. 672.
[2] Chappel *v.* Hicks, 2 C. and M. 214; 4 Tyr. 43.
[3] Cousins *v.* Paddon, 4 Dowl. P. C. 488; 1 Gale, 305.
[4] Gilkes *v.* Leonino, 4 Jur. (N. S.) 537, C. P.
[5] Lovelock *v.* Franklin, 15 L. J. Q. B. 146; 10 Jur. 246; Shut *v.* Stone, 3 Dow. and L. 580; 15 L. J. Q. B. 143; 10 Jur. 245; Caines *v.* Smith, 3 Dow. and L. 462; 15 Mee. and W. 189; 15 L. J. Exch. 106.

6. *Covenants.*

With regard to covenants, it is to be observed that no precise form of words is necessary to constitute a covenant; and that it is enough if the intention of the contracting parties is apparent from the general scope of an instrument under seal; more especially where it commences with the words "It is hereby agreed by and between the said parties in manner following."[1]

A covenant in a demise of land for building purposes to the effect that, on the buildings "being covered in, they [the defendants] would cut good and sufficient roads in, through, and over the meadows, and construct a good and sufficient sewer under the intended roads for the common use of the plaintiff and all other lessees or tenants of the other portion of the meadows," the plaintiff also covenanting to pay as his proportion towards the repair of the roads to be laid down; it was held that the defendants' covenant was not satisfied by their making a road up to the plaintiff's houses, but that as soon as those houses were covered in, the defendants were bound to make good and sufficient roads over the whole meadows as contemplated by the building scheme, although no other houses than the plaintiff's had been built.[2]

Again, a covenant within a given period to erect certain buildings, "the whole of which were to be left to the superintendence of the plaintiff," is an absolute covenant; and the clause respecting the superintendence merely grants liberty for the plaintiff to superintend the buildings, but imposes no duty, so as to make the superintendence a condition precedent or concurrent.[3]

An owner of an estate covered it with houses, and sold some of them subject to a covenant not to carry on any trade, business, or calling therein, or to otherwise use or suffer the same to be used, to the annoyance, nuisance, or injury of any of the houses on the estate; upon a bill for an injunction to restrain the carrying on of a school in one of such houses, it was held that the carrying on of a ladies' school in one of the houses was a breach of the covenant, and that the covenantee had not waived the benefit of the covenant, though he had permitted other houses held under the like covenant to be used as schools.[4]

It is necessary to bear in mind that, if a person contract with

[1] Wood *v.* Copper Miners' Company, 7 C. B. 906.
[2] Mason *v.* Cole, 4 Exch. Rep. 375.
[3] Jones *v.* Connoch, 19 L. J. Exch. 371, Exch. Ch.
[4] Kemp *v.* Sober, 1 Sim. (N. S.) 517; 20 L. J. Chanc. 602; 15 Jur. 458.

another to build a house or other premises within a reasonable time, it will be no defence to an action for breach of the covenant that a reasonable time had not elapsed since the plaintiff required the defendant to build the house. In such a case the terms of the contract avoid the necessity for any requisition by the plaintiff to the defendant to build the house.[1]

The following is an illustration of the law as to implied covenants in contracts. An agreement was entered into between a corporation and a contractor for works, whereby the corporation agreed to let to the contractor the making, constructing, and completing works which they were empowered by Act of Parliament to make, according to a specification and plans annexed, at or for 12,305*l.*, and "on the conditions and in manner hereinafter mentioned;" and the contractor agreed to take the works and complete the same in manner set forth in the specification, and for the sums and subject to the provisions thereinafter mentioned. The agreement went on to provide that the contractor should construct certain of the works, described in the specification as the "first portion" thereof, for 7318*l.*, to be paid as in the specification mentioned; and that he should also construct the "second portion" so described for 4987*l.*, subject to the following provisions, that is to say, "That the assent of the Commissioners of Woods and Forests shall be given to the corporation to carry out the said last-mentioned works, so far as the same affect the land or soil of the Crown, and that the corporation are not prevented from carrying out the last-mentioned works by the Eastern Union Railway Company; and further, that the approbation of the Lords Commissioners of the Treasury is given to the corporation to borrow on bond or on mortgage of the rates and property of the borough, such sum or sums of money as may enable the corporation to pay for the same." In an action by the contractor against the corporation upon this agreement, the declaration assigned for breach that the corporation had omitted within a reasonable time to procure and obtain the assent of the Commissioners of Woods and Forests, and the approbation of the Lords Commissioners of the Treasury, or to permit the contractor to commence the second portion of the works; it was held that there was nothing in the language of the agreement to warrant the Court in implying a covenant on the part of the corporation to obtain the assent and approbation therein mentioned.[2]

A covenant not expressly embodied in a contract may be im-

[1] Fisher *v.* Ford, 4 Jur. 1034.

[2] Smith *v.* Harwich (Mayor, &c.), 2 C. B. (N. S.) 651; 26 L. J. C. P. 257.

plied. Where a deed recited that a Waterworks Company had determined to construct a well, and that the engineers of the company had prepared the necessary drawings, and had made a general specification referring to the drawings of all the works to be done, and of the materials to be found and provided for the purpose, &c.; and the specification so made, which was under the seal of the company, contained the following passage:—"The contractor will be required to sink the well to the depth of 120 feet, after which the company will undertake the erection of the permanent steam-engine, and permit the pumping to be performed by it, sufficient interval of time being allowed for the erection of the steam-engine, and such time added to the period assigned to the contractor for the performance of the work:" it was held that there was an implied covenant on the part of the company to erect the permanent steam-engine as provided in the specification.[1] In an action of debt for work and labour on such a contract, the defendant, on the plea that he never was indebted, may go into evidence to prove that the work was done under such circumstances, and show that there was no implied contract to pay anything; upon this plea, however, the defendant cannot go into evidence of misconduct, except such as goes to show that there was an implied contract to pay for the work.[2]

With regard to the payment of instalments as they become due under express stipulations of a contract, it has been held that a proviso that no instalment payable pursuant to the covenant should be recoverable or capable of being enforced, nor should any proceedings for that purpose be commenced until after the expiration of one month from the day upon which the same should have become payable, does not operate merely as a covenant not to sue; but that the effect of the proviso was to extend the period for payment for one month; therefore in such a case no action is maintainable until the month shall have expired.[3]

7. *Breach of Contracts.*

Leave and licence cannot be pleaded to a breach of contract, but the defendant must show an exoneration or a discharge from the conditions of the contract;[4] and if a builder undertake a work of

[1] Knight *v.* Gravesend and Milton Waterworks Company, 2 H. and N. 6.
[2] Cooper *v.* Whitehouse, 6 C. and P. 545.
[3] Foley *v.* Fletcher, 28 L. J. Exch. 100.
[4] Dobson *v.* Espie, 2 H. and N. 79; 26 L. J. Exch. 240; 3 Jur. (N. S.) 470.

specified dimensions with specified materials, and deviate from the specification, he cannot recover upon a *quantum valebat* for the work, labour, and materials.[1]

In a case in which it was covenanted that the employer's engineer should have power to direct the way in which various portions of the work should be done, and if it should appear to him that they were not properly executed and with due expedition, it should be lawful for him to give notice to the contractor to alter any improper, or to supply proper materials and labour, and with due expedition to proceed therewith; and if the contractor should within seven days fail to comply, the engineer might take the work out of his hands; and the engineer give notice to the contractor to supply proper and sufficient materials and labour for the due prosecution of the works, and with due expedition proceed therewith: the contractor for seven days having refused to comply with a notice given in pursuance of the contract "to supply all proper and sufficient materials and labour for the due prosecution of the work, and with due expedition to proceed therewith," the engineer thereupon took the work out of his hands. An action being brought on the contract, it was held that the notice given to the contractor by the engineer was sufficiently specific.[2]

With regard to contracts for the sale of articles of manufacture, as machines, &c., it has been held that if a person contracts with another for the sale of a particular article and breaks his contract, the proper damages are such as may fairly and reasonably be considered either as arising naturally from the breach of contract, or such as may reasonably be supposed to have been in the contemplation of the parties to the contract at the time they made it as the probable result of the breach of it.[3] Moreover, where a contract is made under special circumstances which are communicated by one of the contracting parties to the other, the damages resulting from a breach of the contract, which the parties would reasonably be supposed to have contemplated, are the amount of injury which would ordinarily follow from such a breach of contract under the special circumstances. But if the special circumstances are unknown to the party breaking the contract, he, at the most, can only be held to have contemplated the amount of injury which would arise generally, and in the great multitude of cases,

[1] Ellis *v.* Hamlem, 3 Taunt. 52.

[2] Pauling *v.* Dover (Mayor, &c.), 10 Exch. 753; 24 L. J. R. (N. S.) Exch. 128.

[3] Smeed *v.* Foord, 28 L. J. (N. S.) Q. B. 178.

not affected by any special circumstances from such a breach of contract.[1]

When a specific thing is the subject of a contract, and it is doubtful what that specific thing is, any fact may be given in evidence which is within the knowledge of both parties in order to identify it. Where a preliminary conversation passed between two persons as to wool which one of them had for sale, and the vendor said that, besides his own clip of wool, he had bought the clips of some of his neighbours, naming them, and that altogether the quantity was 2300 stones, 100 stones more or less; shortly after the other party (S.) wrote to the vendor that he desired him to offer "for your wool" 16*s.* per stone delivered, and to which the vendor replied accepting the offer. In pursuance of this contract the plaintiff tendered 2505 stones, which (S.) the defendant rejected, on the ground of excess in quantity. An action being thereupon brought, and a nonsuit entered with liberty to move to enter the verdict for the plaintiff, it was held *totam curiam* that the preliminary conversation was admissible to show to what the contract referred; and (per Campbell, *C. J.*, and Erle, *J.*, Wightman, *J.*, *dissentiente*) that the written contract did not make it a condition that the quantity should not exceed 2300 by more than 100 stones, and that it was a question for the jury whether the excess was so unreasonable as to entitle the defendant to reject the wool tendered.[2]

If a contract be entered into for the execution of works as a whole, it will not be less a contract as to the whole, because particular parts of the work are required by the contract to be constructed in a particular manner, and nothing is said as to certain other works required to complete the contract as a whole. A carpenter, &c., agreed to build a house for a gentleman who prepared a specification which contained particulars of the different portions of the work. Under the head of "Joiner and Carpenter" there was specified the scantling of the joists for the different floors, the rafters, ridge, and wall pieces; but no mention was made of the flooring. The specification stated that the "whole of the materials mentioned or otherwise in the foregoing particulars, necessary for the completion of the work, must be provided by the contractor." At the foot of the specification the contractor signed a memorandum whereby he agreed with the employer "to do all the works of every kind mentioned and contained in the foregoing particulars according in every respect to the drawings furnished or to be fur-

[1] Hadley *v.* Baxendale, 9 Exch. Rep. 341; 23 L. J. (N. S.) Exch. 179.
[2] Macdonald *v.* Longbottom, 33 L. T. 200.

nished, for a certain sum, and the house to be completed and fit for occupation by a certain day." The contractor prepared the flooring boards, brought them to the premises, and planed and fitted them to the several rooms, but refused to lay them down without extra payment, because the flooring was not mentioned in the specification; whereupon the other party to the contract put an end to it, took possession of the works, and proceeding to complete the building used the flooring boards so prepared and fitted. In an action brought by the contractor for work, labour, and materials, it was held that he was not entitled to recover for the flooring as an extra, because it was included in the contract, though not mentioned in the specification; and also that the plaintiff in the action could not maintain trover for the flooring boards left on the premises by him and subsequently used by the defendant.[1]

The following case may be instanced as to the effect of a forfeiture clause in a builders' contract for delay in the completion of the building by the time stipulated. The plaintiffs on the 19th April, 1836, entered into a written contract to build for the sum of 1700*l.*, a brewery for the defendants, so far as regarded the carpenters' work within the space of four months and a half next ensuing the date of the agreement, and in default of completing the same within the time therein before limited, to forfeit to the defendants 40*l.* per week for each week that the completion of the work should be delayed beyond the 31st August; the amount to be deducted from the sum of 1700*l.* as liquidated damages. The plaintiffs did not begin the work for four weeks after the date of the agreement, in consequence of the defendants not being able to give them possession; they were afterwards delayed one week by the default of their own workmen, and four weeks by default of the masons employed by the defendants, and the work was not completed until five weeks after the time limited; and it was held that under the circumstances the defendants were not entitled to deduct from the 1700*l.* any sum in respect of the delay, either for the one or the four weeks.[2] In another case a contractor agreed to execute the works of a public company, and bound himself for the due performance of his contract by forfeitures, subjecting himself to the arbitrary decision of a person nominated by the company as to his liability; it was held that he was not entitled to relief in Equity against the forfeiture.[3]

The first count of a declaration was on a special agreement for

[1] Williams *v.* Fitzmaurice, 3 H. and N. 844.
[2] Holme and another *v.* Guppy and another, 3 Mee. and W. 387.
[3] Ranger *v.* Great Western Railway, 2 Jur. 787.

the plaintiff to build a house for the defendant at an agreed price, and stated that the plaintiff had bestowed work on the house, and that the defendant abandoned the contract and hindered the plaintiff from completing it; and there was a second count for goods sold. To these the defendant pleaded *non assumpsit*, and that he did not abandon the contract or prevent the plaintiff from completing the house. The particulars of the demand, it should be observed, were for work and materials under the agreement. It was held that if the defendant had not hindered the plaintiff from completing the house, the plaintiff could not recover anything except for extra work which was not in the contract; and that the fact that the defendant, when asked for money, had said, he would never pay a farthing, was not proof that the contract had been abandoned, as the defendant was not then liable to pay anything, the work not being completed.[1]

If a plaintiff declare on a *quantum meruit* for work and labour done, and materials found, the defendant may reduce the damages by showing that the work was improperly done, and may entitle himself to a verdict by showing that it was wholly inadequate to answer the purpose intended.[2] On a special contract for work done under the contract, and for work, labour, and materials generally, the defendant may give in evidence that the work has been done improperly, and not agreeably to the contract; and the plaintiff in that case will only be entitled to recover the real value of the work done and the materials supplied.[3]

The following shows how important it is before an action is brought for damage sustained, that the proper form of action should be adopted.

A and B having entered into a joint agreement with a railway company to execute a contract called "the Morley Contract" for the construction of a tunnel upon the line, A assigned all his right and interest in the contract to B, and the latter agreed to pay A a given sum "on the completion of the said contract." After this agreement had been entered into between A and B, it became necessary to alter the levels of the line, and B, by agreement with the company, abandoned the contract, and another was entered into between the company and other persons, under which the tunnel at the altered level was completed. An action having been brought by A against B for the fulfilment of their mutual contract by B, it was held that A was not in a position, upon the completion of the substituted

[1] Rees *v.* Lines, 8 Car. and P. 126.
[2] Farnsworth *v.* Garrard, 1 Camp. 38.
[3] Chapel *v.* Hicks, 2 C. and M. 214; 2 Tyr. 43.

contract, to maintain an action against B for the payment of the sum stipulated to be paid by his agreement with A, inasmuch as "the Morley Contract" never was completed.[1] In such a case, however, it would seem that A might have some claim against B for damages, though he could not recover on the contract.

Though an agreement may be put an end to by consent, the obligations incurred under it may nevertheless be enforced, and it will not be necessary to sue on the agreement. Thus, if an agreement be entered into for the letting of land to a builder on building leases, and to advance him money to build houses on the land, the money advanced may be recovered in *assumpsit* as money lent, notwithstanding that the agreement was rescinded.[2]

Time may be of the essence of a contract; therefore where a defendant agreed to supply the plaintiff with 150 tons' weight of iron girders at a certain price per ton, and according to plans to be furnished by plaintiff. Plans were furnished within a reasonable time from the date of the agreement, and at the same time fourteen tons' weight of girders were ordered. Four months after the date of the agreement, the fourteen tons were demanded, and other plans were furnished and orders given for sixty tons more girders. The defendant then repudiated the contract, and an action of *assumpsit* being brought, it was held that the contract was entire; and that, as the plaintiff had not furnished plans for the whole 150 tons within a reasonable time from the date of the agreement, he could not recover for the non-delivery of the fourteen tons for which plans had been furnished within a reasonable time from such date.[3] But it must be remembered that where a thing is to be done within a reasonable time, the reasonableness of the time is a question wholly for the jury.[4]

If a contract be entered into for the execution of certain works to be used for a temporary purpose, and a condition of the contract be that the material used in the construction be received back again; the person for whom the work is executed is bound to put the contractor in possession of the materials. Therefore, where plaintiff had agreed with defendant, who was the mayor of [redacted] borough, to erect the hustings for the election of a Member of Parliament for the borough, "as before, with alterations, for 19*l.* 10*s.*, by receiving the wood back again, and to find labour, &c.;" and after the election was ended, the mob carried the wood of the

[1] Humphries *v.* Jones, 5 Exch. 952; 20 L. J. Exch. 88.
[2] James *v.* Cotton, 7 Bing. 266; 5 M. and P. 26.
[3] Kingdom *v.* Cox, 17 L. J. C. P. 155; 12 Jur. 336.
[4] Nelson *v.* Patrick, 2 Car. and K. 641.

hustings away; in an action for not returning the wood, it was held that the defendant was bound to return the wood by putting the hustings safely into the possession of the plaintiff.[1]

An agreement was entered into with a bricklayer in the following terms:—"I agree to perform all the labour necessary in the brickwork, &c., more particularly described in the specification hereunto annexed, to be measured by the surveyor, and paid for at the rate of, &c., on his certificate. Finally, in the event of my not proceeding satisfactorily, &c., and on my receiving notice, &c., I will withdraw all plant, &c. The money paid for wages to be paid weekly; the work executed and measured to be paid for once a fortnight." At the end of the specification were these words, "All scaffolding, &c., to be provided by the contractor without extra charge." Disputes having afterwards arisen, and an action brought for work and labour, and trover for poles, boards, and other materials or tools of a bricklayer, the judge directed the jury, as to the detention of the materials, that the defendant would not be entitled to retain them without an agreement to that effect; and that even if there was, it would give no right to use them; and the use of the articles would be a conversion in law. He further directed that the measure of damages to be given by the jury was the price for which the goods could be bought or hired.[2]

The following case illustrates the liability of a surety to a contractor's bond. The defendant was surety by bond to the plaintiff for the performance of a contract by a builder according to a certain agreement. By that agreement, the builder was to complete the works for a certain sum, and payment was to be made to him by the plaintiff, during the continuance of the work, by instalments—viz., three-fourths of the cost of the work certified to have been done every two months, and the remaining one-fourth one month after the whole was completed. The builder applied for and received advances from the plaintiff exceeding in amount the value of the work done by him, for some of which advances he gave security. The work not being done at the specified time, the plaintiff called in another builder to complete the work, and the amount paid to him, added to the advances made to the builder originally contracted with, greatly exceeded the original contract price. In an action against the surety on the bond, to which there was a plea of *non est factum*, it was held that the defendant might show, in reduction of damages, that the advances were made by the plaintiff not according to the contract, and that as the work had

[1] Fuller v. Patrick, 18 L. J. Q. B. 236; 13 Jur. 561.
[2] Poulton v. Wilson, 1 F. and F. N. P. 403.

been completed within the contract price—*i.e.*, after deducting the advances made, not in accordance with the contract, the plaintiffs were only entitled to nominal damages.[1]

If a licence be obtained to dig or quarry stone on the ground of another person, specific performance of the licence will be compelled by the Court; for, it is immaterial whether in form an agreement to dig stone be a licence or a lease so far as its construction by a Court of Equity is concerned. Thus, it was agreed that the land, the subject of the agreement, was to be laid bare and properly marked out; and the plaintiff being anxious to work a larger quantity of ground than he had previously worked, his agent measured off an additional plot of ground amounting to 1200 square yards, with the defendant's consent, and thereupon plaintiff entered into possession of the ground so marked off, and agreed to work the same at the price of 4*s.* 6*d.* the square yard. The defendant having brought an action of ejectment to recover the additional plot of ground, it was declared by the Court below, and affirmed on appeal to the Lord Chancellor, that the plaintiff was entitled to a specific performance of the agreement for a licence as regarded the 1200 square yards of ground.[2]

That which follows has a more direct bearing upon the rights of assignees under the bankruptcy laws; but it is also pertinent to the subject of the present work. A builder contracted with the trustees of a certain company to build them an hotel for a specified sum, and to provide all necessary materials (except iron-work and papering) to the satisfaction of their superintendent, with a proviso, that, in the event of the contractor becoming bankrupt, it should be lawful for the trustees to take possession of the work already done by him, and put an end to the agreement for the future, paying him a fair proportion for the work actually done. Before the work was completed, the contractor (who had received several sums of money on account to an amount greater than the value of the work done) became bankrupt, having in his workshop certain wooden sash frames destined for the hotel, and approved of by the superintendent for that purpose, into which certain pulleys, the property of the trustees, had been inserted; which frames having been brought by the trustees to the hotel, a demand of the sash frames, without mentioning the pulleys, was made by the assignees, to which the trustees returned a general refusal to give them up. Upon an action by the assignees to recover possession of the frames, it was held—1. That the property in them was not

[1] Warre and another *v.* Calvert, 2 Nev. and P. 126; 1 Jur. 450.
[2] Nelson *v.* Bridges, 1 Jur. 753.

vested in the trustees by force of the contract, and subsequent approval by their superintendent. 2. That the circumstance of their pulleys being inserted into the sash frames did not render the trustees tenants in common with the assignees of the entire chattel. 3. That the money advanced by the trustees did not give them such a lien on the sash frames as authorized the refusal to deliver them up. 4. That by the true construction of the contract, a property passed to the trustees in such work only as was actually done and affixed to the reality by the bankrupt previous to the bankruptcy. 5. That the general demand and general refusal were sufficient evidence of a conversion of the sash frames as distinguished from the pulleys.[1]

II.

CONTRACTS WITH CORPORATIONS.

THERE are rules to be observed on the part of architects, builders, and contractors, in regard to the execution or rather fulfilment of contracts, which, if neglected or set at nought, are sure to operate to the detriment of one or other of them. The chief rule is to observe a literal compliance with every provision of a contract, however apparently trivial it may appear to be, and upon no account to deviate from anything required to be done by either of the contracting parties in respect of matters of form or substance.

For instance, persons dealing with railway or other similar companies, being corporations, should always bear in mind that such companies are essentially different from an ordinary partnership or firm for all purposes of contracts, and especially in respect of evidence against them on legal trials. Persons so dealing should invariably insist upon all contracts with them being by deed under the seal of the company or signed by the directors, or otherwise executed in the manner prescribed by the Act of Parliament regulating the company; for there is no safety or security for any one dealing with such a body on any other footing. Moreover, it should be borne in mind that the same caution applies to any variation or alteration in a contract which has been made with the company; and that the secretary or other managing officer of the company has of himself no independent authority to bind the company by letters or documents signed by him.[2] These rules are most

[1] Trip *v.* Armitage, 4 Mee. and W. 687; 3 Jur. 249.

[2] Williams *v.* Chester and Holyhead Railway Company, 15 Jur. 828 Exch.

forcibly illustrated by the case of the contractor for the erection of the workhouse of the Billericay Poor Law Union in Essex, the facts of which are of such importance as to justify their being set out with more detail than would otherwise have been necessary.

By agreement under seal between the plaintiff of the one part, and the defendants, the Guardians of the Billericay Union of the other part, after reciting (*inter alia*) that the plaintiff had proposed to contract to erect the workhouse at Billericay, and perform all the works particularized in a specification prepared by S. and M. (the architects) for 5500*l.*, the plaintiff, in consideration of the payments to be made to him, agreed with the defendants that he would in a workmanlike manner do all the works mentioned in the specification at the times therein mentioned, and would completely finish the whole by the 24th June, 1840. That if the architects should think proper to make any alterations or additions in the progress of the works, they should give to the plaintiff written instructions for the same signed by them, and the plaintiff should not be considered as having authority for the execution of such additional works without such written instructions. And in consideration of the premises the defendants agreed that they would pay the plaintiff the sum mentioned at the rate of 75*l.* per cent. on the amount of the work done, and the remaining 25*l.* per cent. within thirty days from the full completion of the contract, provided that the plaintiff should not be entitled to receive any payment until the works on which the payments were to be made should have been completed to the satisfaction of the architects, who should examine and make a valuation of the amount so completed from time to time, and certify the same to the defendants, after which the plaintiff should be entitled to receive from the defendants the amount of payment at the rate before mentioned, which should be then due in respect of the works so certified to be completed. The plaintiff further bound himself that if he should fail in the completion of all the works by the 24th June, 1840 (unless hindered by fire or other cause satisfactory to the architects), he would pay to the defendants 10*l.* per week, by way of liquidated damages, so long as the work should remain incomplete. The declaration of the plaintiff averred that he had, to the satisfaction of the architects, executed all the works contracted to be done for 5500*l.*, and that during the progress of the works the architects required and authorized him to make certain additions thereto, "to wit, by means of certain written instructions, signed by the architects, confirmatory of and ratifying and establishing the said requisition and authority so given by them to the said plaintiff." That the plain-

tiff duly, and to the satisfaction of the architects, executed all the additional works so required by them, and that they duly made a valuation thereof, and certified the same to the defendants. The declaration then stated that more than thirty days had elapsed since the due completion of all the works, and that the defendants had taken possession of and accepted all the works as and for work done under and in pursuance of the agreement, and alleged as a breach the non-payment as well of the 5500*l.* as also the sum due for additions. The defendants traversed the averments in the declaration by pleas, some of which related to the original and some to the additional works. There were also pleas of payment of 5500*l.* after and before breach, which were traversed by the replication. The cause having been referred to an arbitrator, the arbitrator found that the plaintiff proceeded to execute the works, and that while they were in progress the architects required him to execute additional works; that the whole of the works, original and additional, were completed in a workmanlike manner, and to the satisfaction of the architects; but that by reason of the additions, the final completion of the works was necessarily delayed until December, 1840, at which time the defendants took possession of the whole. During the progress of the works, the architects from time to time delivered to the plaintiff certificates in the form of letters signed by them and addressed to the clerk to the Board of Guardians, stating that the board might safely advance the sum of £ to the plaintiff on account of the works executed. Certificates in this form to the amount of 5000*l.* were given, but in fact payments were made by the defendants to the amount of 6300*l.* These payments were made generally in respect of the works actually done, without distinguishing the one description from the other. No written directions were given by the architects for the additional works, except that letters were in evidence signed, some by S., and others by M., in which allusion was incidentally made to some of the additional works in progress, and containing suggestions as to the mode of executing them; and save also that long after the works were complete, the architects, on the application of the plaintiff, made a valuation of the additional works, which they estimated at 3133*l.*, and signed a paper stating that to be the amount of their valuation. In an action brought by the plaintiff against the defendants for work and labour under the contract, it was held—

1. That the deed in requiring written directions meant written directions before the additional work should be done, in which sense the averment in the declaration was to be understood, and

that the certificates, letters, and final valuation of the architects did not amount to such directions. 2. That the payments made on the certificates of the architects were to be treated as sums paid on account of whatever the plaintiff might eventually be entitled to recover; and the want of written directions being an answer to any claim in respect of the additional works, the plaintiff could not apply any part of the 6300*l.* in satisfaction of them. 3. That although the defendants had accepted the additional works, the plaintiff was not entitled to be paid on a *quantum meruit;* for the defendants, being a corporation, were incapable of making a new parol contract of that description. And 4. That the time of the completion of the works was not an essential part of the contract; and semble, that no valuation or certificate of the contract works was requisite after their final completion.[1]

In a subsequent case the soundness of the decision of the Court, in absolving the guardians of the union from liability in respect of the extra works executed without the written certificates of the architects, appears to have been doubted; but the case nevertheless illustrates the vital importance of architects, in giving orders for the execution of extra works, conforming in the minutest particular with the terms of the contract with the builder; and, on the other hand, the extreme danger which the builder runs if he executes works without first obtaining an authority for so doing in conformity with the terms of his contract; which he should, under no circumstances and under no degree of pressure, depart from.

It has been already said that persons dealing with corporations should bear in mind that they are essentially different from an ordinary partnership, or individuals, for all purposes of contracts, and especially in evidence against them on legal trials; and that they should insist upon all contracts with them being by deed under the seal of the corporation, or otherwise executed in the manner prescribed by the Act of Parliament regulating the corporation. The same observation applies in respect of any variation or alteration in a contract which has been made; and it should further be borne in mind, that the secretary or other officer of the corporation has of himself no independent authority to bind the corporation by letter or documents signed by him. Generally speaking, corporations are as much bound by their contracts as individuals where the seal is affixed in a manner binding on them; and where a corporation is created by Act of Parliament for particular purposes, with special powers, their contract will bind them, unless it appear by the

[1] Lamprell *v.* the Guardians of the Billericay Union, 3 Exch. 283; 18 L. J. Exch. 282.

express provisions of the statute creating the corporation, or by necessary and reasonable inference from its enactments, that the contract was *ultra vires*, or that the Legislature meant that such a contract should not be made.[1]

The general rule with regard to a contract is, that the contract which the parties solemnly make with each other shall bind both. But it is also an acknowledged principle that, notwithstanding any express contract which the parties may have made with each other, the conduct which one pursues to the other who acquiesces simultaneously and without objection, may itself amount to a waiver of the contract. This principle the Court upheld in a case where a contract between a builder and the guardians of a union, for building a workhouse according to certain plans, contained the following stipulation :—"It is also to be in the power of the Board of Guardians or of the architect (by the authority of the Board of Guardians) to direct such alterations to be made in the works during their progress as they may deem expedient, which alterations shall not vacate or make void the contract, but shall be performed by the contractor according to the directions he may receive; and the value of the same, whether in addition or deduction, is to be ascertained by the said architect, and to be added to or deducted from the amount of the contract accordingly; but no allowance is to be made to the contractor for extra or additional work, unless the same shall have been ordered in writing." In the progress of the works considerable extra work was found necessary; and the contractor, by the direction of the architect and with the approval and sanction of the Board of Guardians, performed such extra work, but without a written order. The guardians afterwards having refused to pay for this extra work, a bill was filed by the builder against the guardians, praying that it might be declared that the defendants had waived or were not under the circumstances entitled to insist, as against the plaintiff, upon the necessity of any order or orders in writing having been given previous to the execution of any of the extra works, and that they might be decreed specifically to perform the contract, and to pay to the plaintiff the balance due to him, or that an account might be taken, &c. The defendants having put in a general demurrer to the bill for want of Equity, the demurrer was overruled, the Vice-Chancellor of England observing that it is quite consistent with the rules of Equity, that, notwithstanding the express contract, the parties have, by their own conduct, laid themselves under an obligation which the Court

[1] Bateman *v.* Ashton-under-Lyne (Mayor, &c. of), 3 H. and N. 323; 27 L. J. (N. S.) Exch. 458.

will make them fulfil.[1] This decision of the Vice-Chancellor was however appealed from to the Lord Chancellor and overruled, his Lordship observing, with reference to the fact that the extra works had been executed with the knowledge and sanction of the defendants, that the knowledge and acquiescence on the part of some of the guardians cannot affect their rights as members of the body corporate, in which character they were sued; and he thought that overruling the demurrer on the ground stated by the Vice-Chancellor would open a new head of Equity which could not be supported.[2]

Another case may be instanced in which serious loss was suffered by the contractors in consequence of their having executed works for a corporation which were not covered by their contract, and which is adverted to in the author's work on Public Health and Local Government. In the case referred to, it was held that the Local Board of Health for whom the works were executed, had no power to bind the rates unless by contracts entered into in the mode pointed out by the 11 & 12 Vict. c. 63; and that therefore a contract exceeding the value of 10*l.* for the performance of works and for carrying into execution the Public Health Act, 1848, made with the Local Board of Health, is not valid so as to enable the contractor to enforce it against the board, unless it be sealed with the seal of the board, and signed by five or more members thereof, and comply in other respects with the requirements of § 85 of the Act; for the section is not merely directory, but creates a condition which must be complied with.[3]

The rule of law is, that a corporation can only bind itself by deed (*see* "Comyn's Digest," tit. *Franchise* (F) 12, 13, and the authorities there referred to); but exceptions to this rule have been established, as in the case of corporations created for the purpose of carrying on trading speculations, where the nature of their constitution has been such as to render the drawing of bills or the making of particular kinds of contracts necessary for the purposes of the corporation. In those cases, the Courts hold that they would imply in those who are, according to the provisions of the Charter or Act of Parliament, carrying on the corporation concerns, an authority to do those acts without which the corporation could not exist. Special provision has, however, been made by the Legislature in regard to the manner in which contracts may be made by and with joint-stock companies in certain cases. Thus:—

[1] Kirk *v.* Guardians of Bromley Union, 11 Jur. 49. [2] Ibid, 12 Jur. 85.

[3] Frend and Hamil *v.* Dennett, 4 C. B. 576; 27 L. J. (N.S.) C. P. 314; 4 Jur. (N.S.) 897.

Contracts with Public Companies, registered under the 19 & 20 Vict. c. 47, may by § 41 of that Act be made as follows—that is to say :—

1. Any contract, which, if made between private persons, would be by law required to be in writing, and if made according to English law, to be under seal, may be made on behalf of the company in writing, under the common seal of the company, and such contract may be in the same manner varied or discharged.

2. Any contract which, if made between private persons, would be by law required to be in writing, and signed by the parties to be charged therewith, may be made on behalf of the company, in writing, signed by any person acting under the express or implied authority of the company, and such contract may in the same manner be varied or discharged.

3. Any contract, which, if made between private persons, would by law be valid, although made by parol only, and not reduced into writing, may be made by parol on behalf of the company by any person acting under the express or implied authority of the company; and such contract may in the same way be varied or discharged.

All contracts made according to these provisions are effectual in law, and binding upon the company and their successors, and all other parties thereto, their heirs, executors, or administrators, as the case may be.

It may be further observed that by § 43 of the same Act, a promissory note or bill of exchange is deemed to have been made, accepted, or endorsed on behalf of any company registered under the Act, if made, accepted, or endorsed in the name of the company by any person acting under the express or implied authority of the company.

Wherever the purposes for which a corporation is created render it necessary that work should be done, or goods supplied, to carry such purposes into effect, the corporation cannot keep the goods or the benefit, and refuse to pay, and then say "no action lies: we are not competent to make a parol contract, and we avail ourselves of our own disability."[1]

Therefore, where the Guardians of a Poor Law Union gave a verbal order for iron gates for the workhouse, and the gates were supplied and adopted by the guardians, it was held that this was a contract coming within the exception, and that the corporation were liable.[2] Where, however, the Poor Law Commissioners, upon

[1] Clarke *v.* Curtfield, 21 L. J. Q. B. 349.

[2] Saunders *v.* St. Neots Union, 8 Q. B. 810; 15 L. J. M. C. 104; 10 Jur. 566.

a representation of the Board of Guardians under the 6 & 7 Wm. IV. c. 96, § 3, issued an order for a survey and plan of a parish for the purposes of that Act, and the guardians contracted, under seal, with a surveyor to execute the survey and plan for a certain sum, and after its completion verbally ordered him to prepare a reduced plan as a key to the larger one, which was accordingly executed and delivered to the guardians; it was held that, as the contract for the reduced plan was not under the seal of the Board of Guardians, nor incident to the purposes for which they were incorporated, it was not binding on them.[1]

In the following instance, a contract not under seal made by a corporation was sustained. The Guardians of the North Bierley Union by a resolution resolved that the plaintiff should be employed to make up the books of the union, and prepare the whole of the accounts for the audit; and in the interval their clerk committed suicide. The plaintiff having reported certain defalcations in the accounts, by another resolution of the guardians he was employed to ascertain how they affected the different parishes in the union. In an action for work and labour as an accountant to recover the value of his services, the defendants pleaded, as to a certain sum, payment into court, and as to the remainder never indebted. The defence was substantially that there was no contract under seal; but it was nevertheless held (Crompton, *J.*, doubting) that the plaintiff was entitled to recover.[2]

Another illustration may be cited of a case in which a corporation may be bound by a contract not under seal. The Guardians of the Poor of the parish of Brighton, incorporated under a Local Act, in pursuance of an order of the Poor Law Commissioners, advertised for designs for a workhouse and schools, in consequence of which several designs were sent in. One of them, with which the architect sent the following estimate of cost, "The building will cost, exclusive of enclosing walls, and with slight alterations, the sum of 5000*l.*," was selected. Ultimately it received the seal of the Poor Law Commissioners in testimony of their approval of it, and advertisements were then issued for tenders for the execution of the works.

The usage is for architects to employ a surveyor to take out the quantities, and for the successful competitor to add to his contract the surveyor's charges. The architect of the selected design employed the plaintiff, a surveyor, to take out the quantities from

[1] Paine *v.* the Guardians of the Strand Union, 15 L. J. M. C. 89; 10 Jur 308.

[2] Haigh *v.* the Guardians of the North Bierley Union, 31 L. T. 213.

the plans and specifications for the schools, and make out copies of them for the lithographers, to be lithographed for the use of the builders who proposed to tender for the performance of the works. This having been done, in due course several tenders were sent in for the performance of the works in the erection of the schools, the lowest of which being 13,600*l.*, and more than the guardians had power to expend, they declined to accept either of the tenders. Afterwards the plaintiff sent in to the guardians the following claim :—

"To services rendered in taking off the quantities from the plans and specifications for the proposed Industrial Schools, Mr. H. H. C., Architect, bringing same into bills, and making out four copies of the several trades for the lithographers, say 1½ per cent. on the amount of the lowest tender. . . . . £204 0 0"

Upon this state of facts the question submitted for the opinion of the Court was whether the plaintiff was by the operation of the 220th section of the Brighton Local Act, 6 Geo. IV. c. clxxix., disentitled to recover his claim in the action which he brought against the guardians for his work and labour.

That section provided that all contracts or agreements made between the guardians and any other person or persons relating to "any act, matter, or thing, to be done in pursuance of that act," should be reduced into writing and signed by the parties thereto. Previous to the 7 and 8 Vict. c. 101, the Poor Law Commissioners had not power to direct that schools for pauper children should be erected. In pronouncing judgment for the plaintiff the Court said that the section of the Local Act referred to had a twofold operation —first, to prevent the necessity of all contracts entered into by the guardians being under seal; secondly, to prevent a contract by parol from being set up. In building a school under the direction of the Poor Law Commissioners, under the 7 and 8 Vict. c. 101, § 43, it was impossible to say that the guardians were acting in pursuance of the Local Act; and the Court were therefore bound to hold that a contract in writing under § 220 was not necessary in the present case, and therefore gave judgment for the plaintiff.[1]

One of the points above mentioned is illustrated by the following case, in which the liability of the corporation was upheld. The Guardians of the Witney Union employed an architect to draw a specification of a building, and he employed the plaintiff to make out the quantities. According to the usual custom, the

[1] Armstrong *v.* Bowdidge, 16 C. B. 358.

plaintiff's work was to be paid for by the successful competitor for the building contract; but a dispute having arisen between the architect and defendants, they refused to go on with the building, upon which the architect sent in his bill to them, together with the plaintiff's bill for making out the quantities, and they paid the architect's bill only. An action having been brought against the guardians for the recovery of the amount of the plaintiff's bill, it was held that, as the defendants had by their own acts rendered it impossible that the "successful competitor" should defray the plaintiff's charges according to the understanding and custom, they were liable to the plaintiff for the amount of his charges.[1]

In further illustration of the principle involved in the foregoing cases, the following may be cited:—

An incorporated company entered into a contract under seal with A. for the execution of certain works according to the terms of a specification annexed, which also contained provisions for extra work. A. entered upon the work under the superintendence of the company's engineer, and also under such superintendence and with the approbation of the engineer executed certain extra works, which, however, could not be considered as coming within the provisions of the contract under seal. A. afterwards made a claim upon the company to a much larger amount than that specified by the contract, and the directors paid him a large sum generally on account. By the 8 and 9 Vict. c. 16, § 97, the directors of such a company may make parol contracts without their being reduced into writing, where such contracts would, if entered into between private persons, be valid; and by § 98 of the same Act the directors are bound to enter minutes of such contracts in a book; and by one of the clauses of the special Act of the company, three of the directors constituted a quorum. An action having been brought by A. for the balance alleged to be due to him, it was held that, as there was not any evidence that the company had contracted for this extra work under seal, or that they had entered into a contract for the same under the terms of their special Act, or of any general Act authorizing the same, they were not liable to A. for the extra work so performed by him.[2]

It is open to question whether if at any time before the adoption and performance of a contract on the part of a corporation, not executed by the corporation under seal, it would be open to the other contracting party to insist that the contract was not binding on the corporation by reason of its not having been entered into

[1] Moon *v.* the Guardians of the Witney Union, 3 Bing. N. C. 814.

[2] Homersham *v.* Wolverhampton Waterworks Company, 6 Exch. 137.

under their common seal, and consequently not binding on such other party for want of mutuality. If, however, in such a case the contract is executed before action brought, and under which the defendant has received the whole benefit of the consideration for which he bargained, it would be no answer to an action of *assumpsit*, that the corporation itself was not originally bound by the contract, by reason of its not having been made under the common seal.[1]

Under certain circumstances a contract with a corporation may be enforced, though not in terms of the charter of incorporation. As where a company were incorporated by Royal Charter for trading purposes, and by the deed of settlement the directors were to manage the business of the company, but all contracts above a certain value were to be signed by at least three individual directors, or sealed with the seal of the company under the authority of a special meeting; and the company were sued on an agreement within the scope of the company's business, but above the prescribed value, and made by parol with the chairman, who, with his own hand, entered a memorandum of it in the minute book of the company: this agreement was recognised in correspondence with the secretary, and the plaintiff did work under it and received payment by cheques for it. These payments passed into the accounts of the company, and were audited and allowed; but there never was any contract signed by three directors or under the seal of the company. On a case stating these facts with power to draw inferences of fact, the Court held that the contract was ratified, if not authorized, by the company, and therefore binding.[2]

III.

EXTRA WORKS.

THE course of business in entering into a contract with a builder or contractor is now to be described. After the plans have been settled and approved, the architect prepares the specifications of the works; the quantities have then to be taken out, and after the acceptance of a tender for the works, the conditions for the specific performance of the work are embodied in a formal contract by the solicitor of the employer. In some instances under

[1] Fishmongers' Company v. Robertson, 12 L. J. 185; 6 Scott, N. R. 56.
[2] Reuter v. Electric Telegraph Company, 6 Ell. and Bl. 341.

special conditions the contract, having been duly executed, the bill of quantities of the works, with the prices of the contractor affixed, is sealed up and deposited with the architect until the work is completed. It however remains the property of the contractor, and though it may be referred to by the respective parties in order to ascertain the correctness of the account by a comparison of the prices charged with those in the bill of quantities, neither the architect nor the employer has a right to take or to demand a copy of it. When the account is finally settled, the proper course is for the architect to deliver it back to the contractor, whose trade secrets (which are his own legal property) might be divulged to competitive opponents if it fell into any other hands than his own, after the purpose for which it had been prepared had been fully answered.

The observations which are made elsewhere upon the importance of obtaining written authority in terms of the contract, for the execution of extra works not provided for by a contract with a corporation, apply with equal force when the contract is with a private individual. If, notwithstanding an express stipulation in a contract between a private individual and a builder, that no alterations or additions shall be admitted or paid for unless directed by the architect by a writing under his hand, the alterations and additions are made without such written authority, the employer will be at liberty to dispute the account for them, and to refuse a settlement. What amounts to a written authority may sometimes admit of dispute, especially if it do not clearly express what alterations or additions are thereby intended to be authorized; and great care should therefore be taken to leave no loophole for doubt upon a point which, if it exist, may lead to misunderstanding between the parties and litigation. It may be said that it is not possible to give a written authority for every extra-work which is directed to be done; but such an argument would not hold good in the face of an express stipulation in a contract; and therefore whether it be considered possible or not, builders will act advisedly in declining to make the required alterations or additions, unless they be ordered in writing, and their nature and extent be clearly expressed in the document. They need not, however, be necessarily expressed in words; for if they be clearly set out in a plan or drawing, signed by the architect, with words specifying or indicating the work to be extra, such would be considered as much an order in writing as if the whole of the details had been specified in words at length. Then if the principal extra work not in the original plans and specifications be

ordered to be done, all the accessories of that work must be taken to be included in the order given for it. Thus, if a door or a window be ordered to be made, where no door or window is shown in the plans, the necessary accessories to a door or window must be taken to be included in the order; or if a wall be ordered to be made of greater or of less thickness than was originally intended, the alterations thereby required to be made in the adjoining work must necessarily be also included in the order for the alteration of the wall.

In the case of Lamprell *v.* the Guardians of the Billericay Union, elsewhere adverted to, it was held that the deed, in requiring written directions, meant written directions before the additional work should be done. Where it is practicable to do so, the order should be obtained before the work is commenced; but, nevertheless, if the work be begun, and the architect approve of it, and give the requisite order before it is finished, it would be a sufficient compliance with the contract. The rule with regard to extras may be thus stated:—There must be a written order, or something equivalent to a written order, either separate and distinct, or included in a principal order, given either before the commencement or whilst the extra work is in progress; or there must be a drawing or plan of the extra work to be done, signed by the architect of the building.

It is usually made a condition precedent in a contract that there shall be delivered by the builder or contractor to the architect or clerk of the works, a weekly account of the extra work done under the contract. What works are to be included in the weekly account may lead to much dispute, and it would be well, therefore, expressly to define in the contract what class or kind of work is to be accounted for weekly—whether of the extent of extra day-work, and quantity of the materials, or of other extra work which is to be the subject of measurement, and to be paid for according to measurement. The custom of the building trade is to include in the weekly account only the day's work and materials consumed in that work, but not extra works which can be measured; and it is not customary for the trade to render weekly accounts of any of the work covered by the contract and specifications.

The object of the weekly account is, not to inform the employer of the additional expense to which he is being put by alterations and additions being made to the building in the course of its erection, but to render an account of the time and materials used in extra works which cannot be measured, in order that the architect or clerk of the works may have an opportunity of ascertaining and checking the work whilst the details of it are fresh in his memory.

According to the recognised practice of the profession, the weekly account should contain only a statement of what is understood by "day work;" that is, of the time of the men and of the materials used in extra day work, and of work which is not in the contract, and is not capable of being ascertained by measurement.

How far an architect is justified in ordering extra works, not contemplated by the contract, without the express concurrence of his principal, depends entirely upon the understanding come to between them on the subject. Where, however, the architect is not directly empowered to make alterations in the plans without the concurrence of the employer, it would be his duty to inform the employer of the expenditure exceeding the contract, especially if it be likely to do so to any great extent. If the architect neglect to do this, much misunderstanding between the parties may arise; and although employers do, and must to a great extent trust to the discretion of their architects, the latter should not entirely rely on that trust for an exoneration of their having, on behalf of their principal, and unknown to him, incurred large bills for extra works.

It is important to bear in mind that if a builder be employed to execute works under a written agreement, he cannot subsequently claim for work done, but not included in the agreement, unless he prove an employment altogether distinct and separate from the agreement; and it is not sufficient to show that the works executed come within the description of extra works to enable the builder to recover the value of them.[1] It would seem that the written contract ought nevertheless to be produced, in order to show how far the additional works were connected with the works contracted for; but not if they were totally unconnected therewith.[2]

If, in such a case as the above, the employer himself directs the additional works to be done, he will be liable to the person to whom he gave the order. On the other hand, if they were ordered by the architect, the liability of the employer would depend upon the extent of the authority he gave to his architect in respect of the works. If he did not authorize the architect to order the execution of any works but those to which the agreement either directly or indirectly relates, he would be exonerated from liability; and, in that case, it would be for the builder to consider how far the architect had made himself personally responsible for having ordered the execution of works not coming within the scope of his general authority.

[1] Parton *v.* Cole, 6 Jur. 370.

[2] Holland *v.* Stevens, 5 Jur. 71.

In rebuilding a church, the architect employed by the defendants, after giving them an assurance that the whole of the works should not exceed a given sum, prepared a statement or bill of particulars, showing the quantities of the works to be performed by the contractors, and also prepared plans and a specification. The plaintiffs tendered for portions of the works, and their tender was accepted at a fixed sum. The architect then prepared a form of contract whereby the plaintiffs agreed to do certain things mentioned "according to the plans and the quantities there given by the architect;" and they signed the specification, the conditions of which stated that, if any doubt should arise during the execution of the works in making out the accounts, "the admission or allowance of claims should be judged of, determined, and adjudged by the architect without reference to any other person;" and that, "in all matters, the decision of the architect should be final." Although no time for the completion of the contract was named, it being left in blank, the defendants were to be subject to a penalty if the works should remain unfinished. The plaintiffs performed works in excess of the quantities stated by the architect in his bill of particulars, and claimed to be paid over and above the fixed sum in respect of such extra works; but the architect rejected the greater portion of such claims, and debited the plaintiffs with a sum (to which they did not consent) for delay in completing their contract. On a bill for a declaration that the plaintiffs were not bound by the conditions in reference to the claims being adjusted and all matters decided by the architect; that an account might be taken of what was due to the plaintiffs, and that they were not chargeable with any sum in respect of penalty for delay, it was held, first, that there was no ground for imposing the penalty for delay; and, secondly, that the plaintiffs were entitled to be paid, in addition to the fixed sum, for all quantities of work done by them beyond the quantities mentioned in the bill of particulars.[1]

Where work has been done under a written contract, evidence of extra work cannot be given without proof of the written contract, in order that it may appear what is within the contract[2] and what is not; and if such contract be inadmissible for want of a stamp, the judge cannot look at it for the purpose of determining whether or not the proposed evidence relates to it.[3] If, however,

[1] Kemp *v.* Rose, 4 Jur. (N. S.) 919.

[2] Jones *v.* Howell, 4 Dowl. P. C. 176.

[3] Buxton *v.* Cornish, 1 Dowl. and L. 585; 13 L. J. Exch. 91; 12 Mee. and W. 426, 8 Jur. 46.

a person be employed to do work under a written contract, and a separate order for other work is afterwards given by parol during the continuance of the first employment, the written contract need not be produced by the plaintiff in an action for the second work.[1]

Again, if a person binds himself to perform certain works according to a specification and other detailed and working drawings, to be furnished during the progress of the works, with power for the employer, by his surveyor, to direct additions or omissions, he must, in a plea of performance, *quoad* such parts in which no orders were given by the surveyor to vary and deviate from the original plan, show an authority in the surveyor to give such directions, or aver that the deviation or variation was an omission or addition.[2]

If a special contract for the performance of work has not been completed but remains open, an action for a *quantum meruit* for work and labour under the contract cannot be brought, for the contract is still open. But the case would be different if the other party to the contract refused even to pay anything. The value of extra works performed in connexion with the works specified in the contract may, however, be recovered, notwithstanding that the contract itself is not performed.[3]

When one person contracts to do certain work in materials supplied to him by another (as where he contracts to survey a parish, and to set down the results of such survey in a map upon paper furnished to him by his employer), his right to sue for work and labour is complete as soon as he has finished the work and has given his employer a reasonable opportunity of ascertaining its correctness; and if (there being no contract for a specific price) he demand more for the work than a reasonable price, and refuses to deliver it except on payment of such larger price, that will not preclude him for sueing for and recovering a reasonable price.[4] So where work is done under a special contract and for estimated prices, and there is a deviation from the original plan by the consent of the parties, the estimate is not excluded, but is the rule of payment so far as the special contract can be traced; and for any excess beyond it the party is entitled to his *quantum meruit*.[5] But where a tradesman finishes work differing from the specification agreed on, he is not entitled to the actual value of the work, but only to the agreed price, minus such a sum as it would take to

[1] Reid *v.* Batte, M. and M. 413.
[2] Rex *v.* Peto, 1 Y. and Y. 37.
[3] Lines v. Rees, 1 Jur. 593.
[4] Hughes *v.* Lenny, 5 Mee. and W. 183.
[5] Robson *v.* Godfrey, Holt, 236; 1 Stark, 275.

complete the work according to the specification ;[1] and, per Lord Tenterden, where work is undertaken on contract at a given price, the employer is not liable to any greater amount by consenting to alterations from the original plan, unless he is either expressly informed, or must necessarily, from the nature of the work, be aware that the alteration will increase the expense.[2]

In concluding the subject of extra works, it may be desirable to add that, in purchasing materials to be supplied from time to time as required during the progress of a building, it may sometimes be advisable to stipulate, in writing, with the dealer or manufacturer that the goods supplied shall be subject to the approval of the architect of the building; as otherwise, if inferior goods be supplied, or goods which do not conform to the specification of the works, they may be thrown on the builder's hands without his having any redress.

In a case which was recently before one of the County Courts, and which related to a claim for tiles which had been rejected by the architect, the Judge of the Court is reported to have said, that "directly the manufacturer receive notice that an architect had rejected his goods, it was his place to remove the materials complained of. If an architect unjustly decided, the tradesman had his remedy in law."[3] In that case the judgment doubtless went upon the particular facts of it; but it should be borne in mind, that the decision of a judge of an inferior Court does not carry with it the weight which attaches to a judgment of a superior Court, and this case is referred to merely as an illustration of the text.

IV.

PARTY WALLS AND INJURIES TO BUILDINGS.

THIS is a subject which has relation more to the rights of property than to the liabilities of those engaged in the building profession; but nevertheless, in a work of this kind, it is necessary that it should be noticed, as it is of great interest and importance. It is a subject of much difficulty to architects and builders; for the rights of adjoining owners to the support given by the joint or party-wall of their respective premises is often a matter of great

[1] Thornton *v.* Place, 1 M. and R. 218.
[2] Lovelock *v.* King, 1 M. and R. 60. [3] 17 Builder, 380.

doubt and uncertainty. The nature and extent of that right, and how far party-walls may be interfered with, without encroaching on the rights of adjoining proprietors, are questions which frequently arise in building operations. If the adjoining proprietor has a right to the support given to his premises by a party-wall, and damage accrue by reason of an adjoining house having been taken down, without the party-wall having been properly underpinned, he will have a right of action against the person causing the damage, either by himself or by his agents. The question to be determined in such a case is more a question of fact than of law. The extent of the injury, and the liability for it in damages, are questions which a jury would have to determine upon the evidence before them, which is most frequently conflicting and contradictory.

Where a public nuisance exists, caused by a ruinous house in such a state as to occasion fear to the neighbours and the public, the occupier of the house is immediately liable to the public for the continuance of the nuisance.[1] There is, however, no obligation towards a neighbour cast by law on the owner of a house, merely as such, to keep it repaired in a substantial manner; his duty in such a case is merely to prevent it from becoming a nuisance to his neighbour. A declaration set forth that a certain messuage was in the occupation of the tenant of the plaintiff, who had the reversion; that the defendant was the proprietor of another messuage adjoining; and by reason thereof, as such owner and proprietor, ought to have repaired and kept in a substantial manner the messuage; and in an action for non-repair, it was pleaded that the messuages were contiguous and abutting on each other, and were divided by a party-wall, whereof the plaintiff was seised of an undivided moiety; that it was in a ruinous state, and being parcel of the messuage, had fallen on the first-mentioned messuage; and it was held that the declaration was bad.[2] An action on the case was brought by a reversioner of a house against the owner of the adjoining house, for pulling it down without shoring up the plaintiff's house, in consequence whereof it was impaired and in part fell down. The plaintiff being nonsuited, upon a rule obtained to set aside the nonsuit, it was held, first, that the plaintiff could not recover, on the ground of the defendant not having given notice that he was about to pull down his house, that not being alleged as the cause of the injury; secondly, that as the plaintiff had not alleged or proved any right to have his house supported by the

[1] Rex *v.* Watts, 1 Salk, 357.

[2] Chauntler *v.* Robinson, 4 Exch. 163.

defendant's house, he was bound to protect himself by shoring, and could not complain that the defendant had neglected to do it.[1] The facts upon which the plaintiff was nonsuited are important, and they are therefore here stated at length. It appeared on the trial, that the two houses were very old and decayed, the party-wall between them weak and defective; that for some time pieces of timber (struts) had been carried across Honey Lane, on the east side whereof defendant's house was situate, to the opposite house on the west side of the lane; that the plaintiff's house adjoined the defendant's eastward; that these struts, by preventing the defendant's house from falling westward, had the effect also of preventing the plaintiff's house from falling that way; that when defendant's house was taken down, these struts were necessarily removed, and no other and longer struts substituted, extending from the plaintiff's house on the opposite side of Honey Lane, nor any upright shores placed within the plaintiff's house to sustain the floors and roof without the aid of the party-wall: that if either of these measures had been adopted, the plaintiff's house might have stood; but that neither of them being adopted, it soon became separated from the house adjoining it on the east, and either partly fell, or was necessarily taken down, and rebuilt, being injured, dangerous, and uninhabitable. Moreover, it did not appear whether the two houses had been erected at the same time, or at different times; but from their construction, it seemed likely that they were built at or about the same time. The freehold was then in different hands, and it was also most probably the case that it was in different hands at the time the houses were built.

The following case is a further illustration. The plaintiff owned a house, adjoining which was the house of a third person, and adjoining this third person's house were two houses of the defendants. These four houses, for more than thirty years past, were all of them out of the perpendicular, leaning to the west. The defendants contracted to have their two houses, which were the most westward, pulled down, and others erected in their stead. The contractor accordingly pulled them down, and by so doing the plaintiff's house fell, doing considerable damage. Upon this state of facts, it was held that the plaintiff had not established his claim to a right of support for his house, and enjoyed as of right from the defendants through the medium of the plaintiff's house being supported by the intermediate house, which leaned upon the defendant's house.[2]

[1] Payton *v.* Mayor, &c., of London, 9 B. and C. 725.
[2] Solomon *v.* the Vintners' Company, 33 L. T. 224.

In an action by one tenant in common of a party-wall against a builder employed by the other tenant for pulling it down carelessly and rebuilding it with unreasonable delay, special damage being laid, damage to fixtures, loss to business, &c., one count being as trespass, the other being grounded on a want of due care and diligence; the tacit assent of the plaintiff to the work being commenced was held to support a plea of leave and license as to the count for trespass; but that the plea was not applicable to the second count alleging delay and negligence in rebuilding the wall, supposing that the action was sustainable.[1]

It may be further observed that the mere circumstance of juxtaposition does not render it necessary for a person who pulls down his wall to give notice of his intention to the owner of an adjoining wall which rests upon it; and that he is not even liable for carelessly pulling down his wall if he had not notice of the existence of the adjoining wall, provided, however, the plaintiff has not a right to have his wall supported by that of the defendant.[2]

Where several houses belonging to the same owner are built together, so that each requires the mutual support of the neighbouring house, and the owner parts with one of the houses, the right to such mutual support is not thereby lost. The reason for this is, that the law presumes that the owner reserves to himself such right, and at the same time grants to the new owner an equal right; and, consequently, if the owner parts with several houses at different times, the possessors still enjoy the right to mutual support, the right being wholly independent of the question of the priority of their titles.[3]

An adjoining owner has no right to underpin a party-wall, either partially or wholly, unless he can do so without injury to the adjoining messuage. Whether or not the party who underpins the wall has a several interest in half of it, or is tenant-in-common with the other party of the whole wall, he is liable for the injury resulting from his mode of dealing with it.

The plaintiff, in his declaration, complained that he, being possessed of a certain dwelling-house, and the defendant being also possessed of a certain other dwelling-house next adjoining that of the plaintiff, the defendant proceeded to pull down his said house for the purpose of building another house on the site thereof; and that the defendant continuing, &c., by his workmen, &c., behaved

[1] Pfluger *v.* Hocken, 1 F. and F. N. P. 142.
[2] Chadwick *v.* Trower, 3 N. S. C. 334.
[3] Richards *v.* Rose, 9 Exch. 218.

and conducted himself so carelessly, negligently, and improperly in and about digging and clearing the ground for the foundation of the said house, on the site of the said first-mentioned house, and in and about underpinning the party-wall between that house and the said house of the plaintiff, &c., and by and through the carelessness, &c., of the defendant and his agents, the said party-wall, and all the walls, floors, beams, &c., of the said house of the plaintiff were greatly sunk, cracked, weakened and injured, &c.: this it was held disclosed a good cause of action against the defendant; for that the defendant had no right to underpin the party-wall, either partially or wholly, unless that could be done without injury to the plaintiff's house, even though it might be doubtful whether the interests of the parties were several, or whether they stood in the relation of tenants-in-common.[1]

Again, a person cannot be compelled to execute works under an agreement if the execution of those works will interfere with rights acquired by third parties. A motion for an injunction to restrain the rebuilding of a house until the whole eastern party-wall had been pulled down was made under the following circumstances:—The plaintiff was the ground landlord of the house in question, the defendants being his tenants, and a contract in writing was entered into between the parties to pull down the entire structure and rebuild it upon certain specified terms. The defendants having pulled down the building, with the exception of the eastern party-wall, gave notice, under the Metropolitan Building Act, to the adjoining owner on the east side, and an award was made under the Act, the district surveyor being umpire, and under that award they were proceeding to underpiece and patch, instead of entirely removing the party-wall in question. The plaintiff, contending that this was a breach of the contract, filed a bill for specific performance, and for an injunction to restrain the rebuilding until the whole eastern party-wall was pulled down. In delivering judgment, refusing the motion for an injunction, the Vice-Chancellor (Kindersley) said that it was unnecessary to determine the question whether a bill for specific performance would lie upon a building contract, although he had no doubt that such a case stood upon exactly the same footing as any other contract. On such a contract, he said, although the Court might not be able to compel a party to do an act, it might restrain him from doing it in any other mode than that contracted for. In the present case; the defendants not pretending that they were acting in accor-

[1] Bradbee *v.* Christ's Hospital (Governors) 2 Dowl. (N. S.) 164; 2 Scott, N. R. 79, 4 Man. and G. 714.

dance with the contract, the difficulty was that third parties were interested. The Act of Parliament had laid down certain rules, binding on all parties, and if proceedings had been taken by which those third parties (the adjoining owners) had acquired rights, could the Court affect a state of things in which they were deeply interested? The defendants desired to fulfil the contract; whether they had taken the proper steps for that purpose was another question. They gave notice to the adjoining owners that they intended to pull down and rebuild the party-wall, if, on a survey, it was so far defective as to make it necessary. It was said that the notice ought to have been imperative by the building owners that they would do it after a certain time. The clause of the Act with regard to such notice bore no such construction. Where, although a party-wall was sufficient to prevent fire, it was not sufficient for a structure the building owner meant to lay upon it, he might pull it down at his own expense; but where both parties were interested in its removal, each bore a portion of the cost. The building owner in the first case had a right on notice to pull down the party-wall, however inconvenient to the adjoining owner, who had also a right to challenge its necessity, and to appoint surveyors and an umpire to determine the question. The only appeal from such a proceeding was to the County Court, which alone had the power to deal with it, and, unless on appeal from the County Court, no Court could interfere any more than with a decree of the House of Lords. If there was a dispute about the thickness, there was the same right of arbitration. It was said that the award was bad because the district surveyor was umpire; but he was, in fact, the most proper person, unless he was otherwise interested, and here he was not. It was now asked that, after the award had settled everything, the defendants must pull down the wall. Assuming they were entirely wrong, and were acting in contravention of the agreement, still, when the plaintiff asked for an injunction, which might leave the adjoining owners with their rooms exposed to the sky, he was asking the Court to compel the defendants to do that which they were unable to do. It was the same as the case of a vendor who had burned his title-deed. That might be a very wicked act, but could the Court decree him to deliver it up, and commit him to prison if he did not?[1]

The following bears on the same subject. A person had pulled down a party-wall, thereby destroying the internal decorations of his next neighbour's house, and rebuilt the wall without restoring or replacing the decorations. On a motion for a *mandamus* the

[1] Seawell *v.* Webster, MS.

Court held that it was not competent for the person so injured to compel by *mandamus* the reihstatement of his apartments under the Building Act, 14 Geo. 3. c. 78, § 41, but that his remedy was by action against the person causing the injury.[1]

Of common right the owner of the surface of the soil is entitled to support for his buildings thereon from the adjacent strata; and therefore if the owner of minerals remove the strata, it is his duty to leave sufficient support for the surface in its natural state. But in 2 Rolls abr. 564, tit. *Trespass* I. pl. 1,[2] it is said, "If A, seised in fee of copyhold land next adjoining that of B, erect a new house on his land, and part of the house is erected on the confines of his land next adjoining the land of B, if B afterwards digs his land near to the foundations of the house of A, but not touching the land of A, whereby the foundation of the house and the house itself fell into the pit, still no action lies at the suit of A against B, because this was the fault of A himself that he built his house so near to the land of B; for he could not by his act hinder B from making the most profitable use of B's own land. But a man who has land next adjoining to my land cannot dig his land so near to my land that thereby my land shall fall into his pit; and for this, if an action were brought, it would lie." In a late case this doctrine was upheld; the reason given being that the plaintiff could not, by putting an additional weight upon his land, and so increasing the lateral pressure upon the defendant's land, render unlawful any operation in the defendant's land which, before would have caused no damage.[3] Where, however, a house has been supported more than twenty years by land belonging to another proprietor with his knowledge, and he digs near the foundation of the house whereby it falls, he is liable to an action at the suit of the owner of the house.[4] But in a more recent case it was held that no cause of action accrued by the mere excavation by a defendant on his own land, so long as he caused no damage to the plaintiff; and that the cause of action accrued when the actual damage first occurred, from which time the statute of limitations began to run, and not from the time when the excavation was made.[5]

In Gale on *Easements*, p. 216, it is observed on this latter point, "If the neighbouring owners might excavate their soil on every

[1] Reg. v. Ponsford, 3 Dowl. (N. S.) 116; 12 L. J. 313; 7 Jur. 767.
[2] Humphries v. Brogden, 12 Q. B. 739.
[3] Wyatt v. Harrison, 3 B. and Ad. 871.
[4] Stansell v. Jollard, 1 Selw. N. P. 457; Hide v. Thornborough, 2 Carr. and Kir. 250; Partridge v. Scott, 3 Mee. and W. 220.
[5] Bonomi and Wife v. Backhouse, 33 L. T. 331.

side up to the boundary line to an indefinite depth, land thus deprived of support on all sides could not stand by its own coherence alone."

"This right to a lateral support from adjoining soil, is not," Lord Campbell, *C. J.*, in Humphries *v.* Brogden, observed, "like the support of one building upon another, supposed to be gained by grant, but is a right of property passing with the soil. If the owner of two adjoining closes conveys away one of them, the alienee, without any grant for that purpose, is entitled to the lateral support of the other close the very instant when the conveyance is executed, as much as after the expiration of twenty years or any longer period."

In Scotland, where a house is divided into different floors (flats) or stories, each floor belonging to a different owner, the proprietor of the ground-floor is bound merely by the nature and condition of his property, without any servitude or contract, not only to bear the weight of the upper story, but to repair his own property, in order that it may be capable of bearing that weight; and as the proprietor of the ground-story is obliged to uphold it for the support of the upper, the owner of the upper must uphold his story as a roof or cover to the lower.[1]

Where the owner of two or more adjoining houses sells and conveys one of them to a purchaser, such house is entitled to the benefit, and is subject to the burden, of all existing drains communicating with the other house, without any express reservation or grant for that purpose. Thus the plaintiff's and the defendant's houses adjoined each other; they having formerly been one house, and converted into two by the owner of the whole property. Subsequently the defendant's house was conveyed to him, and, after that, the plaintiff took a conveyance of his house. At the time of these conveyances, a drain ran under the plaintiff's house and then under the defendant's house, and discharged itself into the common sewer. Water from the eaves of the defendant's house fell on the plaintiff's house, and then ran into a drain on the plaintiff's premises, and then through the drain into the common sewer, through which the plaintiff's house was drained. On the trial of the action, a verdict was entered for the plaintiff, with leave to the defendant to move to enter a verdict for him; and it was held by the Court, that the plaintiff was, by implied grant, entitled to have the use of the drain as it was used at the time the defendant purchased his house.[2]

[1] Erskine's Inst. book i. tit. 9, § 11.

[2] Pyer *v.* Carter, 1 H. and N. 916.

V.

ARBITRATIONS.

THE law with regard to submissions to arbitration is too extensive a subject to be exhausted within the limits of this work; and, indeed, it would answer no useful purpose to attempt to do so, as the subject is more appropriately treated of at length in the works of practice intended for the special use of the legal profession. So far, however, as lay arbitrators and laymen are concerned, the more salient points of the law of arbitrations will be found in the following pages; the object of the author has been to set before his readers the landmarks by which they must be guided in matters of this sort.

1. *The Submission.*

Merchants, traders, and others, desiring to end any controversy, suit, or quarrel, for which there is no other remedy but by personal action or suit in Equity, may, by arbitration, agree that the submission of their suit to the award or umpirage of any person shall be made a rule of any Court of Record which the parties shall choose, and insert their agreement in the submission or the condition of the bond or promise whereby they oblige themselves to submit to the award or umpirage of any person or persons; which may, on affidavit of the witnesses thereto, or any one of them, be made a rule of Court and enforced by the usual means.[1] The act puts submissions to arbitration, where no cause was depending, upon the same footing as where there was a cause depending, and was only declaratory of what the law was in the latter cases previous to its passing.[2] The submission so made is not revocable without leave of the Court; and the arbitrator or umpire is to proceed with the reference notwithstanding revocation by the parties, and make his award, although the person making the revocation shall not afterwards attend the reference; and the Court, or a judge thereof, may, from time to time, enlarge the time for making the award.[3]

The subject of submissions to arbitration is now, however, chiefly regulated by the Common Law Procedure Act, 1854.[4] By that Act every agreement or submission to arbitration by consent,

[1] 9 and 10 W. 3. c. 15.
[2] Lucas *v.* Wilson, 2 Burr. 701.
[3] 3 and 4 W. 4. c. 42, § 39.
[4] 17 and 18 Vict. c. 125.

whether by deed, or instrument in writing not under seal, may be made a rule of any one of the superior Courts of Law or Equity, on the application of any party thereto, unless the agreement or submission contain words purporting that it is intended that it should not be made a rule of Court.[1] When the reference is or is intended to be to two arbitrators, one appointed by each party, either party in the case of the death, refusal to act, or incapacity of any arbitrator appointed by him, may substitute a new arbitrator, unless the document authorizing the reference show that it was intended that the vacancy should not be filled up. If one party fail to appoint an arbitrator, either originally or by way of substitute, for seven clear days after the other party has appointed one, and has served the party failing to appoint with a written notice to make the appointment, the party who has appointed an arbitrator may appoint him to act as sole arbitrator in the reference; and an award made by him will be as binding as if the appointment had been by consent. The Court or judge may, however, revoke the appointment on such terms as may appear just.[2]

If the reference be to a single arbitrator, and all the parties do not concur in the appointment; or if the person appointed refuse to act, become incapable, or die, and it was not intended that the vacancy should not be supplied, and the parties do not concur in appointing a new one; or if where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator, and do not; or if any appointed umpire or third arbitrator refuse to act, become incapable, or die, and it was not intended that the vacancy should not be supplied, and the parties or arbitrators do not appoint a new one: in every such instance any party to the submission may serve the remaining parties, or the arbitrators, as the case may be, with a written notice to appoint an arbitrator, or umpire, or third arbitrator; and if within seven days thereafter no appointment be made, any judge of any superior Court of Law or Equity, upon summons, may make the appointment; and the person so appointed shall have the like power to act in the reference, and make an award, as if he had been appointed by consent of all parties.[3] Formerly an agreement to refer was no bar to an action; but now, if after a reference to arbitration, an action or suit in Equity be commenced, the defendant may apply to the Court for, and the Court, after appearance and before plea or answer, on being satisfied that no sufficient reason exists why the matters in dispute cannot be or ought not to be referred to arbitration, according to the agreement, and that the defendant was at the time of the

[1] 17 and 18 Vict. c. 125, § 17. [2] Ib. § 13. [3] Ib. § 12.

bringing the action or suit, and still is, ready and willing to join and concur in all acts necessary and proper for causing them to be decided by arbitration, may make a rule or order staying all proceedings, on such terms, as to costs or otherwise, as to the Court or judge may seem fit; and the rule or order may afterwards be discharged or varied as justice may require.[1]

The section contemplates a completed deed of submission; therefore, where several persons agreed to refer matters in dispute to an arbitrator, and that a formal submission should be drawn up to be signed by themselves and another party, and that party refused to sign, the Court refused to stay an action commenced by one of the parties to the agreement against another; the agreement which was come to for a formal submission not being within the section, and the formal submission not having been executed: *semble*, the 17 & 18 Vict. c. 125, § 11, is not confined to the case of a deed or instrument in writing, in which there is a stipulation of the parties to it to refer differences to arbitration.[2]

Where an action is brought, and it is made to appear to a Court or judge that the matter in dispute consists wholly or in part of matters of mere amount, which cannot be conveniently tried in the ordinary way, the Court or judge may decide the matter in a summary manner; or order that it be referred, either wholly or in part, to an arbitrator appointed by the parties, or to an officer of the Court, or in country causes to the Judge of any County Court, upon such terms as to costs and otherwise as the Court or judge shall think reasonable; and the decision of the Court or judge, or the award or certificate of the referee shall be enforceable, by the same process as the finding of a jury on the matter referred.[3] If in such a case it appear to the Court or judge that the allowance or disallowance of any particular item or items in the amount depends upon a question of law or fact, the Court or judge may direct a case to be stated, or an issue or issues to be tried; and the decision of the Court or finding of the jury is to be taken and acted upon by the arbitrators as conclusive.[4] Also, if upon the trial of any issue of fact by a judge, it appear to him that the questions arising thereon involve matters of account which cannot conveniently be tried before him, he may, at his discretion, order that the matter of account be referred to an arbitrator appointed by the parties, to an officer of the Court, or, in country cases, to a County Court Judge, upon such terms as to costs and otherwise as he may think reasonable; and the award or certificate of the referee shall have

[1] 17 and 18 Vict. c. 125, § 11.
[2] Mason v. Hadden, 33 L. T. 163.
[3] 17 and 18 Vict. c. 125, § 3.
[4] Ib. § 4.

the same effect as the award or certificate of a referee before trial.[1] With reference to the above provisions, it is necessary to observe that the Court of Chancery has the same jurisdiction over arbitrators and awards, under the Common Law Procedure Act, 1854, as the Courts of Common Law have.[2]

It is a principle of law that parties cannot by contract oust the Courts of their jurisdiction; and a covenant in an arbitration agreement to that effect is absolutely void;[3] thus, it has been held that an action lay on a contract containing a prospective agreement, that if any difficulties arose it should be referred, where one of the parties to the contract refused a reference.[4] Nevertheless, persons may covenant that no right of action shall accrue till a third person has decided in a difference that may arise between the contracting parties;[5] and where there is an agreement to refer a question of account due for work to an engineer, and to exclude the jurisdiction of the ordinary tribunals till an award shall be made by him, it will be valid;[6] for if a contract provides for the determination of the contractor's claims and liabilities by the judgment of a particular person, everything depends upon that person's decision, and until he has spoken, no right arises which can be enforced either at law or Equity. Clauses which are derogatory to the powers possessed by arbitrators under the general law, should not, however, be introduced into submissions to arbitration. Thus, if in a cause referred to arbitration, the submission contain a clause that "the witnesses of each party respectively shall be sworn before a Judge of a Superior Court, or a Commission thereof," the arbitrator is notwithstanding entitled to swear the witnesses himself, if he think proper to do so; as these words are merely cumulative, and do not take away the power vested in him by the 3 & 4 Wm. 4. c. 42, § 41.[7]

An action by an engineer for professional services, the claim depending partly upon his right to commission and partly on the propriety of charges for work done, the items of which were numerous, the judge ordered to be referred to arbitration as a

[1] 17 and 18 Vict. c. 125, § 6. [2] *In re* Aitken 3 Jur. (N. S.) 1296.

[3] Mexborough *v.* Bower, 7 Bea. 127; Scott *v.* Liverpool Corporation, 5 Jur. (N. S.) 105; 28 L. J. (N. S.) Ch. 230; Horton *v.* Sayer, 33 L. T. 287.

[4] Livingston *v.* Ralli, 5 El. and Bl. 132; 24 L. J. Q. B. 269: 1 Jur. (N. S.) 591. See also Thompson *v.* Chadwick, 8 T. R. 139.

[5] Scott *v.* Avery (in error), 5 H. L. Cas. 611; 25 L. J. Exch. 303; 2 Jur. (N. S.) 815.

[6] Scott *v.* Liverpool Corporation, 27 L. J. Ch. 641; 28 L. J. Ch. 230; 4 Jur. (N. S.) 402.

[7] Hodson *v.* Wilde, 2 Jur. 992.

matter of account, consenting to try the question with regard to the right to commission as a question of fact.[1] It has also been held that an action for dilapidations where money is paid into Court, and the question is only as to the amount of the dilapidations, may be a matter of account, and the subject of a compulsory reference under the 17 and 18 Vict. c. 125, § 3.[2]

If a contract be so framed that the fulfilment of one part of it be left to be determined by arbitration; as a contract for the sale of a house and certain fixtures to be taken at a valuation to be made by persons mutually chosen, or an umpire; a Court of Equity cannot decree a specific performance of the conditions of the contract when the arbitration has not been had recourse to in the first instance.[3]

Finally, it should be borne in mind, that the fact of one of the parties to a reference having become a bankrupt is no revocation of a submission to arbitration.[4] Moreover, an arbitrator's authority is not revoked by the death of one of the parties to the submission if the order of reference contains a provision that he shall make and publish his award by a certain day specified, ready to be delivered to the parties, or, if either of them should be dead, to their respective personal representatives.[5]

2. *Witnesses.*

The Court, by which the rule or order shall be made, or which shall be mentioned in the submission, or any judge, by rule or order, may command the attendance and examination of any person to be named, or the production of any documents to be mentioned in the rule or order; and disobedience shall be deemed a contempt, if, in addition to the service of the rule or order, an appointment of the time and place of attendance signed by one at least of the arbitrators, or by the umpire before whom the attendance is required, shall also be served either together with or after the service of the rule or order. The witnesses, however, are to be entitled to the like conduct money and payment of expenses, and for loss of time, as for and upon attendance at any trial. The application for the rule or order must set forth the county where the witness is residing at

[1] Murray *v.* Sunderland Dock Company, 1 F. and F. 179.

[2] Cummings *v.* Birkett, 3 H. and N. 156; 27 L. J. Exch. 216; 4 Jur. (N. S.) 242.

[3] Darbey *v.* Whitaker, 4 Drew. 134.

[4] Hemsworth *v.* Brian, 1 C. B. 131; 2 Dowl. and L. 844; 14 L. J. C. P. 134.

[5] Wrightson *v.* Bywater, 6 Dowl. P. C. 359; 3 Mee. and W. 199.

the time, or satisfy the Court or judge that the person cannot found. It is further provided, that no person shall be compelled to produce any writing or other document that he would not be compelled to produce at a trial, or to attend more than two consecutive days, to be named in the order.[1]

When it is ordered or agreed in any rule or order of reference, or submission containing an agreement to make it a rule of Court, that the witnesses shall be examined upon oath, the arbitrator or umpire, or any one arbitrator, may and are required to administer an oath to such witnesses or to take their affirmation in cases where affirmation is allowed by law instead of oath; and perjury may be assigned on such oath or affirmation.[2] By the subsequent Act to amend the law of evidence, every arbitrator having by law or consent of parties authority to receive evidence, may administer an oath to the witnesses.[3] In taking evidence, arbitrators are bound by those rules of evidence which govern the Courts of Law;[4] but the award will not be set aside on the ground of the witnesses not having been examined on oath, if no such objection was made at the time of their examination.[5] The refusal of an arbitrator to examine witnesses is however sufficient misconduct on his part to induce the Court to set aside his award, even though he may think that he has sufficient evidence without them.[6] If the arbitration relate to a matter in which value is in question, the arbitrator should look narrowly into evidence of value which may be tendered; for, it is said, little reliance is to be placed on the evidence of surveyors in a contest as to value.[7] It has however been held that a surveyor is a competent witness in the matter of a building lease; and therefore that a lessee who has had the advice and assistance of a competent surveyor cannot complain of surprise.[8]

Where a cause is referred to arbitration with power to the arbitrator to settle all matters in difference between the parties, the submission providing also that the parties respectively are to be examined on oath, if thought necessary by him, it is in the discretion of the arbitrator to examine the parties, each in support of his own cause, if he think fit so to do.[9] If the submission be "so

[1] 3 and 4 W. 4. c. 42, § 40. [2] Ib. § 41.
[3] 14 and 15 Vict. c. 99, § 16.
[4] Attorney-General *v.* Davison, McClel. and G. 160.
[5] Ridout *v.* Pye, 1 B. and P. 91.
[6] Phipps *v.* Ingram, 3 Dowl. P. C. 669.
[7] Waters *v.* Thorn, 22 Beav. 547.
[8] Haberdashers' Company *v.* Isaac, 3 Jur. (N. S.) 611, V. C. W.
[9] Wells *v.* Benskin, 9 Mee. and W. 45; 1 Dowl. (N. S.) 343.

that the witnesses be examined on oath," affidavits cannot be read; and if they are, the award may be set aside.[1]

3. *The Arbitrators—their Powers and Duties.*

The proceedings upon an arbitration, unless otherwise directed, must be conducted in like manner, and subject to the same rules and enactments as to the power of the arbitrator and of the Court, the attendance of witnesses, the production of documents, enforcing or setting aside the award or otherwise, as upon a reference made by consent under a rule of Court or judge's order.[2]

The mode of conducting the arbitration must be left to the arbitrators, subject always to the liability of their award to be set aside if they conduct it illegally. In conducting the arbitration, however, they must act impartially, and not consider themselves agents for the persons by whom they were respectively appointed.[3] It should be observed also, that there is no distinction with regard to legal and other arbitrators; and that the Court will not examine an award because it has been made by one who is not in the profession of the law.[4]

An arbitrator's power is determined by the death of the parties to the submission, or any one of them at any time before the award;[5] but it is best in entering into the submission to stipulate that the reference shall not be defeated by the death of one of the parties before award made,[6] for in that case the death of either of the submitting parties will not determine the authority of the arbitrator, or vacate the subsequent proceedings upon the reference;[7] so also where the reference is ordered by a Court of Equity or under a rule of Court.[8] Where the submission is by deed, an arbitrator may, with the assent of both parties, be substituted in the place of one of the original arbitrators.[9]

In matters submitted to arbitration, it is of the greatest importance that the arbitrators should act within the powers given to them

[1] Banks *v.* Banks, 1 Gale, 46. [2] 17 and 18 Vict. c. 125, § 7.
[3] Calcraft *v.* Roebuck, 1 Ves. J. 226.
[4] Jupp *v.* Grayson, 3 Dowl. P. C. 199; 1 C. M. and R. 523.
[5] Edmunds *v.* Cox, 2 Chit. 432; 3 Doug. 406; Cooper *v.* Johnson, 2 B. and Ald. 394; 1 Chit. 387; Potts *v.* Ward, 1 Mars. 366.
[6] Toussaint *v.* Hartop, 7 Taunt. 571.
[7] Macdougal *v.* Robertson (in error), 2 G. and J. 11; 1 M. and P. 147; 4 Bing. 435.
[8] Dowse *v.* Cox, 10 Moore, 272; 2 Bing. 20; Clarke *v.* Crofts, 4 Bing. 143; 12 Moore, 349.
[9] *In re* Tunno, 5 B. and Ad. 488; 2 Nev. and M. 328.

by the submission, as if they do not, the whole of the proceedings may be set aside. They should also take care that their award is not open to exception on the ground of uncertainty; and that no part of their finding is bad, for if it be, the whole of the award may be set aside. Thus in an arbitration the arbitrator recited that, among other matters in difference, it was referred to him to say whether certain grates, &c., were part of the demised premises; and further, to order what should be done to make a final determination of such matters in difference. He awarded certain damages to the plaintiff on the issues in the declaration, and found that the grates, &c., were part of the demise of the defendant to the plaintiff, and that they were removed and carried away by the defendant and applied to his own use, and that they were of the value of 11*l.* 5*s.*; and he ordered the plaintiff to fix and set up other grates, &c., in the place and stead of such as were removed, and to leave them to and for the use of the defendant at the end of the term, and that the defendant should pay the plaintiff the sum of 11*l.* 5*s.* The defendant by affidavit denied that power was given to the arbitrator to order what should be done by the parties as to the grates; and it was held that the award was bad, as the arbitrator had exceeded his powers, and that the award itself was uncertain in not specifying the quality and price of the grates, &c., to be set up; and also, that as the matter in difference as to the grates was one of the matters submitted to the arbitrator, the finding on that being bad, the whole award must be set aside.[1]

An arbitrator greatly errs if, in the minutest particular, he takes upon himself to listen to evidence behind the back of any of the parties to the submission;[2] and where an arbitrator questions a witness, and receives statements from him in the absence and without the consent of one party to the reference, the Court will set the award aside, without taking into consideration the nature of the statements, or the probability of their having influenced the decision.[3] The Court will also set aside an award on the ground of interviews having taken place between the arbitrator and one party in the absence of the other; and similar misconduct on the part of the person applying will not prevent the Court setting aside the award, for the matter concerns the true administration of justice.[4] But it was held by the House of Lords that it is no objection to an award that the arbitrator, in the absence of one of

[1] Price *v.* Popkin, 2 Per. and Dav. 304; 3 Jur. 433.
[2] Drew *v.* Leburn, 2 Mac. H. L. Cas. 1.
[3] Reg. *v.* Dobson; S. P. Dobson *v.* Groves, 6 Q. B. 637.
[4] Harvey *v.* Skelton, 7 Bea. 455.

the parties, called in the other and asked him merely whether he admitted or disputed certain items in an account.[1] The arbitrators must be perfectly unbiassed in their judgment as to the matter referred to them; *i.e.*, they must have no direct personal interest in the matter, however remote. It is sufficient for the interference of a Court of Equity if any circumstance is shown which is calculated to produce a bias in the judgment of an arbitrator. Therefore, where the guarantee by an architect, who was also the arbitrator, that the expense of a certain building should not exceed a certain sum, was unknown to the plaintiffs, it was held that they were not bound by their contract to submit in all things to his determination.[2]

Upon a reference, the arbitrator should be careful not to admit a party in the cause as a witness, unless a specific power so to do be given to him; for if he do so, the award may be set aside. Thus the parties to an order of reference mutually agreed to strike out the usual clause giving the arbitrator power to examine the parties. At the hearing, the plaintiff's attorney tendered the plaintiff as a witness, and he was examined by the arbitrator. The defendant's counsel objected to the admission of the plaintiff; but as the arbitrator decided against him, he proceeded to cross-examine the plaintiff, and went into his case. On a motion to set aside the award for irregularity, it was held that the examining of the plaintiff under the circumstances was a good ground for setting aside the award, and that the objection was not waived by the defendant's going on with the arbitration under the circumstances. But *semble*, if the defendant had tendered himself as a witness to support his own case, that would have been a waiver.[3]

Arbitrators may under certain circumstances reject evidence tendered to them on a reference: thus, when under an order of reference the parties had submitted their accounts to the arbitrators, and a report had been made and a meeting fixed to close the accounts, one of the parties at the meeting tendered in evidence fresh documents which he had discovered relating to the accounts, and the arbitrators after looking at them declined to go into them; it was held that this was not misconduct affecting the validity of the award, but a rejection of evidence within the authority of the arbitrators.[4] Again, where an arbitrator has made an appointment,

[1] Anderson *v.* Wallace, 3 Cl. and Fin. 26.

[2] Kemp *v.* Rose, 4 Jur. (N. S.) 919; 32 L. T. 51.

[3] Smith *v.* Sparrow, 1 Dowl. and L. 604; 1 B. C. 340; 16 L. J. Q. B. 139; 11 Jur. 126.

[4] *In re* March, 16 L. J. Q. B. 330.

and one of the parties, although under the mistaken notion that there will be notice of another meeting before an award is made, goes away without tendering evidence, or intimating that he intends to offer it, the arbitrator may proceed *ex parte*, and without further notice make an award.[1]

In referring a matter to arbitration it is necessary that it should be borne in mind that, as before observed, the law recognises no distinction between professional and non-professional arbitrators; so that if a case be referred to a non-professional arbitrator, and he make a mistake in law, the parties to the reference are as much bound by the award as if the arbitrator belonged to the former class. Where parties refer matters to an arbitrator, whether he be a professional (*i.e.*, legal) man or not, they must be considered as having referred both the case and all matters of law arising upon it, and must take the consequence of any mistake either in law or upon the facts. Whether the question disputed before the arbitrators, be one of law or fact, is altogether immaterial, and the parties are in every case equally bound by his decision upon it.[2]

4. *Umpirage.*

If a reference be to two arbitrators, and the terms of the reference do not show that it was intended that there should be an umpire, or provide otherwise for the appointment of an umpire, the two arbitrators may appoint an umpire at any time within the period during which they have power to make their award, unless they be called upon by the terms of the reference to make the appointment sooner.[3] In any case where an umpire shall have been appointed, it shall be lawful for him to enter on the reference in lieu of the arbitrators, if they shall have allowed their time, or their extended time, to expire without making an award, or shall have delivered to any party or to the umpire a notice in writing stating that they cannot agree.[4]

The appointment of an umpire in a submission to arbitration is a judicial act, and must therefore be made or signed by the arbitrators at the same time, or in each other's presence; for if it be not, the Court will not issue an attachment for non-performance of the award of the umpire.[5] With regard to the appointment of

[1] Harding *v.* Watts, 15 East, 556; Tryer *v.* Shaw, 27 L. J. Exch. 320.

[2] Ashton *v.* Pointer, 2 Dowl. 651; Young *v.* Walter, 9 Ves. Jur. 364; Ching *v.* Ching, 6 Ib. 282; Henty *v.* Rally, 4 Jur. 1091.

[3] 17 and 18 Vict. c. 125, § 14. [4] Ib. § 15.

[5] Lord *v.* Lord, 5 El. and Bl. 404; 26 L. J. Q. B. 34; 1. Jur. (N. S.) 893.

an umpire, it is said that it may be made by lot if the parties to the reference assent to such a mode of election.[1] But the assent of the parties to the umpire chosen does not make the election good, unless they know the mode in which the umpire was chosen, and all the circumstances relating to his election.[2] Their assent will sufficiently appear by each presenting three names from which that of the umpire is to be drawn; or by signing the memorandum by which the person whose name is drawn is appointed umpire.[3] Again, where the appointment of an umpire by lot was consented to by the attorneys' clerk, and not by the attorneys themselves or their client, the appointment was held bad, although the parties in ignorance of the mode of appointment had attended the arbitrator.[4] So where arbitrators decided the choice of an umpire by tossing up, the acquiescence of parties subsequently to the choice and before the reference is proceeded in, does not render the appointment valid, unless the parties acquiescing have knowledge of the circumstance under which the choice was made.[5] If the reference be to three arbitrators, or any two of them, and two of them without consulting the third, and in his absence make the award, the award so made cannot be supported.[6] Moreover, the two who execute the award must do so at the same time and place and in the presence of each other, otherwise it is not what was stipulated for—viz., the joint judgment of the two; it must also be signed and published by the arbitrators at the same place.[7]

Arbitrators, having power to choose an umpire, may elect one before they enter upon the examination of the matter referred to them.[8] If, however, they appoint an umpire by lot, they will vitiate their award, even though the appointment be assented to by the attorney's clerk, who conducts the arbitration on behalf of the party seeking to set aside the award, if the assent be given without the knowledge of the party or his attorney.[9]

Where arbitrators have a special power to choose an umpire, they must refer the whole matter to him, and the submission of a

[1] *In re* Tunno, 5 B. and Ad. 488; 2 Nev. and M. 328; Taylor *v.* Backhouse, 2 Prac. Rep. 70; 20 L. J. Q. B. 233; 15 Jur. 86.

[2] *In re* Greenwood, 1 Per. and D. 463.

[3] *In re* Tunno, 5 B. and Ad. 488; 2 Nev. and M. 328.

[4] *In re* Hodson, 7 Dowl. P. C. 569.

[5] *In re* Jamieson, 4 A. and E. 945.

[6] *In re* Beck, 1 C. B. (N. S.) 695.

[7] Preston *v.* Ayre, 15 C. B. 724; Wade *v.* Dowling, 2 El. and Bl. 44; 23 L. J. Q. B. 302; 18 Jur. 728.

[8] Roe and Wood *v.* Doe, 2 T. R. 644.

[9] Hodson *v.* Drewry, 2 Jur. 1088.

particular point only of the matter in dispute will be bad. Thus where the arbitration bonds were conditioned for the performance of the award of the arbitrators, or of the umpirage of such persons as the arbitrators should jointly choose between the parties, and the arbitrators agreed upon several matters, but not being able to agree upon one point, they referred that point to an umpire, the award was held to be bad, as the umpire should have gone into the whole case, and the arbitrators had in effect chosen an umpire between *themselves*, and not between the parties to the submission.[1]

5. *The Award.*

The arbitrator is to make his award under his hand, and, unless the time be otherwise limited, within three months after he shall have been appointed, and shall have entered on the reference, or shall have been called upon to act by a notice in writing from any party. The time may, however, be enlarged by consent of the parties, or by order of Court; and if no period be stated for the enlargement in the consent or order, it shall be deemed to be an enlargement for one month.[2] An umpire is entitled to enter on the reference in lieu of the arbitrators, when they shall have allowed their time to expire without making an award, or shall have delivered a notice, in writing, stating that they cannot agree.[3]

Upon any compulsory reference, or a reference by consent, where the submission is or may be made a rule or order of Court, the arbitrator may, if it be not provided to the contrary, state his award as to the whole or any part of it in the form of a special case for the opinion of the Court; and when an action is referred, judgment, if so ordered, may be entered according to the opinion of the Court.[4] The Court or judge may also remit the matters referred or any or either of them, to the reconsideration and redetermination of the arbitrator, upon such terms as to costs and otherwise as to the Court or judge may seem proper.[5] When, however, an award is remitted back to the arbitrator under the 17 & 18 Vict. c. 125, § 8, only to set it right on the face of it, the arbitrator is not bound to rehear the parties.[6]

No precise form of words is necessary to constitute an award; for it is sufficient if the arbitrator expresses by it a decision upon the matter submitted to him. And where a cause is referred, it is

[1] Tollit *v.* Saunders, 9 Prid. 612; Bradford *v.* Bryan, Willes, 268; 7 Mod. 349.

[2] 17 and 18 Vict. c. 125, § 15. [3] Ib. [4] Ib. § 5.

[5] 17 and 18 Vict. c. 125, § 8. [6] Morris' Arbitration, 6 El. and Bl. 383.

not necessary that the arbitrator should find for the plaintiff or defendant in the very words of the issue. It is sufficient if he decide substantially the question in dispute.[1]

An award drawn up in the form of an opinion has been held sufficient,[2] and it will be good though it be drawn up by the solicitor of one of the parties.[3] It must be certain and conclusive; but *primâ facie* uncertainty will not vitiate it, if it be capable of being rendered certain or conclusive, and it may be good or bad according to the event.[4] Moreover, if the terms of an award be clear on the face of it, the Court will not admit of an affidavit of one of the arbitrators to explain their intention.[5] Again, it may be good in part and bad in part where the subject is clearly capable of being separated;[6] but not so where all the matters are within the submission, and the award is upon the face of it entire.[7] Again, if the arbitrator exceed his authority, the direction as to the excess may be rejected as a nullity, forming no part of, and consequently not affecting, the award.[8] An award only affects those who are parties to it; therefore the award of an arbitrator as between a master and his workmen, will not bind another workman who came into the employ of a master after the award, and raised in reference to himself the same question which it decided.[9]

An award is final between the parties, unless the objection is apparent on the face of it;[10] and no objection can be taken on the ground of a mistake in point of law, unless the grounds of the objection appear on the award, or in some authentic shape before the Court in which it is questioned;[11] nor will a mere statement of facts from which it may be inferred that the award was founded upon an incorrect notion of the law of the case avail.[12] If, however, the award be contrary to law, it may be impeached; for it would be an excess of power on the part of the arbitrator;[13] but not unless the law upon the subject of the award be clear.[14]

[1] Wykes and Shipton, 3 Nev. and M. 240.
[2] Matson *v.* Trower, R. and M. 17.
[3] Fetherstone *v.* Cooper, 9 Ves. Jur. 67.
[4] Aitcheson *v.* Cargey (in error), 9 Moore, 381; 2 Bing. 199.
[5] Gordon *v.* Mitchell, 3 Moore 241. [6] Addison *v.* Gray, 2 Wils. 293.
[7] Auriol *v.* Smith, 1 T. and R. 128.
[8] Aitcheson *v.* Cargey (in error), 9 Moore 381, 2 Bing. 199.
[9] Hill *v.* Levey, 28 L. J. (N. S.) Exch. 80.
[10] Sharman *v.* Bell, 5 M. and S. 504. [11] Price *v.* Jones, 2 Y. and J. 114.
[12] Delver *v.* Barnes, 1 Taunt. 48. [13] Morgan *v.* Mather, 2 Ves. Jur. 15.
[14] Richardson *v.* Nourse, 3 B. and A. 237.

Where the parties appoint a lawyer their arbitrator, they appoint him judge of law as well as of fact; the Court therefore refused to set aside the award of a barrister on the ground that he had admitted an incompetent witness.[1]

An arbitrator, it would seem, is bound to find either in the affirmative or the negative, and where he does not, but has no objection to re-consider the matter, the Court will under special circumstances refer the matter back to him to investigate more fully, and to hear new evidence.[2] It must be borne in mind, however, that the decision of an arbitrator, whether a lawyer or a layman, is binding on the parties both in matters of law and in matters of fact, unless there has been fraud or corruption on his part, or there has been some mistake of law apparent on the face of the award, or of some paper accompanying and forming part of the award;[3] where, therefore, a verdict was taken for the plaintiff subject to the award of an arbitrator as to the amount of damages, and his award included an amount of damages which (it was assumed) the plaintiff was not legally entitled to in the action, the Court refused to interfere. Again, the award is conclusive as to the amount of damages, unless the award itself can be impeached.[4]

The award must be final, sufficiently certain, and not inconsistent. The following statement of an award in the matter of a business carried on by two persons as builders and excavators which had been dissolved by mutual consent, was held to have complied with those requisites,—that the defendant should pay to the plaintiff the sum of 223*l.* 4*s.* 6*d.*, in full of all demands in respect of his one equal moiety, half part, or share of the co-partnership property, estate and effects; and that upon payment thereof, and upon having such conveyances as thereinafter mentioned tendered to him for execution, the plaintiff should, at the defendant's request, execute a proper conveyance unto and to the use of the defendant, of, in, and to certain messuages, &c. therein mentioned, subject to certain mortgage debts charged thereon; that the debts then due and owing to and from the co-partnership concern should be received and paid by the defendant and the plaintiff in equal proportions; and that if either party should advance or pay any sum or sums of money over and above his half share or proportion of the co-partnership debts, then the amount

[1] Perryman *v.* Steggall, 3 M. and S. 93; 9 Bing. 679.
[2] Fergusson *v.* Norman, 1 Jur. 797.
[3] Hodgkinson *v.* Fernie, 3 C. B. (N. S.) 189; 27 L. J. C. P. 66.
[4] Whitehead *v.* Tattersall, 1 Ad. and Ellis, 491.

so overpaid should, on demand, be made good and repaid to the party paying the same by the party making default.[1] It was, however, in that case doubted whether upon the supposition that there had been no arrangement between the partners by which the premises were ultimately to become the property of one partner, subject to the mortgages, the arbitrators did not exceed their authority in awarding the messuages, &c. to one of the parties, and not dividing them between both.

In a cause referred to a barrister, he was empowered to direct "that a nonsuit or a verdict for the plaintiff or the defendants should be entered as he should think proper," and who was at the request of either party to state any point of law upon the face of his award for the opinion of the Court; and it was held that it was not incumbent on the arbitrator to decide finally as to the amount of damages to be recovered, and to direct how the judgment should be entered up; but that having by his award disposed of all the issues joined on the record, and assessed damages separately in respect of each subject matter of complaint stated in the declaration, and having referred to the Court the question as to the right of the plaintiff to recover damages in respect of some of the grievances stated in the declaration, at the request of the defendants and at the request of the plaintiffs, the question of the validity of a custom which was claimed, and other matters, he had properly discharged his duty, and that he was not bound definitively to determine as to the validity of the custom.[2]

If the submission in a reference be to two arbitrators, and a third to be named by them, the non-attendance of the third at the meetings (owing to his having been erroneously treated as an umpire throughout the whole of the proceedings), and the want of notice to him, will not be a ground for setting aside the award of the two arbitrators first appointed.[3] Then if "all or any of the matters in difference between the parties" are referred to arbitrators who disagree, but only as to the costs, the umpire must adjudicate on the whole question.[4]

Again, if a reference be made to two persons and to a third whom they are to appoint, and the award is to be made by a majority of them, and if, after hearing all the evidence, they differ as to making the award, and subsequent to the last meeting two of

[1] Wood *v.* Wilson, 2 C. M. and R. 241.
[2] Bradbee *v.* Mayor, &c., of London, 4 Man. and Gr. 714.
[3] *In re* Marsh or Haywood *v.* Marsh, 16 L. J. Q. B. 330; 11 Jur. 657.
[4] Wicks *v.* Cox, 11 Jur. 542.

them make an award without consulting with the third; the award is bad and will be set aside.[1] So where an umpire refuses an express request either to rehear evidence already given before arbitrators, or to examine new witnesses, the Court will set aside the award;[2] and the not insisting on this objection at the time of making the award does not amount to a waiver of it. An umpire may make his award on the notes of the arbitrators if no objection be taken to his doing so. Where, however, the arbitrators disagree after hearing the witnesses, the umpire must re-hear the witnesses; and if he omits to do so and makes his award on the evidence taken down by the arbitrators, the award will be set aside. The objecting to such proceedings by the umpire may, however, be waived; but clear proof of the waiver must be given to prevent the award being set aside.[3] But in a previous case the Court refused to set aside the award of an umpire who received the evidence from the arbitrators without examining the witnesses; he not having been required to re-examine them before making his award.[4] Moreover, the umpirage will not be bad, though the arbitrators, who did not agree in their award, join in it;[5] and this even though the arbitrators are *functi officio*, and though a stranger join in it.[6] Neither would it be a valid objection to an award the fact that the arbitrators and the umpire sat and heard the evidence, and that then the latter made the award pursuant to the terms of the submission.[7]

An arbitrator is not bound to make his award on each issue specifically if his intention as to each of them is sufficiently clear from the general language of the award.[8] It will suffice if he find on the whole for one party or the other.[9]

By an order of reference the Court had power, on the validity of an award being disputed, to remit the matters referred to the reconsideration of the arbitrators. An award having been made and containing a defect, the attorneys agreed verbally that the arbitrator should amend it, subsequently to which the defendant's attorney obtained a judge's order, that the matters referred should

[1] *In re* Templeman, 6 Jur. 324.
[2] Jenkins *v.* Legg, 1 Dowl. (N. S.) 277; 6 Jur. 397.
[3] *In re* Salkeld and Slater, 12 A. and E. 767; 4 Per. and D. 732.
[4] Hall *v.* Laurence, 4 T. R. 589. [5] Beck *v.* Sargent, 4 Taunt. 232.
[6] Soulsby *v.* Hodgson, 3 Burr. 1474.
[7] *In re* the Owners of Flag Lane Chapel *v.* the Mayor, &c., of Sunderland, 5 Jur. (N. S.) 894.
[8] Clements *v.* Fuller, 11 Jur. 242. [9] Hunt *v.* Hunt, 5 Dowl. P. C. 442.

be remitted to the arbitrator for his re-consideration. Upon such re-consideration he altered the award without giving notice to either party of his intention so to do; neither party requested him to hear fresh evidence, and he did not recite the judge's order in the amended award. On a motion to set aside the award, it was held that the arbitrator was not bound to give notice to the parties, or to recite the judge's order in his amended award.[1]

An award may be equivalent to the verdict of a jury; as where a market gardener whose premises adjoined those of a gas company brought an action against the company for the injury done to his crops by reason of the noxious matter issuing from the gas-works. During the trial the judge suggested a reference to an arbitrator, who was to determine as to the injury, and as to "what should be done" between the parties. The reference having taken place, the arbitrator made his award in respect of the damage sustained up to the date of the award, and no evidence having been adduced before him as to the respective damage, a verdict was entered up for the sum awarded. The company subsequently increased their works, and on a bill being filed by the market gardener, it was held that he was entitled to perpetual injunction to restrain the further manufacture of the gas in a manner injurious to his crops, the award of the arbitrator being under the circumstances equivalent to the verdict of a jury.[2]

An action on *assumpsit* was brought on an agreement to build a house according to certain drawings, plans and specifications, and to the satisfaction of the plaintiff, and with the best materials; alleging as breaches that the defendant did not build the house to the satisfaction of the plaintiff; and that he did not perform the work with the best materials. The defendant pleaded—first, *non assumpsit;* secondly, that he did the works to the satisfaction of the plaintiff; thirdly, that before the breach the contract was rescinded; fourthly, leave and license; fifthly, that he deviated from the drawings by the direction of the plaintiff's architect; sixthly, a plea stating an agreement between the plaintiff and himself to build a stone wall in lieu of the wall mentioned in the original agreement; seventhly, that by command of the plaintiff he erected a stone wall instead of a brick wall. The plaintiff thereupon took issue on the first two pleas, traversed the third, sixth, and seventh, replied *de injuriâ* to the fourth, and demurred

[1] Baker *v.* Hunter, 16 L. J. Exch. 203.

[2] Broadbent *v.* Imperial Gas Company, 7 De G. Mac. and G. 436; 26 L. J. Ch. 276; 3 Jur. (N. S.) 221; 34 L. T. 1.

to the fifth. The cause was at the assizes referred to an arbitrator, the costs of the cause and reference to abide the event; and the arbitrator awarded a general verdict to be entered for the defendant. On proceedings being taken to set aside the award, it was held that it was not uncertain, inconsistent, or repugnant; and that it was not necessary for the arbitrator to assess contingent damages on the demurrer, neither party having requested him to do so, but acted as if the matter had not been submitted to him. With regard to the fifth plea—namely, that the defendant deviated from the drawings by the direction of the plaintiff's architect, it was held that it was bad on general demurrer, as the architect was not shown to be the plaintiff's agent to bind him by any deviation from the approved drawings.[1]

To an action of *assumpsit* on a builder's bill, the particulars of demand being 104*l.* 12*s.*, the defendant pleaded payment of 30*l.* before action brought, and payment into court of 45*l.* more. The cause having been referred at *Nisi Prius* to a surveyor who was to measure and value the plaintiff's work, and to certify for whom and for what amount the verdict should be entered, and an order of *Nisi Prius* having been drawn up; he certified that he was of opinion that 74*l.* 7*s.* was a fair and proper sum to be paid to the plaintiff; and this was held to amount to a verdict for the defendant.[2] It has been already observed that no precise form of words is necessary to constitute an award, and that it is sufficient if the arbitrator expresses by it a decision upon the matter submitted to him. Nevertheless, where an arbitrator to whom a dispute between an architect and his clerk respecting a claim by the latter to wages was referred, stated in a letter that he had examined drawings made by the clerk, with an account of his time, which did not show experience or ability to the extent to justify a demand for remuneration under the circumstances; but in consideration of the clerk's services out of the office on some occasions, and to meet the case in a liberal manner, he proposed that the architect should pay the clerk 10*l.*; it was held that the latter part of the letter was a mere suggestion of the arbitrator, and not a decided opinion that the clerk was or was not entitled to recover 10*l.*, and therefore not a good award.[3]

A submission to arbitration empowered the arbitrator to settle and judge of alleged defects in a house, and to determine what was

[1] Cooper *v.* Langdon, 9 Mee. and W. 60; 1 Dowl. (N. S.) 392.
[2] Salter *v.* Yates, 2 Mee. and W. 67.
[3] Lock *v.* Vulliamy, 5 B. and Ad. 600; 2 Nev. and M. 336.

necessary to put the house in a perfect condition, and to settle certain claims for extra work by one of the parties; and further contained an agreement that the costs of the arbitration should abide the result of the award. The arbitrator having awarded a certain sum to be paid by one party to, and received by the other in full satisfaction of all the matters in difference, his award was held uncertain, and not final, for not deciding upon the various matters referred, and therefore void.[1]

Where an agreement provides that various things shall be done by the respective parties to it, and that if any disputes shall arise with respect to them, such disputes shall be settled by particular persons as arbitrators, the award of the arbitrators need not embrace any more of the matters provided for by the agreement than are brought before them by the parties.[2]

In an arbitration suit, a particular of a set-off for 20*l.* 12*s.* 6*d.* was stated in the following terms:—"To fitting up a shop in A. street, with 1 pair of glass doors, fanlight, locks, bolts, and hinges, to a partition to ditto, and moulding all complete, and fitting up shop window with glass case and linings and sundry work, nails, &c." On the hearing of the reference before a legal arbitrator, the value of all the specified work named in the particulars was proved to be worth 9*l.*; but under the words in the particulars, "sundry work, nails, &c.," the arbitrator (subject to the opinion of the Court) admitted evidence of other work done about the premises to the amount of 10*l.* 1*s.* And it was held that the evidence was rightly received by the arbitrator; and that if the plaintiff was misled or taken by surprise by the particulars, he should have asked for an adjournment of the reference to have enabled him to answer the evidence as to that claim.[3]

Surveyors are frequently appointed arbitrators to determine the amount of loss occasioned by fire; the following case illustrates how far they will be justified in rejecting evidence touching the matters in dispute. A submission referred the amount of loss by fire on "wool in the process of wooling, carding, scribbling, and spining;" in other parts of the submission "raw wool" was spoken of; and the arbitrator conceiving that he was not justified in taking into his consideration wool which had undergone a part of the process of manufacture, but was not at the time of the fire in any of the engines, refused to receive evidence applicable to that

[1] *In re* Riders, 3 Bing. N. C. 874; 1 Jur. 406.
[2] Hawksworth *v.* Bramwell, 5 Myl. and Cr. 281.
[3] Eastham *v.* Tyler, 2 B. C. Rep. 136.

wool, he was held to have been justified in so doing; and the Court refused to disturb an award made on that principle.[1]

An award ought always to be signed by all the arbitrators (including the umpire, if one be called in) in the presence of each other. The Court, however, refused to set aside an award because it was signed by the several arbitrators at different times and places, but intimated that they should not enforce it by attachment or rule.[2] In a case in which a reference was made to two arbitrators and an umpire to be chosen by them, who was to be present, and decide each reference as it might arise, and either of them might make an award; the umpire in the presence of the arbitrators disallowed the plaintiff part of his claim, which made the balance in favour of the defendant, and afterwards without notice to the arbitrator or defendant, made his award in favour of the plaintiff; the award was set aside by the Court.[3] Again, if the award is to be made by two arbitrators and an umpire, or any two of them, and one of them decline to act, the other two may make their award; but if they have before doing so consulted the one who declined to act, and he have made any suggestions, they cannot make their award if it differ from the suggestions unless they again consult or give notice to the third arbitrator who declined to act.[4]

An award is to be considered as published, when the parties have notice that it is ready for delivery on payment of the charges,[5] whether they be reasonable or not;[6] and it is complete if made in writing and ready to be delivered by the arbitrator within the appointed time, though it be not actually delivered.[7] If the arbitrators cannot make their award within the time limited by the rule of Court, or order of *Nisi Prius*, a rule may be obtained by consent, but not otherwise, for enlarging it; and where the submission is by agreement, without suit, the time may be enlarged, simply by the consent of the parties;[8] and an award so made is good, though it do not recite that the time was enlarged.[9] An

[1] *In re* Hurst, 1 Har. and Woll. 275.

[2] Stalworth *v.* Inns, 13 Mee. and W. 466; 2 Dowl. and L. 428; 14 L. J. Exch. 81; 9 Jur. 285.

[3] Potter *v.* Newman, 4 Dowl. P. C. 504; 2 C. M. and R. 742.

[4] *In re* Allen, 5 Nev. and M. 374; Perring and Keymer, 3 Ad. and Ell. 245.

[5] McArthur *v.* Campbell, 5 B. and Ad. 518; 2 Nev. and M. 444.

[6] Musselbrook *v.* Dunkin, 9 Bing. 605; 1 Dowl. P. C. 722.

[7] Brown *v.* Vawser, 4 East. 584.

[8] Teesdale *v.* Atkins, 2 Tidd's Prac. 880.

[9] George *v.* Lousley, 8 East. 13.

agreement to enlarge the time should, however, contain a consent that it shall be made a rule of Court; for if it do not, no attachment will be granted for not performing an award made under it.[1]

If the arbitrators are empowered themselves to enlarge the time for making their award to any other day, they may enlarge it more than once;[2] and an objection that the time for making an award has not been duly enlarged, is waived by proceeding in the reference with a knowledge of that fact.[3]

There may be a constructive consent of parties to enlargement of time for making the award; thus upon a compulsory reference under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), it will be no objection to entering up judgment on the award under § 3, that the award was made more than three months after the arbitrator entered on the reference, though the order of reference name no time, and no written consent for enlarging the time be given by the parties, if it appear that the parties have, within a month before the making of the award, acted upon the reference as still subsisting, as such acting will estop them from saying that the circumstances necessary to give jurisdiction to the arbitrator did not exist.[4]

Finally, an award made on a compulsory reference, may, by authority of a judge, on such terms as he may consider reasonable, be enforced at any time after seven days from the time of publication, notwithstanding that the time for moving to set it aside has not elapsed;[5] and after the award has been made, the authority of the arbitrators, in respect of the submission, cannot then be revoked.[6]

6. *Setting aside the Award.*

All applications to set aside any award made on a compulsory reference, are to be made within the first seven days of the term next following the publication of the award to the parties, whether in vacation or term. If no such application is made, or if no rule is granted thereon, or if any rule granted is afterwards discharged, the award is to be final between the parties.[7]

[1] Jenkins *v.* Law, 8 T. R. 87.
[2] Payne *v.* Deakle, 1 Taunt. 509; Barrett v. Parry, 4 Taunt. 658.
[3] Laurence *v.* Hodgson, 1 Y. and J. 16.
[4] Tyerman *v.* Smith, 6 Ell. and Bl. 719.
[5] 17 and 18 Vict. c. 125, § 10.
[6] Phipps *v.* Ingram, 3 Dowl. P. C. 669. [7] 17 and 18 Vict. c. 125, § 9.

Any arbitration or umpirage procured by corruption or undue means, shall be adjudged and esteemed void and of none effect, and shall be set aside by the Court on complaint made before the last day of the next term after it is made and published to the parties.[1] An award upon a general reference cannot be impeached for erroneous judgment upon facts, but it may for excess of power or mistake admitted by the arbitrators, as well as for corruption or misbehaviour. There must, however, be satisfactory evidence against the arbitrators to induce the Court to interfere.[2]

If a motion be not made before the last day of the next term, it will be too late, and an attachment for non-performance of the award may issue.[3] Where, however, there is a palpable objection upon the face of an award, though the Court cannot set it aside after the time limited by the statute has elapsed, they may refuse to enforce it.[4]

It has, however, been held, that the time limited by the statute for setting aside awards, made under submission by virtue of the statute does not attach on awards made under orders of *Nisi Prius*.[5] On the other hand, a motion to set aside an award made under an order of *Nisi Prius*, not under 9 and 10 W. 3. c. 15, must be made within the time allowed for moving for a new trial, unless sufficient reason for delay be shown.[6] The jurisdiction in matters of award belongs to the Court of which the submission is made a rule;[7] but, nevertheless, it has been held that the Court of Chancery had jurisdiction to relieve against an award, where it was one of the terms of an agreement to refer disputes to arbitration, that the submission might be made a rule of a Court of Law on the application of either party, but which had not been done.[8] Moreover, the Court of Chancery having once exercised its jurisdiction over an award, will retain it, although, on the coming in of the answer, it appear that the submission had been made a rule of a Court of Law by the defendant.[9]

Pending a reference to arbitration if any communication takes place between one of the parties to the reference and one or more of the referees, it will be a ground for setting aside the award, but not so if the fact of the communication be known at the time to all the parties to the reference; and no objection be made to it

[1] 9 and 10 W. 3. c. 15, § 2. [2] Morgan *v.* Mather, 2 Ves. J. 15.
[3] Freame *v.* Pinneger, Cowp. 23.
[4] Auriol *v.* Smith, 1 T. and R. 125. [5] Synge *v.* Jervoise, 8 East. 466.
[6] Rowsthorn *v.* Arnold, 6 B. and C. 629.
[7] Auriol *v.* Smith, 1 T. and R. 125.
[8] Nichols *v.* Roe, 5 Sim. 156. [9] Ibid.

until after the award was made.[1] And again, it is no ground for setting aside an award that the arbitrator (a layman) examined witnesses, not upon oath or affirmation, if that mode of proceeding was not objected to at the time of their examination.[2] But the Court set aside an award where the arbitrators had, by agreement between themselves, separately examined witnesses out of court in the absence of the parties, though it was sworn that the matter in dispute amounted to only a few shillings.[3]

An award will not be set aside if the arbitrator avail himself, in coming to a decision, of the judgment of another person.[4] Moreover, after the delivery of an award, the arbitrator cannot, though within the time limited by the submission, correct a mistake in the calculation of figures by making another award.[5] And the Court will not refer the award back to the arbitrator to correct the mistake without the consent of the parties.[6] If an arbitrator erroneously makes an award, the Court will not set it aside on the ground that part of it was founded on a mistake of law ;[7] and this whether the arbitrator be a professional person or not.[8] But it is no ground for setting aside an award that the unsuccessful party suffered a surprise, inasmuch as an arbitrator has power to postpone the proceedings upon a reasonable application being made to him to do so.[9] In a case in which a barrister to whom a cause was referred improperly admitted evidence, the Court refused to disturb his award ;[10] for an arbitrator's decision on the admissibility of evidence before him is final.[11] Neither, where matters in difference are referred to a legal arbitrator absolutely will the Court entertain a motion for reviewing his decision either upon the law or the facts.[12] And they will not set aside an award on the ground that the arbitrator has made a mistake where all the facts were placed before him, and he was competent from his occupation to judge of them, unless it be clearly seen that it was a mistake.[13]

Under certain circumstances an award, though informal, cannot

[1] Mills *v.* Bowers, 3 Kay and J. 66. [2] Biggs *v.* Hansell, 16 C. B. 562.
[3] *In re* Plews, 14 L. J. Q. B. 139 ; 9 Jur. 160.
[4] Emery *v.* Wase, 5 Ves. J. 848. [5] Ervine *v.* Elnon, 8 East. 54.
[6] *Ex parte* Cuerton, 7 D. and R. 774.
[7] Armstrong *v.* Marshall, 4 Dowl. P. C. 593.
[8] Haydock *v.* Beard, 2 Jur. 1069.
[9] Solomon *v.* Solomon, 28 L. J. (N. S.) Exch. 129.
[10] Berryman *v.* Steggal, 2 Dowl. P. C. 726.
[11] Symes *v.* Goodfellow, 4 Dowl. P. C. 642.
[12] Ashton *v.* Pointer, 2 Dowl. P. C. 651 ; 3 Ib. 201.
[13] 1 Har. and Wol. 185.

be impeached ; as, where a cause was referred to arbitration by an order of reference, directing the witnesses to be sworn before a judge, and the arbitrator took the evidence of the plaintiff's witnesses not upon oath, which the defendant objected to, though he permitted his own witnesses to be examined without being sworn ; it was held that by this proceeding the defendant had waived the objection, and that he could not be allowed, on this ground, to impeach the award.[1] An objection to an award, on the ground of irregular and improper conduct on the part of the arbitrators, was held to be waived, where such conduct had been known to the party injured three weeks before the award was made without any objection being taken.[2]

In an action for not repairing, the arbitrators to whom the matter was referred made their award upon a view of the premises without calling the parties before them ; but their award was set aside, on the ground that other facts than the state of repair of the premises might be necessary to be inquired into.[3]

7. *Costs.*

An arbitrator cannot, unless such power is expressly reserved to him by the submission, award to himself a sum (named or otherwise) for his own costs and expenses.[4] If, however, having authority, he awards an excessive sum to be paid to himself, the Court will refer it to the prothonotary to reduce it.[5]

With regard to the fees and remuneration of an arbitrator, it may be desirable to observe that the Court has no general jurisdiction over arbitrators as to the amount of fees charged by them, whether the reference be under a rule of Court or not ; nor over the attorney who prepares the award ; the remedy would appear to be by action for money had and received ; but to give the Court jurisdiction in the matter, a clear intention of the parties to the arbitration must at all events be shown.[6] Where, however, there is an express promise to pay arbitrators the costs of their award, a joint action for their recovery will lie against the parties liable, even though no demand for payment of the costs may have been previously made;[7] and where a party to an arbitration is

[1] Allen *v.* Francis, 9 Jur. 691.
[2] Bignoll *v.* Gale, 2 Man. and G. 830 ; 3 Scott, N. R. 108.
[3] Anon. 2 Chit. 44.
[4] Roberts *v.* Eberhardt, 3 C. B. (N. S.) 482 ; 4 Jur. (N. S.) 893.
[5] Miller *v.* Robe, 3 Taunt. 461.
[6] Dossett *v.* Gingell, 2 Man. and G. 870 ; 3 Scott, N. R. 179.
[7] Hoggins *v.* Gordon, 6 Jur. 895.

compelled to pay to a lay arbitrator an exorbitant sum in order to take up the award, he may maintain an action for money had and received, to recover the excess beyond what is a proper remuneration for the arbitrator's services.[1]

If by the submission the costs of an arbitration are to abide the event of the award, it will be an excess of jurisdiction for the arbitrator to determine their amount.[2] And, indeed, in that event, the arbitrator need not notice the costs in his award, for he has no power over them.[3] Further, where before trial of a cause, the parties agree to refer the case to an arbitrator, and that the costs of the cause shall follow the event, a finding for the plaintiff upon one issue out of several, with a farthing damages, it has been held, will carry the costs of the cause;[4] and if there be a substantial finding for one of the parties, that party, it would seem, would be entitled to the costs, though there be a finding in respect of some lesser matters in favour of the other party.[5]

It is not necessary that the decision should be wholly in favour of one of the parties in order to have the costs; the meaning being in such case that the costs are to follow the event of the action, as decided by the award. The event of the award may be such as to put each party to the arbitration in such a position that each shall be called to do certain things; as, the one to deliver certain goods to the other, who, on the other hand, shall pay a certain sum of money, and a general release to be given; and in such a case it has been held that the award was not uncertain as to costs (which were to abide the event), as the effect of it was that each party should pay his own costs.[6] Then if an award be that two parties on the same side should pay a moiety of the costs of the arbitration, and of making the submission a rule of Court; and one of those parties, in order to get the award out of the hands of the arbitrators, pays the whole of the costs; it was held that he might have an attachment against the other to compel repayment of the moiety;[7] but an action would have been maintainable if the party had preferred that mode of proceeding.[8]

[1] Barnes *v.* Braithwaite, 2 H. and N. 569.
[2] Kendrick *v.* Davis, 5 Dowl. P. C. 693.
[3] Jupp *v.* Grayson, 3 Dowl. P. C. 199; 1 C. M. and R. 523; Boodle *v.* Davis, 3 A. and E. 200; 4 Nev. and M. 788.
[4] Wiggins *v.* Cook, 33 L. T. 224.
[5] Matlock Gas Coke Company *v.* Peters, 6 El. and Bl. 215.
[6] Yates *v.* Knight, 2 Bing. N. R. 277; 2 Scott 470.
[7] Hicks *v.* Richardson, 1 Bos. and P. 93. Stokes *v.* Lewis, 2 Smith, 12.
[8] Cardwell *on Arbitration*, 145, 167.

8. *Arbitrations under the Companies Clauses, Lands Clauses, and Railway Clauses Acts*, 1845.

Any work relating to the law of arbitrations would be imperfect if the provisions on the subject contained in the above-mentioned Acts were omitted. Engineers, architects, and surveyors, are more frequently than others called in as arbitrators when disputes as to value are to be settled; and it will therefore be convenient to them to have those Acts at hand to refer to upon such occasions. It should be borne in mind, however, that the Acts above mentioned are not of general application; and that it is only when their provisions (or any of them) are incorporated with the special Act under which the arbitration may take place that they are of any force. In all cases, therefore, it is necessary before proceeding with the reference, that the terms of the special Act should be consulted in order to ascertain how much of the Acts referred to are incorporated, and how far special provisions on the subject of arbitration may have been made.

Regarding the choice of an arbitrator, it is to be observed that parties referring matters to arbitration will always do well to make the reference to one or more entire strangers, instead of to friends or neighbours, who may be either biassed towards one or the other of the parties, or be otherwise subject to local prejudices; and whose decisions therefore may be equally dissatisfactory to both parties to the reference. It is said that references to arbitration are sometimes the means of saving expense, and that they are peculiarly adapted to the settlement of matters of account and mercantile transactions, which are difficult and almost impossible to be adjusted on a trial at law. As a general principle this may be true; but nevertheless it is obvious that if the arbitrators be not well chosen, prolonged litigation and expense may be the result of the reference.

1. *The Companies Clauses Consolidation Act*, 1845, 8 *Vic. Cap.* 16.

SETTLEMENT OF DISPUTES BY ARBITRATION.

§ 128. *Where Questions are to be determined by Arbitration, Arbitrators to be appointed within Fourteen Days after Notice.*—When any dispute authorized or directed by this or the special Act, or any Act incorporated therewith, to be settled by arbitration, shall have arisen, then, unless both parties shall concur in the appointment of

a single arbitrator, each party, on the request of the other party, shall by writing under his hand nominate and appoint an arbitrator to whom such dispute shall be referred ; and after any such appointment shall have been made, neither party shall have power to revoke the same without the consent of the other, nor shall the death of either party operate as such revocation ; and if for the space of fourteen days after any such dispute shall have arisen, and after a request in writing shall have been served by the one party on the other party to appoint an arbitrator, such last-mentioned party fail to appoint such arbitrator, then upon such failure the party making the request, and having himself appointed an arbitrator, may appoint such arbitrator to act on behalf of both parties, and such arbitrator may proceed to hear and determine the matters which shall be in dispute ; and in such case the award or determination of such single arbitrator shall be final.

§ 129. *Vacancy of Arbitrator to be supplied.*—If before the matters so referred shall be determined any arbitrator appointed by either party die, or become incapable or refuse or for seven days neglect to act as arbitrator, the party by whom such arbitrator was appointed may nominate and appoint in writing some other person to act in his place ; and if for the space of seven days after notice in writing from the other party for that purpose he fail to do so, the remaining or other arbitrator may proceed *ex parte ;* and every arbitrator so to be substituted as aforesaid shall have the same powers and authorities as were vested in the former arbitrator at the time of such his death, refusal, or disability as aforesaid.

§ 130. *Appointment of Umpire.*—Where more than one arbitrator shall have been appointed, such arbitrators shall, before they enter upon the matters referred to them, nominate and appoint by writing under their hands an umpire to decide on any such matters on which they shall differ ; and if such umpire shall die, or refuse or for seven days neglect to act, they shall forthwith after such death, refusal, or neglect, appoint another umpire in his place ; and the decision of every such umpire on the matters so referred to him shall be final.

§ 131. *Board of Trade empowered to appoint an Umpire, on Neglect of the Arbitrators, in case of Railway Companies.*—If in either of the cases aforesaid the said arbitrators shall refuse, or shall, for seven days after request of either party to such arbitration, neglect to appoint an umpire, it shall be lawful for the Board of Trade, if they think fit, in any case in which a railway company shall be one party to the arbitration, on the application of either party to

such arbitration, to appoint an umpire; and the decision of such umpire on the matters on which the arbitrators shall differ shall be final.

§ 132. *Power of Arbitrators to call for Books, &c.*—The said arbitrators or their umpire may call for the production of any documents in the possession or power of either party which they or he may think necessary for determining the question in dispute, and may examine the parties or their witnesses on oath, and administer the oaths necessary for that purpose.

§ 133. *Costs to be in the Discretion of the Arbitrators.*—Except where by this or the special Act, or any Act incorporated therewith, it shall be otherwise provided, the costs of and attending every such arbitration to be determined by the arbitrators, shall be in the discretion of the arbitrators or their umpires, as the case may be.

§ 134. *Submission to Arbitration to be made Rule of Court.*—The submission to any such arbitration may be made a rule of any of the superior Courts, on the application of either of the parties.

2. *The Lands Clauses Consolidation Act*, 1845, 8 *Vict. Cap.* 18.

PURCHASE AND TAKING OF LANDS OTHERWISE THAN BY AGREEMENT.

§ 16. *Capital to be subscribed before compulsory Powers of Purchase put in force.*—Where the undertaking is intended to be carried into effect by means of a capital to be subscribed by the promoters of the undertaking, the whole of the capital or estimated sum for defraying the expenses of the undertaking shall be subscribed under contract binding the parties thereto, their heirs, executors, and administrators, for the payment of the several sums by them respectively subscribed, before it shall be lawful to put in force any of the powers of this or the special Act, or any Act incorporated therewith, in relation to the compulsory taking of land for the purposes of the undertaking.

§ 17. *A Certificate of Two Justices to be Evidence that the Capital has been subscribed.*—A certificate under the hands of two justices, certifying that the whole of the prescribed sum has been subscribed, shall be sufficient evidence thereof, and on the application of the promoters of the undertaking, and the production of such evidence as such justices think proper and sufficient, such justices shall grant such certificate accordingly.

§ 18. *Notice of Intention to take Lands.*—When the promoters of the undertaking shall require to purchase or take any of the lands

which by this or the special Act, or any Act incorporated therewith, they are authorized to purchase or take, they shall give notice thereof to all the parties interested in such lands, or to the parties enabled by this Act to sell and convey or release the same, or such of the said parties as shall, after diligent inquiry, be known to the promoters of the undertaking, and by such notice shall demand from such parties the particulars of their estate and interest in such lands, and of the claims made by them in respect thereof; and every such notice shall state the particulars of the land so required, and that the promoters of the undertaking are willing to treat for the purchase thereof, and as to the compensation to be made to all parties for the damage that may be sustained by them by reason of the execution of the works.

§ 19. *Service of Notices on Owners and Occupiers of Lands.*—All notices required to be served by the promoters of the undertaking upon the parties interested in or entitled to sell any such lands shall either be served personally on such parties or left at their last usual place of abode, if any such can after diligent inquiry be found; and in case any such parties shall be absent from the United Kingdom, or cannot be found after diligent inquiry, shall also be left with the occupier of such lands, or, if there be no such occupier, shall be affixed upon some conspicuous part of such lands.

§ 20. *Service of Notice on a Corporation aggregate.*—If any such party be a corporation aggregate such notice shall be left at the principal office of business of such corporation, or if no such office can after diligent inquiry be found, shall be served on some principal member, if any, of such corporation, and such notice shall also be left with the occupier of such lands, or, if there be no such occupier, shall be affixed upon some conspicuous part of such lands.

§ 21. *If Parties fail to treat, or in case of Dispute, Question to be settled as after mentioned.*—If, for twenty-one days after the service of such notice, any such party shall fail to state the particulars of his claim in respect of any such land, or to treat with the promoters of the undertaking in respect thereof, or if such party and the promoters of the undertaking shall not agree as to the amount of the compensation to be paid by the promoters of the undertaking for the interest in such lands belonging to such party, or which he is by this or the special Act enabled to sell, or for any damage that may be sustained by him by reason of the execution of the works, the amount of such compensation shall be settled in the manner hereinafter provided for settling cases of disputed compensation.

§ 22. *Disputes as to Compensation where the Amount claimed does not exceed 50l. to be settled by Two Justices.*—If no agreement be

come to between the promoters of the undertaking and the owners of or parties by this Act enabled to sell and convey or release any lands taken or required for or injuriously affected by the execution of the undertaking, or any interest in such lands, as to the value of such lands or of any interest therein, or as to the compensation to be made in respect thereof, and if in any such case the compensation claimed shall not exceed fifty pounds, the same shall be settled by two justices.

§ 23. *Compensation exceeding 50l. to be settled by Arbitration or Jury, at the Option of the Party claiming Compensation.*—If the compensation claimed or offered in any such case shall exceed fifty pounds, and if the party claiming compensation desire to have the same settled by arbitration, and signify such desire by notice in writing to the promoters of the undertaking, before they have issued their warrant to the sheriff to summon a jury in respect of such lands, under the provisions hereinafter contained, stating in such notice the nature of the interest in respect of which such party claims compensation, and the amount of the compensation so claimed, the same shall be so settled accordingly; but unless the party claiming compensation shall as aforesaid signify his desire to have the question of such compensation settled by arbitration, or if when the matter shall have been referred to arbitration the arbitrators or their umpire shall for three months have failed to make their or his award, or if no final award shall be made, the question of such compensation shall be settled by the verdict of a jury, as hereinafter provided.

§ 24. *Method of proceeding for settling Disputes as to Compensation by Justices.*—It shall be lawful for any justice, upon the application of either party with respect to any question of disputed compensation by this or the special Act, or any Act incorporated therewith, authorized to be settled by two justices, to summon the other party to appear before two justices, at a time and place to be named in the summons, and upon the appearance of such parties, or in the absence of any of them, upon proof of due service of the summons, it shall be lawful for such justices to hear and determine such question, and for that purpose to examine such parties or any of them, and their witnesses, upon oath, and the costs of every such inquiry shall be in the discretion of such justices, and they shall settle the amount thereof.

§ 25. *Appointment of Arbitrator when Questions are to be determined by Arbitration.*—When any question of disputed compensation by this or the special Act, or any Act incorporated therewith, authorized or required to be settled by arbitration, shall have arisen,

then unless both parties shall concur in the appointment of a single arbitrator, each party, on the request of the other party, shall nominate and appoint an arbitrator, to whom such dispute shall be referred; and every appointment of an arbitrator shall be made on the part of the promoters of the undertaking under the hands of the said promoters or any two of them, or of their secretary or clerk, and on the part of any other party under the hand of such party, or if such party be a corporation aggregate under the common seal of such corporation; and such appointment shall be delivered to the arbitrator, and shall be deemed a submission to arbitration on the part of the party by whom the same shall be made; and after any such appointment shall have been made neither party shall have power to revoke the same without the consent of the other, nor shall the death of either party operate as a revocation; and if for the space of fourteen days after any such dispute shall have arisen, and after a request in writing, in which shall be stated the matter so required to be referred to arbitration, shall have been served by the one party on the other party to appoint an arbitrator, such last-mentioned party fail to appoint such arbitrator, then upon such failure the party making the request, and having himself appointed an arbitrator, may appoint such arbitrator to act on behalf of both parties, and such arbitrator may proceed to hear and determine the matters which shall be in dispute, and in such case the award or determination of such single arbitrator shall be final.

§ 26. *Vacancy of Arbitrator to be supplied.*—If before the matters so referred shall be determined, any arbitrator appointed by either party die, or become incapable, the party by whom such arbitrator was appointed may nominate and appoint in writing some other person to act in his place, and if, for the space of seven days after notice in writing from the other party for that purpose, he fail to do so, the remaining or other arbitrator may proceed *ex parte;* and every arbitrator so to be substituted as aforesaid shall have the same powers and authorities as were vested in the former arbitrator at the time of such his death or disability as aforesaid.

§ 27. *Appointment of Umpire.*—Where more than one arbitrator shall have been appointed, such arbitrators shall, before they enter upon the matters referred to them, nominate and appoint, by writing under their hands, an umpire to decide on any such matters on which they shall differ, or which shall be referred to him under the provisions of this or the special Act, and if such umpire shall die, or become incapable to act, they shall forthwith after such death or incapacity appoint another umpire in his place, and the

decision of every such umpire on the matters so referred to him shall be final.

§ 28. *Board of Trade empowered to appoint an Umpire on neglect of the Arbitrators, in case of Railway Companies.*—If in either of the cases aforesaid the said arbitrators shall refuse, or shall, for seven days after request of either party to such arbitration, neglect to appoint an umpire, the Board of Trade, in any case in which a railway company shall be one party to the arbitration, and two justices in any other case, shall, on the application of either party to such arbitration, appoint an umpire, and the decision of such umpire on the matters on which the arbitrators shall differ, or which shall be referred to him under this or the special Act, shall be final.

§ 29. *In case of Death of single Arbitrator the Matter to begin* de novo.—If, when a single arbitrator shall have been appointed, such arbitrator shall die or become incapable to act before he shall have made his award, the matters referred to him shall be determined by arbitration under the provisions of this or the special Act in the same manner as if such arbitrator had not been appointed.

§ 30. *If either Arbitrator refuse to act, the other to proceed* ex parte. —If, where more than one arbitrator shall have been appointed, either of the arbitrators refuse or for seven days neglect to act, the other arbitrator may proceed *ex parte*, and the decision of such other arbitrator shall be as effectual as if he had been the single arbitrator appointed by both parties.

§ 31. *If Arbitrators fail to make their Award within Twenty-one Days, the Matter to go to the Umpire.*—If where more than one arbitrator shall have been appointed, and where neither of them shall refuse or neglect to act as aforesaid, such arbitrators shall fail to make their award within twenty-one days after the day on which the last of such arbitrators shall have been appointed, or within such extended time (if any) as shall have been appointed for that purpose by both such arbitrators under their hands, the matters referred to them shall be determined by the umpire to be appointed as aforesaid.

§ 32. *Power of Arbitrators to call for Books, &c.*—The said arbitrators or their umpire may call for the production of any documents in the possession or power of either party which they or he may think necessary for determining the question in dispute, and may examine the parties or their witnesses on oath, and administer the oaths necessary for that purpose.

§ 33. *Arbitrator or Umpire to make a Declaration.*—Before any

arbitrator or umpire shall enter into the consideration of any matters referred to him, he shall in the presence of a justice make and subscribe the following declaration; that is to say,

"I *A. B.* do solemnly and sincerely declare, that I will faithfully and honestly, and to the best of my skill and ability, hear and determine the matters referred to me under the provisions of the Act [*naming the special Act*]. *A. B.*

"Made and subscribed in the presence of ."

And such declaration shall be annexed to the award when made; and if any arbitrator or umpire, having made such declaration, shall wifully act contrary thereto, he shall be guilty of a misdemeanour.

§ 34. *Costs of Arbitration, how to be borne.*—All the costs of any such arbitration, and incident thereto, to be settled by the arbitrators, shall be borne by the promoters of the undertaking, unless the arbitrators shall award the same or a less sum than shall have been offered by the promoters of the undertaking, in which case each party shall bear his own costs incident to the arbitration, and the costs of the arbitrators shall be borne by the parties in equal proportions.

§ 35. *Award to be delivered to the Promoters of the Undertaking.*—The arbitrators shall deliver their award in writing to the promoters of the undertaking, and the said promoters shall retain the same, and shall forthwith, on demand, at their own expense, furnish a copy thereof to the other party to the arbitration, and shall at all times, on demand, produce the said award, and allow the same to be inspected or examined by such party or any person appointed by him for that purpose.

§ 36. *Submission may be made a Rule of Court.*—The submission to any such arbitration may be made a rule of any of the superior Courts, on the application of either of the parties.

§ 37. *Award not void through Error in Form.*—No award made with respect to any question referred to arbitration under the provisions of this or the special Act, shall be set aside for irregularity or error in matter of form.

§ 38. *Promoters of the Undertaking to give Notice before summoning a Jury.*—Before the promoters of the undertaking shall issue their warrant for summoning a jury for settling any case of disputed compensation, they shall give not less than ten days' notice to the other party of their intention to cause such jury to be summoned, and in such notice the promoters of the undertaking shall state what sum of money they are willing to give for the interest in such lands sought to be purchased by them from such party, and

for the damage to be sustained by him by the execution of the works.

§ 39. *Warrant for summoning Jury to be addressed to the Sheriff.*—In every case in which any such question of disputed compensation shall be required to be determined by the verdict of a jury, the promoters of the undertaking shall issue their warrant to the sheriff, requiring him to summon a jury for that purpose, and such warrant shall be under the common seal of the promoters of the undertaking if they be a corporation, or if they be not a corporation under the hands and seals of such promoters or any two of them; and if such sheriff be interested in the matter in dispute such application shall be made to some coroner of the county in which the lands in question, or some part thereof, shall be situate, and if all the coroners of such county be so interested, such application may be made to some person having filled the office of sheriff or coroner in such county, and who shall be then living there, and who shall not be interested in the matter in dispute; and with respect to the persons last mentioned, preference shall be given to one who shall have most recently served either of the said offices; and every ex-sheriff, coroner, or ex-coroner, shall have power, if he think fit, to appoint a deputy or assessor.

§ 40. *Provisions applicable to Sheriff to apply to Coroner.*—Throughout the enactments contained in this Act relating to the reference to a jury, where the term "sheriff" is used, the provisions applicable thereto shall be held to apply to every coroner or other person lawfully acting in his place; and in every case in which any such warrant shall have been directed to any other person than the sheriff, such sheriff shall, immediately on receiving notice of the delivery of the warrant, deliver over, on application for that purpose, to the person to whom the same shall have been directed, or to any person appointed by him to receive the same, the jurors' book and special jurors' list belonging to the county where the lands in question shall be situate.

§ 41. *Jury to be summoned.*—Upon the receipt of such warrant the sheriff shall summon a jury of twenty-four indifferent persons, duly qualified to act as common jurymen in the superior Courts, to meet at a convenient time and place to be appointed by him for that purpose, such time not being less than fourteen nor more than twenty-one days after the receipt of such warrant, and such place not being more than eight miles distant from the lands in question, unless by consent of the parties interested, and he shall forthwith give notice to the promoters of the works of the time and place so appointed by him.

§ 42. *Jury to be impannelled.*—Out of the jurors appearing upon such summons a jury of twelve persons shall be drawn by the sheriff, in such manner as juries for trials of issues joined in the superior Courts, are by law required to be drawn, and if a sufficient number of jurymen do not appear in obedience to such summons, the sheriff shall return other indifferent men, duly qualified as aforesaid, of the bystanders, or others that can speedily be procured, to make up the jury to the number aforesaid; and all parties concerned may have their lawful challenges against any of the jurymen, but no such party shall challenge the array.

§ 43. *Sheriff to preside; Witnesses to be summoned.*—The sheriff shall preside on the said inquiry, and the party claiming compensation shall be deemed the plaintiff, and shall have all such rights and privileges as the plaintiff is entitled to in the trial of actions at law; and if either party so request in writing, the sheriff shall summon before him any person considered necessary to be examined as a witness touching the matters in question, and on the like request the sheriff shall order the jury, or any six or more of them, to view the place or matter in controversy, in like manner as views may be had in the trial of actions in the superior Courts.

§ 44. *Penalty on Sheriff and Jury for Default.*—If the sheriff make default in any of the matters hereinbefore required to be done by him in relation to any such trial or inquiry, he shall forfeit fifty pounds for every such offence, and such penalty shall be recoverable by the promoters of the undertaking by action in any of the superior Courts; and if any person summoned and returned upon any jury under this or the special Act, whether common or special, do not appear, or if appearing, he refuse to make oath, or in any other manner unlawfully neglect his duty, he shall, unless he show reasonable excuse to the satisfaction of the sheriff, forfeit a sum not exceeding ten pounds, and every such penalty payable by a sheriff or juryman shall be applied in satisfaction of the costs of the inquiry, so far as the same will extend; and, in addition to the penalty hereby imposed, every such juryman shall be subject to the same regulations, pains, and penalties, as if such jury had been returned for the trial of an issue joined in any of the superior Courts.

§ 45. *Penalty on Witnesses making Default.*—If any person duly summoned to give evidence upon any such inquiry, and to whom a tender of his reasonable expenses shall have been made, fail to appear at the time and place specified in the summons without sufficient cause, or if any person, whether summoned or not, who

shall appear as a witness, refuse to be examined on oath touching the subject matter in question, every person so offending shall forfeit to the party aggrieved a sum not exceeding ten pounds.

§ 46. *Notice of Inquiry.*—Not less than ten days' notice of the time and place of the inquiry shall be given in writing by the promoters of the undertaking to the other party.

§ 47. *If the Party make Default the Inquiry not to proceed.*—If the party claiming compensation shall not appear at the time appointed for the inquiry such inquiry shall not be further proceeded in, but the compensation to be paid shall be such as shall be ascertained by a surveyor appointed by two justices in manner hereinafter provided.

§ 48. *Jury to be sworn.*—Before the jury proceed to inquire of and assess the compensation or damage in respect of which their verdict is to be given, they shall make oath that they will truly and faithfully inquire of and assess such compensation or damage, and the sheriff shall administer such oaths, as well as the oaths of all persons called upon to give evidence.

§ 49. *Sums to be paid for Purchase of Lands and for Damage, to be assessed separately.*—Where such inquiry shall relate to the value of lands to be purchased, and also to compensation claimed for injury done or to be done to the lands held therewith, the Jury shall deliver their verdict separately for the sum of money to be paid for the purchase of the lands required for the works, or of any interest therein belonging to the party with whom the question of disputed compensation shall have arisen, or which, under the provisions herein contained, he is enabled to sell or convey, and for the sum of money to be paid by way of compensation for the damage, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such lands by the exercise of the powers of this or the special Act, or any Act incorporated therewith.

§ 50. *Verdict and Judgment to be recorded.*—The sheriff before whom such inquiry shall be held shall give judgment for the purchase money or compensation assessed by such jury, and the verdict and judgment shall be signed by the sheriff, and being so signed, shall be kept by the clerk of the peace among the records of the general or quarter sessions of the county in which the lands or any part thereof shall be situate in respect of which such purchase money or compensation shall have been awarded; and such verdicts and judgments shall be deemed records, and the same or true copies thereof shall be good evidence in all courts and elsewhere, and all

persons may inspect the said verdicts and judgments, and may have copies thereof or extracts therefrom, on paying for each inspection thereof one shilling, and for every one hundred words copied or extracted therefrom sixpence, which copies or extracts the clerk of the peace is hereby required to make out, and to sign and certify the same to be true copies.

§ 51. *Costs of the Inquiry how to be borne.*—On every such inquiry before a jury, where the verdict of the jury shall be given for a greater sum than the sum previously offered by the promoters of the undertaking, all the costs of such inquiry shall be borne by the promoters of the undertaking; but if the verdict of the jury be given for the same or a less sum than the sum previously offered by the promoters of the undertaking, or if the owner of the lands shall have failed to appear at the time and place appointed for the inquiry, having received due notice thereof, one half of the costs of summoning, impannelling, and returning the jury, and of taking the inquiry and recording the verdict and judgment thereon, in case such verdict shall be taken, shall be defrayed by the owner of the lands, and the other half by the promoters of the undertaking, and each party shall bear his own costs, other than as aforesaid, incident to such inquiry.

§ 52. *Particulars of the Costs.*—The costs of any such inquiry shall, in case of difference, be settled by one of the Masters of the Court of Queen's Bench of England or Ireland, according as the lands are situate, on the application of either party, and such costs shall include all reasonable costs, charges, and expenses incurred in summoning, impannelling, and returning the jury, taking the inquiry, the attendance of witnesses, the employment of counsel and attorneys, recording the verdict and judgment thereon, and otherwise incident to such inquiry.

§ 53. *Payment of Costs.*—If any such costs shall be payable by the promoters of the undertaking, and if within seven days after demand such costs be not paid to the party entitled to receive the same, they shall be recoverable by distress, and on application to any justice he shall issue his warrant accordingly; and if any such costs shall be payable by the owner of the lands or of any interest therein, the same may be deducted and retained by the promoters of the undertaking, out of any money awarded by the jury to such owner, or determined by the valuation of a surveyor under the provision hereinafter contained; and the payment or deposit of the remainder, if any, of such money shall be deemed payment and satisfaction of the whole thereof, or if such costs shall exceed the amount of the money so awarded or determined, the excess shall

be recoverable by distress, and on application to any justice he shall issue his warrant accordingly.

§ 54. *Special Jury to be summoned at the Request of either Party.*—If either party desire any such question of disputed compensation as aforesaid to be tried before a special jury, such question shall be so tried, provided that notice of such desire, if coming from the other party, be given to the promoters of the undertaking before they have issued their warrant to the sheriff; and for that purpose the promoters of the undertaking shall by their warrant to the sheriff require him to nominate a special jury for such trial; and thereupon the sheriff shall, as soon as conveniently may be after the receipt by him of such warrant, summon both the parties to appear before him, by themselves or their attorneys, at some convenient time and place appointed by him for the purpose of nominating a special jury (not being less than five nor more than eight days from the service of such summons); and at the place and time so appointed, the sheriff shall proceed to nominate and strike a special jury, in the manner in which such juries shall be required by the laws for the time being in force to be nominated or struck by the proper officers of the superior Courts, and the sheriff shall appoint a day, not later than the eighth day after striking of such jury, for the parties or their agents to appear before him to reduce the number of such jury, and thereof shall give four days' notice to the parties; and on the day so appointed, the sheriff shall proceed to reduce the said special jury to the number of twenty, in the manner used and accustomed by the proper officers of the superior Courts.

§ 55. *Deficiency of Special Jurymen.*—The special jury on such inquiry shall consist of twelve of the said twenty who shall first appear on the names being called over, the parties having their lawful challenges against any of the said jurymen; and if a full jury do not appear, or if after such challenges a full jury do not remain, then, upon the application of either party, the sheriff shall add to the lists of such jury the names of any other disinterested persons qualified to act as special or common jurymen, who shall not have been previously struck off the aforesaid list, and who may then be attending the court, or can speedily be procured, so as to complete such jury, all parties having their lawful challenges against such persons; and the sheriff shall proceed to the trial and adjudication of the matters in question by such jury, and such trial shall be attended in all respects with the like incidents and consequences, and the like penalties shall be

applicable, as hereinbefore provided in the case of a trial by common jury.

§ 56. *Other Inquiries before same Special Jury by consent.*—Any other inquiry than that for the trial of which such special jury may have been struck and reduced as aforesaid, may be tried by such jury, provided the parties thereto respectively shall give their consent to such trial.

§ 57. *Jurymen not to attend more than once a Year.*—No juryman shall, without his consent, be summoned or required to attend any such proceeding as aforesaid more than once in any year.

§ 58. *Compensation to absent Parties to be determined by a Surveyor appointed by two Justices.*—The purchase money or compensation to be paid for any lands to be purchased or taken by the promoters of the undertaking from any party who, by reason of absence from the kingdom, is prevented from treating, or who cannot after diligent inquiry be found, or who shall not appear at the time appointed for the inquiry before the jury, as hereinbefore provided for, after due notice thereof, and the compensation to be paid for any permanent injury to such lands, shall be such as shall be determined by the valuation of such able practical surveyor as two justices shall nominate for that purpose, as hereinafter mentioned.

§ 59. *Two Justices to nominate a Surveyor.*—Upon application by the promoters of the undertaking to two justices, and upon such proof as shall be satisfactory to them that any such party is, by reason of absence from the kingdom, prevented from treating, or cannot after diligent inquiry be found, or that any such party failed to appear on such inquiry before a jury as aforesaid, after due notice to him for that purpose, such justices shall, by writing under their hands, nominate an able practical surveyor for determining such compensation as aforesaid, and such surveyor shall determine the same accordingly, and shall annex to his valuation a declaration in writing subscribed by him of the correctness thereof.

§ 60. *Declaration to be made by the Surveyor.*—Before such surveyor shall enter upon the duty of making such valuation as aforesaid he shall, in the presence of such justices, or one of them, make and subscribe the declaration following at the foot of such nomination; (that is to say),

"I, *A. B.* do solemnly and sincerely declare, that I will faithfully, impartially, and honestly, according to the best of my skill and ability, execute the duty of making the valuation hereby referred to me. *A. B.*

"Made and subscribed in the presence of ."

And if any surveyor shall corruptly make such declaration, or having made such declaration, shall wilfully act contrary thereto, he shall be guilty of a misdemeanour.

§ 61. *Valuation, &c., to be produced to the Owner of the Lands on demand.*—The said nomination and declaration shall be annexed to the valuation to be made by such surveyor, and shall be preserved together therewith by the promoters of the undertaking, and they shall at all times produce the said valuation and other documents on demand, to the owner of the lands comprised in such valuation, and to all other parties interested therein.

§ 62. *Expenses to be borne by Promoters.*—All the expenses of and incident to every such valuation shall be borne by the promoters of the undertaking.

§ 63. *Purchase Money and Compensation, how to be estimated.*—In estimating the purchase money or compensation to be paid by the promoters of the undertaking, in any of the cases aforesaid, regard shall be had by the justices, arbitrators, or surveyors, as the case may be, not only to the value of the land to be purchased or taken by the promoters of the undertaking, but also to the damage, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such other lands by the exercise of the powers of this or the special Act, or any Act incorporated therewith.

§ 64. *Where Compensation to absent Party has been determined by a Surveyor, the Party may have the same submitted to Arbitration.*—When the compensation payable in respect of any lands, or any interest therein, shall have been ascertained by the valuation of a surveyor, and deposited in the bank under the provisions herein contained, by reason that the owner of or party entitled to convey such lands or such interest therein as aforesaid could not be found or was absent from the kingdom, if such owner or party shall be dissatisfied with such valuation it shall be lawful for him, before he shall have applied to the Court of Chancery for payment or investment of the moneys so deposited under the provisions herein contained, by notice in writing to the promoters of the undertaking, to require the question of such compensation to be submitted to arbitration, and thereupon the same shall be so submitted accordingly, in the same manner as in other cases of disputed compensation hereinbefore authorized or required to be submitted to arbitration.

§ 65. *Question to be submitted to the Arbitrators.*—The question to

be submitted to the arbitrators in the case last aforesaid shall be, whether the said sum so deposited as aforesaid by the promoters of the undertaking was a sufficient sum, or whether any and what further sum ought to be paid or deposited by them.

§ 66. *If further Sum awarded, Promoters to pay or deposit same within Fourteen Days.*—If the arbitrators shall award that a further sum ought to be paid or deposited by the promoters of the undertaking, they shall pay or deposit, as the case may require, such further sum within fourteen days after the making of such award, or in default thereof, the same may be enforced by attachment, or recovered with costs by action or suit in any of the superior Courts.

§ 67. *Costs of the Arbitration.*—If the arbitrators shall determine that the sum so deposited was sufficient, the costs of and incident to such arbitration, to be determined by the arbitrators, shall be in the discretion of the arbitrators, but if the arbitrators shall determine that a further sum ought to be paid or deposited by the promoters of the undertaking, all the costs of and incident to the arbitration shall be borne by the promoters of the undertaking.

§ 68. *To be settled by Arbitration or Jury, at the Option of the Party claiming Compensation.*—If any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special Act, or any Act incorporated therewith, and if the compensation claimed in such case shall exceed the sum of fifty pounds, such party may have the same settled either by arbitration or by the verdict of a jury, as he shall think fit; and if such party desire to have the same settled by arbitration, it shall be lawful for him to give notice in writing to the promoters of the undertaking of such his desire, stating in such notice the nature of the interest in such lands in respect of which he claims compensation, and the amount of the compensation so claimed therein; and unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and shall enter into a written agreement for that purpose within twenty-one days after the receipt of any such notice from any party so entitled, the same shall be settled by arbitration in the manner herein provided; or if the party so entitled as aforesaid desire to have such question of compensation settled by jury, it shall be lawful for him to give notice in writing of such his desire to the promoters of the undertaking, stating such particulars as aforesaid, and unless the promoters of the undertaking be willing to pay the amount of compensation so

claimed, and enter into a written agreement for that purpose, they shall, within twenty-one days after the receipt of such notice, issue their warrant to the sheriff to summon a jury for settling the same in the manner herein provided, and in default thereof they shall be liable to pay to the party so entitled as aforesaid the amount of compensation so claimed, and the same may be recovered by him, with costs, by action in any of the superior Courts.

3. *The Railway Clauses Consolidation Act*, 1845. 8 *Vict. cap.* 20.

SETTLEMENT OF DISPUTES BY ARBITRATION.

§ 126. *Appointment of Arbitrators when Questions are to be determined by Arbitration.*—When any dispute authorized or directed by this or the special Act, or any Act incorporated therewith, to be settled by arbitration, shall have arisen, then, unless both parties shall concur in the appointment of a single arbitrator, each party, on the request of the other party, shall nominate and appoint an arbitrator to whom such dispute shall be referred; and every appointment of an arbitrator shall be made on the part of the company, under the hand of the secretary or any two of the directors of the company, and on the part of any other party under the hand of such party, or if such party be a corporation aggregate, under the common seal of such corporation, and such appointment shall be delivered to the arbitrators, and shall be deemed a submission to arbitration on the part of the party by whom the same shall be made; and after any such appointment shall have been made, neither party shall have power to revoke the same without the consent of the other, nor shall the death of either party operate as a revocation; and if for the space of fourteen days after any such dispute shall have arisen, and after a request in writing, in which shall be stated the matters so required to be referred to arbitration, shall have been served by the one party on the other party to appoint an arbitrator, such last-mentioned party fail to appoint such arbitrator, then upon such failure the party making the request, and having himself appointed an arbitrator, may appoint such arbitrator to act on behalf of both parties; and such arbitrator may proceed to hear and determine the matters which shall be in dispute; and in such case the award or determination of such single arbitrator shall be final.

§ 127. *Vacancy of Arbitrator to be supplied.*—If before the matters referred shall be determined any arbitrator appointed by either party die, or become incapable to act, the party by whom such arbitrator was appointed may nominate and appoint in writing

some other person to act in his place, and if for the space of seven days after notice in writing from the other party for that purpose he fail to do so, the remaining or other arbitrator may proceed *ex parte*; and every arbitrator so to be substituted as aforesaid shall have the same powers and authorities as were vested in the former arbitrator at the time of such his death or incapacity as aforesaid.

§ 128. *Appointment of Umpire.*—Where more than one arbitrator shall have been appointed, such arbitrators shall, before they enter upon the matters referred to them, nominate and appoint by writing under their hands an umpire to decide on any such matters on which they shall differ, or which shall be referred to him under this or the special Act; and if such umpire shall die, or become incapable to act, they shall forthwith after such death or incapacity appoint another umpire in his place; and the decision of every such umpire on the matters so referred to him shall be final.

§ 129. *Board of Trade empowered to appoint an Umpire, on Neglect of the Arbitrators.*—If in either of the cases aforesaid the said arbitrators shall refuse, or shall for seven days after request of either party to such arbitration neglect to appoint an umpire, the Board of Trade shall, on the application of either party to such arbitration, appoint an umpire; and the decision of such umpire on the matters on which the arbitrators shall differ, or which shall be referred to him under this or the special Act, shall be final.

§ 130. *In case of Death of single Arbitrator the Matter to begin* de novo.—If, where a single arbitrator shall have been appointed, such arbitrator shall die, or become incapable to act, before he shall have made his award, the matters referred to him shall be determined by arbitration, under the provisions of this or the special Act, in the same manner as if such arbitrator had not been appointed.

§ 131. *If either Arbitrator refuse to act, the other to proceed* ex parte.—If, where more than one arbitrator shall have been appointed, either of the arbitrators refuse or for seven days neglect to act, the other arbitrator may proceed *ex parte*, and the decision of such other arbitrator shall be as effectual as if he had been the single arbitrator appointed by both parties.

§ 132. *If Arbitrators fail to make their Award within Twenty-one Days, the Matter to go to the Umpire.*—If, where more than one arbitrator shall have been appointed, and where neither of them shall refuse or neglect to act as aforesaid, such arbitrators shall fail to make their award within twenty-one days after the day on which the last of such arbitrators shall have been appointed, or within

such extended time, if any, as shall have been appointed for that purpose by both such arbitrators under their hands, the matter referred to them shall be determined by the umpire to be appointed as aforesaid.

§ 133. *Power for Arbitrators to call for Books, &c.*—The said arbitrators or their umpire may call for the production of any documents in the possession or power of either party which they or he may think necessary for determining the question in dispute, and may examine the parties or their witnesses on oath, and administer the oaths necessary for that purpose.

§ 134. *Arbitrator and Umpire to make Declaration.*—Before any arbitrator or umpire shall enter into the consideration of any matters referred to him, he shall, in the presence of a justice, make and subscribe the following declaration; that is to say,

"I, *A. B.*, do solemnly and sincerely declare, that I will faithfully and honestly, and to the best of my skill and ability, hear and determine the matters referred to me, under the provisions of the Act [*naming the special Act*]. *A. B.*

"Made and subscribed in the presence of ."

And such declaration shall be annexed to the award when made; and if any arbitrator or umpire, having made such declaration, shall wilfully act contrary thereto, he shall be guilty of a misdemeanour.

§ 135. *Costs to be in the Discretion of the Arbitrators.*—Except where by this or the special Act, or any Act incorporated therewith, it shall be otherwise provided, the costs of and attending every such arbitration, to be determined by the arbitrators, shall be in the discretion of the arbitrators.

§ 136. *Submission to Arbitration may be made a Rule of Court.*—The submission to any such arbitration may be made a rule of any of the superior Courts, on the application of either of the parties.

§ 137. *The Award not to be set aside for Matter of Form.*—No award made with respect to any question referred to arbitration under the provisions of this or the special Act shall be set aside for irregularity or error in matter of form.

9. *Forms of Submission to Arbitration.*

1. *Form of Agreement to refer Matters in Difference to Arbitration.*

ARTICLES of agreement made the day of , between , of , of the first part, , of , of the second part.

Whereas several questions, disputes, and controversies have arisen and are subsisting between the said parties respecting certain matters and things, to wit,
and otherwise relating to the premises; now these presents witness, that it is hereby covenanted and agreed by and between the said parties hereto, to refer all questions, disputes, and controversies in anywise relating thereto, or touching, or concerning the premises and the accounts relating thereto, to the award, order, arbitration, and determination of , of &c.

And the said parties, for themselves, their heirs, executors, and administrators, do hereby severally and respectively agree well and truly to obey and perform the award of the said , or any two of them, touching the matters and things hereinbefore particularly mentioned, or otherwise concerning the premises; and so as the said award be made in writing, under the hands of the said arbitrators, or any two of them, and ready to be delivered to the said parties or their respective executors or administrators, or such of them respectively as shall desire the same, on or before the day of next ensuing; and that the said arbitrators shall have power to examine the parties and their witnesses on oath or affirmation, and call for all books, papers, deeds, evidences, and writing, relating to the premises as shall be in the possession or power of either of the said parties; and to take the depositions of the parties and their witnesses, in writing, and to be duly signed by them respectively; and that each of the said parties shall at any time before the day which may be appointed for entering upon the arbitration, be at liberty to inspect, peruse, and take copies of all or any of the books, papers, deeds, evidences, and writings in the possession or power of either of the said parties, touching or relating to the matters in reference; and if either of the said parties shall, in the opinion of the arbitrators, or of the majority of them, without good and sufficient cause, delay, or impede, or attempt to delay or impede, the said arbitrators in

making the award, the said arbitrators, or the majority of them, may and shall be at liberty to proceed *ex parte*, after days' notice to the party causing the delay or impediment as aforesaid, to be left at his or their last known place of abode or of business; and it is agreed that all proceedings at law or in equity shall be stayed until the said arbitrators, or the majority of them, shall have made their award; and it is agreed that the powers of the arbitrators, under this submission, shall not be defeated or affected by the death of the said parties, or either of them, pending the same, but shall and may be proceeded with, and the matters in controversy determined, in the same manner as if the award had been made and delivered in the lifetime of the party or parties so dying; and it is agreed that the expense of this submission, and of the award to be made thereunder, shall be paid in the following proportions, that is to say: half (or part) by the said , and half (or part) by the said ; and it is agreed that this submission shall be made a rule of her Majesty's Court of Exchequer at Westminster.

In witness, &c.

2. *Form of Agreement to submit to an Arbitrator to determine the Sum to be paid for Premises taken under the Compulsory Powers of an Act of Parliament.*

Whereas, under the provisions of the Covent Garden Approach and Southwark and Westminster Communication Act, 1857, 20 & 21 Vict. c. 115, the Metropolitan Board of Works, hereinafter called the Board, are entitled to take, and have given due notice in writing, to , of , in the county of , hereinafter called the Claimant, that they require for the purposes of the said Act certain leasehold lands, houses, shops, and tenements, with their appurtenances, situate in the parish of , in the county of , in which the said claimant is interested, which said lands, houses, shops, tenements, and appurtenances, are specifically described in the said notice, and also in the schedule hereunto annexed. And whereas the said claimant has made a certain claim against the Board, but has not agreed with the Board as to the price and compensation to be paid for the value of his estate and interest in the said premises, for his goodwill and loss by removal, and for the fixtures and fittings of and belonging to the said premises, and also for the injury and damage sustained by him on account of the execution of the said Act: and whereas it has been agreed by and between the said Board and the said

claimant, that his said claim for compensation shall be forthwith referred to an arbitrator to determine the sum to be paid by the Board to the claimant in respect thereof; and that the arbitration should be conducted by the surveyors of the respective parties, who shall be competent nevertheless to give evidence as witnesses, without counsel on either side: now these presents witness that the Board and the claimant, in pursuance of the said Act and of the said agreement, do hereby appoint , of , in the county of , architect and surveyor, to be an arbitrator, to settle and determine the sum to be paid by the Board to the claimant, according to the said notice, and according to the said Act.

Dated this day of , in the year of our Lord one thousand eight hundred and .

Schedule above referred to.

Name, Residence, Business, or Description of the person claiming.	Number, Situation, and Description of the Property.	The estate, share, or interest claimed, whether freehold or leasehold; if freehold, whether absolutely entitled or in mortgage, &c., if leasehold, the Landlord's name and residence, the terms of years unexpired, the rent reserved, the premium paid, and any special Covenants or circumstances.	Names of Occupiers, whether Lessees or Quarterly or other Tenants; the rents paid, the terms of years, the periods when the tenancies commenced, and premiums paid.	Particulars of Amount claimed, specifying separately the proportion claimed for value of estate or interest and that claimed for compensation for removal, &c.

(Signed)

Witness to the Signature of
the above-named

3. *Form of Appointment of an Umpire by Arbitrators.*

We, the within-named and , do hereby nominate and appoint , of , to be the umpire between us in the matters within referred; on condition that he do within days from the date hereof, by some writing under his hand, accept the umpirage.

As witness our hands, &c.

4. *Form of Enlargement, by the Parties, of Time for making Award.*

Know all men by these presents, that we, the within-named and , for ourselves severally and respectively, and for our several and respective heirs, executors, and administrators, do hereby give, grant, and allow unto the within-named further time for making their award of and concerning the several matters within referred to them, until the day of now next ensuing

In witness, &c.

5. *Form of Notice to produce Papers, &c.*

I do hereby give you notice to produce before , of , to whom all matters in difference between the above-named parties have been referred, on the day of next ensuing, at o'clock in the morning (afternoon), all books, deeds, papers, evidences, writings, vouchers, letters, or other documents whatsoever, relating to the matters in difference between the said parties so referred as aforesaid, now in your custody, power, or possession, and especially a certain book, &c. Dated this day of .

To

VI.

THE RELATION OF ARCHITECTS AND SURVEYORS TO EMPLOYERS.

In every trade or profession it is important that the usages of it should be understood by the respective parties to a transaction; for if there be a general usage applicable to a particular trade or profession, persons employing one in such trade or profession will be taken to have dealt with him according to that usage.[1]

It is not a usual practice for architects to make out the bills of particulars or quantities for work to be done. Architects of the highest class never do so, and indeed the practice is reprobated in the profession. The usual course is for the person who makes out such bills to do so in detail; so that builders or contractors tendering for the execution of the works may be enabled to judge, not only of the gross quantity of materials to be used, but also of the quantity of labour to be employed in preparing the materials, the cost of which is often very much in excess of the value or cost of the materials before their arrival at the spot where they are to be used. In the case of Kemp *v.* Rose, it was held to have been established by the evidence before the Court that it is neither the usual nor a safe course for the architect to prepare bills of particulars or quantities of the works to be executed; in consequence of its having been done by the architect in that case, the statement which he furnished was held to be of the essence of the contract; and it was also held that the contractor was not bound by the quantities of work referred to in the written contract as the quantities appearing in the drawings.[2] Where, however, an architect does himself supply a bill of quantities, he may, under certain circumstances, be personally liable for any loss occurring to a contractor in consequence of an error on his part in the particulars specified in the bill. In illustration of this liability the following case may be cited:—The plaintiff sued the defendant, an architect, to recover damages for supplying to the plaintiff an inaccurate statement of the quantities of work and materials required for the erection of a building which the plaintiff contracted to erect. The defendant advertised for tenders for the erection of a Baptist chapel, stating that the plans and specifications could be seen, and that the quanti-

[1] Sewell *v.* Corp, 1 C. and P. 392.
[2] Kemp *v.* Rose, 4 Jur. (N. S.) 919.

ties of work and materials would be furnished. The plaintiff obtained from the defendant's office a table of such quantities, headed by a statement that it was to be paid for by the successful competitor. From this table the plaintiff calculated his tender, which was accepted, and according to the plaintiff's evidence, but contradicted by the defendant, the latter expressly stated to the plaintiff that he was responsible to him for the quantities. The defendant, however, admitted that in the plaintiff's absence he (the defendant) on one occasion assured the chapel committee that the quantities were correct and that he guaranteed them. There was a second claim made by the plaintiff in respect of a contract for building a gentleman's villa, the bill of quantities being headed "2 per cent. for quantities." For the plaintiff, it was contended, that independently of the computations there was an implied undertaking in law that the bill of quantities paid for by the plaintiff should be reasonably correct. And for the defendant it was contended that there was no contract between the architect and the builder; that the committee had stipulated with the plaintiff that he should pay the architect, and that the architect was not liable to the builder for any inaccuracy in the quantities. Mr. Justice Byles, in summing up the evidence, directed the jury that the defendant had stipulated that the plaintiff should pay him for the calculation of the quantities, and having been paid for them by him was liable to compensate him if the bill were not reasonably correct, and the jury thereupon found for the plaintiff.[1]

It is also said that if a surveyor make an estimate which turns out to be incorrect to a considerable amount, through his omitting to examine the ground for the foundation of the work, he is not entitled to recover anything for his plans, specifications, or estimates made for that work.[2]

When an architect, or other qualified person, enters into competition with others in submitting designs and estimates for works, and his plans are accepted, if his designs are afterwards entrusted to others to be carried into execution, he will be entitled to be compensated for the trouble and expense he was put to in respect of his designs. So also, if a builder or carpenter prepares a tender for the execution of works, which is accepted, and the execution of the works is afterwards entrusted to another. To give an architect or builder under such circumstances a legal right to recover compensation for the services rendered, there must however be an express or implied contract or retainer to do the work; for if

[1] Bolt *v.* Thomas, MS.

[2] Moneypenny *v.* Hartland, 1 C. and P. 352, 2 C. and P. 378.

such be wanting, the demand cannot be enforced. In all competitions the terms of the announcement inviting plans or tenders should be carefully examined, in order to ascertain that the conditions are expressed in such terms as will amount to a contract, either express or implied, between the persons inviting the competition and the successful competitor. If this be not done, it may turn out that the labour bestowed is entirely thrown away, so far as any benefit is likely to accrue to the labourer, who at the last may find that, though considered worthy in other respects, he is not considered worthy of his hire.

The following case bears incidentally upon the subject here treated of:—A prize had been offered for the best plan and model of a machine for loading colliers and barges, and plans and models intended for the competition were to be sent in by a certain day. A person who had made a plan and constructed a model, with the intention of becoming a competitor, sent the plan and model by a railway, addressed to the parties; but through negligence they did not arrive at their destination until after the appointed day. Upon this state of facts, it seems that the damage arising from the non-delivery of the plan and model was to be measured by the value of labour and materials expended in making the plan and model, and not by the chance of obtaining the prize, as the latter was considered too remote a ground for assessing damages.[1]

VII.

LIABILITY OF CONTRACTORS FOR DAMAGE.

By statute 3 Vict. c. 55, § 5, it was declared, that no act of the Commissioners of the Dartford Creeks should be valid, unless made or done at a meeting under the Act; and that all the powers of the Act shall be executed by a majority of the commissioners present at a meeting, not less than three being present. By another section of the same Act, the commissioners were to be sued in the name of their clerk. The commissioners passed resolutions to the effect that their engineer should prepare specifications, with a view to certain works, and that tenders should be invited for the execution of the works. Afterwards, at a meeting at which seven

[1] Watson v. Ambergate, &c., Railway Company, 15 Jur. 448.

commissioners were present, they unanimously agreed to accept a tender sent in. The contract was accordingly prepared by the secretary of the commissioners; but three of them only were named in it, and by none of those three was it signed. The person whose tender was accepted performed the works specified in the contract, (*inter alia*) a bank, which he erected of insufficient materials. Water having been prematurely let in, the bank sank, and caused damage to an adjoining orchard. An action on the case, for the damage so sustained, having been brought against the commissioners, in the name of their clerk, a verdict for the plaintiff was found, and a rule *nisi* obtained for a nonsuit, pursuant to leave reserved, or for a new trial, on the ground of misdirection; it was held on the hearing of the rule, that the contract agreed upon, as above mentioned, at a regular meeting, was made in execution of their office by the commissioners, and that work done under it may be work done by them as commissioners; so that the defendant might be properly sued as their representative, assuming that in other respects they were liable; but it was held that they were not so liable. The Court said, that it was perfectly clear that in an ordinary case a contractor to do works of the nature referred to is not to be considered as a servant, but as a person carrying on an independent business, such as the commissioners were fully justified in employing to perform works which they could not execute for themselves, and who was known to all the world as performing for them. The bank, which failed, and which was the cause of the damage, being part of the works specified and described in the contract, and being unskilfully constructed, the contractor, the Court held, was liable, and not the commissioners. The rule was accordingly made absolute for a nonsuit.[1]

Another statute, the 11 & 12 Vict. c. 112, § 128, enacts that "no matter or thing done by the commissioners, or by any clerk, surveyor, or other person acting under their direction, shall, if the matter or thing were done *bonâ fide* for the purpose of executing that act, subject them primally to any action, liability, claim or demand whatsoever; and any expense incurred by such commissioners, clerk, surveyor, or person acting as last aforesaid, shall be borne and repaid out of the funds under the control of the commissioners." An action having been brought for an injury to a house, caused by works executed by a contractor, it was held that the words above quoted absolved from liability to an action persons who, acting under the direction of the commissioners, did some matter or thing *bonâ fide*, which but for the enactment would

[1] Allen *v.* Hayward, 15 L. J. Q. B. 99; 10 Jur. 92.

subject them to an action, and that therefore a contractor who, acting *bonâ fide*, and under the control of the commissioners, executed works which caused injury to a house, was not liable to an action, but that the person injured must bring his action against the commissioners in the name of their clerk, in pursuance of the 125th section of the Act.[1]

The following case illustrates the liability of sub-contractors :— The plaintiff having contracted to repair a machine, employed the defendant to make part of the machinery, a fire-box, but did not inform him of his contract to repair the machine. The defendant failed to make the fire-box within the time specified; but the interval between that time and the time fixed for the completion of the plaintiff's contract for the repair of the machine was sufficient to have enabled him to have got a fire-box made elsewhere. The plaintiff, for want of the fire-box, failed to complete his contract for the repair of the machine, and being sued thereon, paid damages. He thereupon brought his action against the defendant for breach of his contract, and it was held that the damages paid by the plaintiff were not recoverable by him from the defendant as the result of his breach of contract.[2]

The extent to which a contractor may be liable for insufficient workmanship, is illustrated by the following case :—A person employed another to make bricks for him at a stipulated price per thousand, and some of the bricks made under the contract were so badly made, that they were good for nothing. The employer in such case was held to be entitled to make a deduction for those badly-made bricks out of the stipulated price; and he may make such deduction in an action brought by the maker of the bricks for the stipulated price. If, however, the bricks be badly made in a trifling degree only, so as merely to be less valuable than they otherwise would have been, in an action by the maker for the stipulated price, the employer will not be entitled to make any deduction on this account.[3]

[1] Ward *v.* Lee, 7 El. and Bl. 426; 26 L. J. (N. S.) Q. B. 142; 3 Jur. (N. S.) 557.

[2] Portman v. Middleton, 27 L. J. C. P. 231; 4 Jur. (N. S.) 689.

[3] Pardow *v.* Webb, 1 Car. and M. 531.

VIII.

LIABILITY OF MASTERS FOR INJURIES TO SERVANTS IN THE COURSE OF THEIR EMPLOYMENT, AND OTHER PERSONS.

THE next subject to be treated of is the liability of employers for injuries resulting to their servants whilst in the ordinary course of employment in their masters' service, and for injuries to others caused by the acts of such servants; and also to make compensation in an action for damages to the wife, husband, parent, and child of a person killed through a wrongful act, neglect, or default.

1. *Injuries resulting to Servants and Others.*

The rule of law is, that for the acts of a man's own domestic servants, in the ordinary course of their employment, the master is responsible; and this rule extends to other servants whom the master selects and appoints to do any work, or superintend any business, although the servants be not in the immediate employ or under the superintendence of the master. As in the case where the owner of a mine employs a manager to superintend the working of the mine and to hire workmen, and he pays them on behalf of the owner. In such a case, the under-workmen are the servants of the owner of the mine, who is answerable for their default; for their acts are the acts of the manager, and the act of the manager is the act of the principal. This rule, however, does not hold good in its application to the case of sub-contractors, for generally a sub-contractor is not deemed in law the servant of the person employing him, so as to render the latter liable for any accident occasioned by his misconduct or negligence. Again, the rule is, that though a master is answerable for damage occasioned by his servants' negligence in doing a lawful act in the course of his service, he is not so liable if the act is in itself unlawful, and is not proved to have been authorized by the master.[1]

These are the general principles which determine the liability of a master for injuries to others resulting from the acts of his servants whilst employed in the master's business; and the following are illustrations of their application to particular cases.

[1] Lyons *v.* Martin, 8 A. and E. 512; 3 Nev. and P. 509.

Where a master builder personally interferes, and directs his workmen to make a scaffolding out of poles which he knows to be unsound, he is liable to make compensation if the scaffolding gives way, and a workman upon it in his employ who has notice of the unsoundness is injured thereby.[1] So also, if a servant is required in the course of his employment to ascend a ladder which is wholly unfit and unsafe for use, and receives an injury. But it would seem that if the servant had the means of knowing that the ladder was unsafe, it would have been a defence to the action;[2] in such a case, however, the defendant should plead such means and knowledge.

A master is not generally held responsible to one servant for an injury occasioned to such servant by the negligence of a fellow-servant whilst they are employed in the same service; but this rule does not hold good where the person causing the injury is not a person of ordinary care and skill in the particular employment;[3] and, moreover, it is subject to this further qualification, that the master uses reasonable care in the selection of his servant.[4] He is, however, not bound to warrant the competency of his servants; and any servant who apprehends danger to himself in doing the work required of him, may decline the service.[5]

In a more recent case, upon an appeal from a Scotch Court, it was held by the House of Lords that where workmen are engaged in a common work, and an injury happens to one of them through the negligence of another engaged in the same work, the master is not responsible, unless the servant causing the injury was incompetent to discharge his duty.[6]

Generally, it may be said that a master is bound to take all reasonable precautions to secure the safety of his workmen, more especially if the work is of a dangerous character, and the persons engaged in it are proverbially reckless.[7] If, however, the person injured has himself contributed to the accident, he cannot recover; neither if he be killed could his representative recover under the 9 & 10 Vict. c. 93.[8]

[1] Roberts *v.* Smith, 2 H. and N. 213; 26 L. J. Exch. Ch. 319; 3 Jur. (N. S.) 469. See also Ormond *v.* Holland, 1 E. B. & E. 102.

[2] Williams *v.* Clough, 3 H. and N. 258.

[3] Wiggett *v.* Fox, 11 Exch. Rep. 832; 2 Jur. (N.S,) 955; 25 L. J. Exch. 188.

[4] Tarrant *v.* Webb, 18 C. B. 787; 25 L. J. C. P. 261.

[5] Wiggett *v* Fox, *supra*.

[6] Barton's Hill Coal Company *v.* Reid, 3 Macg. H. L. Cas. 266; 4 Jur. (N. S.) 767.

[7] Paterson *v.* Wallace, 1 Macg. H. L. Cas. 748.

[8] Griffiths *v.* Gidlow, 3 H. and N. 648.

In Paterson *v.* Wallace, Cranworth, *C.*, said:—"It is the master's duty to be careful that his servant is not induced to work under a notion that tackle or machinery is stanch and secure, while, in fact, the master knows, or ought to know, that it is not so; and if from any negligence in this respect damage arises, the master is responsible." Upon which, Pollock, *C. B.*, in another case, observes,—"That is merely a declaration of the Lord Chancellor in a Scotch case, not a decision of the House of Lords."[1]

In that case it was held by the Court of Exchequer that a servant has no right of action against his master for injury done to him in the course of his employ by the acts of his fellow-servant; and if killed, no action under the 9 and 10 Vict. c. 93, can be maintained by his representative; but it would seem that these rules do not hold where the master has personally interfered to direct the act which caused the injury or death.

The case of Addie *v.* Lenman, decided by the House of Lords, may be instanced in further illustration of this principle. That case was an appeal from the Second Division of the Court of Session in Scotland, and it appeared that the appellants, Messrs. Addie and Miller, were coal-masters at Roschall and Glasgow, and the respondent was in their service as reddsman or labourer. He brought an action against his masters in the Sheriff's Court of the county of Lanark to recover compensation for injuries he had sustained through the alleged negligence of the appellants or their managers, by whose neglect a stone had fallen upon him while employed in repairing a road in the mine, which stone he contended ought to have been properly secured before he was sent to work there. The appellants denied the negligence and their liability. The sheriff-substitute before whom the case was heard decided that the respondent had failed in making out the alleged negligence on the part of the appellants or their managers. The sheriff, however, reversed that decision, being of opinion that there had been such negligence proved on the part of the overseers of the mine as would render the appellants liable. The appellants then took the case before the Court of Session, contending that they were not liable to the respondent for injuries sustained by him through the negligence of a fellow-servant, and that Court held that the appellants were liable for such negligence. That decision was appealed from, and their lordships reversed the decision of the Court below, holding that the law both of England and Scotland was clear, that a master was not liable to his servant for

[1] Vose *v.* Lancashire and Yorkshire Railway Company, 2 H. and N. 728, 732; see also Roberts *v.* Smith, 2 H. and N. 213.

injuries sustained by him in consequence of the negligence of a fellow-servant whom the master believed to be a competent person.

Negligence is of the essence of the liability of a master for injury occasioned to his servants in the course of their employment; and a master is bound to take all reasonable precautions to secure the safety of his workmen.[1] The rule of law is, that a master is not in general responsible to his servant for injury occasioned by the negligence of a fellow-servant in the course of their common employment; and this rule applies equally to the case of a stranger who is injured whilst voluntarily assisting the servants in their work;[2] neither is a master liable for injury occasioned to his servant in the course of his ordinary employment, if such injury be not occasioned by the personal negligence of the master.

Again, if a servant meets with an injury while in the actual use of an instrument or machine, of the nature of which he is as much aware as his master, and the use of which is the approximate cause of the injury, he cannot, at all events if the evidence is consistent with his own negligence in the use of it being the real cause, nor in the case of his dying from the injury, can his representative under the 9 & 10 Vict. c. 93, recover against his master, there being no evidence that the injury arose through the personal negligence of the master. And this even though the master have in use in his works an instrument or machine less safe than some other which is in general use for the particular purpose.[3]

The following case further illustrates this subject:—A declaration against a builder alleged that he knowingly, carelessly, and negligently erected a hoarding in a street, and left a machine in a position in which it was likely to cause danger to the workmen, and that a cart accidentally ran against the hoarding and knocked down the machine against the plaintiff. The hoarding had been erected by the builder, and it projected too far into the street, but sufficient room was left for carts to pass. The machine which was the immediate cause of the injury, was placed inside the hoarding and close to it, and a cart in passing struck the hoarding, and knocked down the machine against the plaintiff, a workman employed by the builder. The plaintiff had previously made some

[1] Bryden v. Stewart, 2 Macg. H. L. Cas. 30.

[2] Degg v. Midland Railway Company, 1 H. and N. 773; 26 L. J. Exch. 171; 3 Jur. (N. S.) 395.

[3] Dynen v. Leach, 26 L. J. Exch. 221.

complaint of the position of the machine to his master, but voluntarily continued to work, though the machine was not removed; and it was held that this state of facts afforded no evidence to go to the jury of the builder's liability for the injury.[1]

Again, an owner of land having a private road for the use of persons coming to his house, gave permission to a person engaged in building on the land to place materials upon the road. The builder accordingly placed a quantity of slates on the road, but in such a manner that a person using the road sustained damage; and he was held liable to an action for the damage.[2]

In an action for damage occasioned by negligence, a material question is whether or not the person injured might not have escaped the damage by ordinary care on his own part; the person causing the damage is not excused merely because the injured person knew that some danger existed through the particular neglect, and voluntarily incurred the danger. In such a case, the amount of danger, and the circumstances which led to its being incurred, will be for the consideration of the jury. Therefore, where Commissioners of Sewers had made a dangerous trench in the only outlet from a mews, putting up no fence, and leaving only a narrow passage, on which they had heaped rubbish, and a cabman in the exercise of his calling attempted to lead his horse out over the rubbish, and the horse fell, and was killed, it was held that he was not disentitled to recover.[3] Moreover, it will be no answer to an action for negligence, that part of the injurious consequences would not have occurred had the injured person not been guilty of some negligence;[4] and a plaintiff is not precluded from recovering for an injury negligently done by the defendant, by the fact, that he himself has been guilty of unlawful or negligent conduct, unless he might by the exercise of ordinary care at the time have avoided the injury.[5] The following case further illustrates this principle.

A workman employed with others in sinking a pit, being at the bottom, was injured by the fall of a tub of water, which was being drawn up by machinery. Evidence was given that the tackle was imperfect, not being pulled with a safe hook, and that a "jiddy" should have been used. He worked with the hook, making no complaint of it; a jiddy had been provided by the master, who had directed that it should be used when earth was raised. In his

[1] Assop *v.* Yates, 2 H. and N. 768; 27 L. J. Exch. 156.
[2] Corby *v.* Hill, 4 C. B. 576.
[3] Clayards *v.* Dethick, 12 Q. B. 439.
[4] Greenland *v.* Chaplin, 19 L. J. Exch. 293; 5 Exch. Rep. 243.
[5] Davis *v.* Man, 12 L. J. 10; Exch. 10 Mee. and W. 546.

master's presence, he had complained that the jiddy was not used for water, and the master was at the workings several times each day. Upon this state of things, it was held that the master was not liable for the injury; first, because assuming the injury to have arisen from the defect of the hook, the workman himself voluntarily used it, and it was not shown that the injury was not caused by his own rashness; secondly, because, assuming it to have arisen from the neglect to use the jiddy, the master, having provided a proper apparatus, was not liable for the neglect of the fellow-workmen in omitting to use it.[1]

It may sometimes happen that though there may be no negligence on the part of the person injured, such person may nevertheless not be entitled to maintain an action for the injury to himself. As, where the plaintiff, a child of five years old, was under the care of his grandmother, who purchased a ticket for him and another for herself, to go from A to B on the defendant's railway. While crossing the line at A to be ready for their train, they were both knocked down and injured by another train. The accident was partly owing to the defendant's negligence, and partly to such negligence on the part of the grandmother as would have disentitled her to recover damages from the defendants for the injury to herself. Upon an application to reverse the decision of the Court of Queen's Bench, making absolute a rule for a nonsuit,[2] it was held by the Court of Exchequer Chamber, that the plaintiff not being able to take care of himself, and being under his grandmother's care, there was such an identification between the grandmother and the plaintiff, that by reason of her negligence, the plaintiff was unable to maintain an action for the injury to himself.[3]

A master is civilly responsible for the negligence of his servant acting in the course of his employment, but not for an act of wilful negligence done out of the scope of his employment. Where a common labourer had been employed to clean out a drain by the job, and in the course of doing so, took up part of an adjoining highway, and replaced it in an improper manner and with insufficient materials, in consequence whereof the horse of a person passing along the highway was injured, it was held that the labourer was not an independent contractor, but was acting as the servant and under the control of his employer, who was con-

[1] Griffiths v. Gidlow, 3 H. and N. 648; 27 L. J. Exch. 404.

[2] Waite v. the North Eastern Railway Company, 27 L. J. (N. S.), Q. B. 417.

[3] Ib. 28 L. J. (N. S.) Q. B. 258; 5 Jur. (N. S.) 936.

sequently responsible for the injury.[1] Where, however, work is done for a company under a contract (parol or otherwise), the company is not responsible for injury resulting to a third person from the negligent manner of doing the work, though they employ their own surveyor to superintend it and to direct what shall be done.[2] So also if a person employs another to do a lawful act, and he in doing it commits a public nuisance whereby an injury is occasioned to a third person.[3]

So where an accident occurred whilst the reins of a cart were entrusted to a stranger, who was riding with the owner's servant, the owner was held to be liable for the damage though the stranger was not in his service.[4] Again, if a servant driving his master's cart, on his master's business, make a detour from the direct road for some purpose of his own, the master will be liable to damages for any injury occasioned by his negligent driving while so out of the road; but not so if the servant take his master's cart without leave, at a time when it is not wanted for the purposes of business, and drive it about solely for his own purposes.[5]

It would seem that the owner of property who enters into a contract for its repair, and parts with all control over the conduct of such repair, is not liable for any mischief which the contractor may occasion in the progress of the work by negligently depositing materials in the highway in the neighbourhood of the property, or other acts of a like nature. Where, however, the owner of premises caused a drain to be made on them, and the soil removed was placed on the highway near the spot where the workmen were employed by the contractor, and an action on the case being brought against the owner by a person who was thrown out of his cart in consequence of its passing over the heap and so injured; it was held that it was not necessary to render the owner liable that the contractor should be his servant; and that he could not complain that the judge on the trial directed the jury to consider, on the evidence, whether he had parted with all control over the making of the drain and the removal of the soil.[6]

A railway company entered into an agreement with A to construct a portion of their line. A contracted with B, who resided in the county, to erect a bridge on the line. B had in his employ-

[1] Sadler *v.* Henlock, 4 El. and Bl. 570; 24 L. J. R. Q. B. 138; 1 Jur. (N. S.) 677.

[2] Steel *v.* South Eastern Railway Company, 16 C. B. 550.

[3] Peachy *v.* Rowland, 22 L. J. C. P. 81; 17 Jur. 764.

[4] Booth *v.* Muster, 7 C. and P. 66.

[5] Joel *v.* Morison, 6 C. and P. 501.

[6] Burgess *v.* Gray, 14 L. J. C. P. 184.

ment C, who acted as his general servant, and as a surveyor, and had the management of B's business in London, for which he received an annual salary. B entered into a contract with C, by which C agreed for 40*l.* to erect a scaffold which had become necessary for the building of the bridge; but it was agreed that B was to provide the requisite materials, and lamps, and other lights. The scaffold was erected upon the footway by C's workmen, and a portion of it improperly projected, and owing to that, and the want of sufficient light, D fell over it at night, and was injured. After the accident, B caused other lights to be placed near the spot to prevent a recurrence of similar accidents. An action being brought by D for the injury he sustained, it was held that it was not maintainable against B, but that D's remedy lay against C, the foreman of B.[1]

The following case is an illustration of the general rule as to non-liability for the acts of a sub-contractor. The defendant, a builder, was employed by the committee of a club to execute certain alterations at the club-house, including the preparation and fixing of gas-fittings. He made a sub-contract with a gas-fitter to execute this part of the work; and in the course of the execution of the work, through the negligence of the sub-contractor, the gas exploded, and injured the plaintiff. An action on the case having been brought for the injury, it appeared at the trial that the specification included various works to be done, and amongst the rest some gas-fittings. For this latter purpose the defendant employed a person who had been for many years extensively engaged as a gas-fitter, and who, while the work was in progress, received a fresh order from the club through the plaintiff, who was their butler and steward, for the construction of a gas-pipe and burner, not mentioned in the original specification with the defendant, and which he constructed accordingly without any notice to or communication with the defendant on the subject, who, however, either by himself or his servants superintended the works generally. On the occasion of a trial of all the gas-works which had been set up, an explosion of gas from this new pipe took place, in consequence of the negligence of one of the gas-fitter's workmen, by which the plaintiff and his wife were severely injured. On this evidence the plaintiff had a verdict, with leave reserved to the defendant to move to enter a non-suit, on the ground that he was not liable, and that the plaintiff's right of action lay either against the gas-fitter, or the workman by whose immediate negligence the injury

[1] Knight *v.* Fox and Henderson, 5 Exch. 721; 20 L. J. Exch. 9; Overton *v.* Freeman, 15 Jur. 65.

had been occasioned. A rule having been obtained either to enter a non-suit, or for a new trial, or in arrest of judgment, it was held that the injured person could not maintain any action against the original contractor:—"If a man," said Alderson, *B.*, "does an injurious act, either by himself or his servant, he is responsible for it, and the whole question resolves itself into this—Was the gas-fitter the servant of the defendant? and that comes to this—Is a sub-contractor to be considered a servant? I think he is not; and this rule ought, therefore, to be made absolute."[1]

2. *Damages in case of Death of the Person injured.*

By Lord Campbell's Act it is provided, that whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action, and recover damages in respect thereof, then, and in every such case, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony.[2] The action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been caused; and shall be brought in the name of the executor or administrator of the deceased; and the jury may give such damages as they may think proportioned to the injury resulting from the death to the parties for whom and for whose benefit the action shall be brought; to be divided amongst them (after deducting costs) in such shares as the jury, by their verdict, shall find and direct.[3]

Not more than one action lies under the Act in respect of the same subject matter of complaint[4]; and every action must be commenced within twelve calendar months after the death of the deceased person.[5] It is further required that the plaintiff on the record shall, together with the declaration, deliver to the defendant or his attorney a full particular of the person or persons for whom, and on whose behalf the action shall be brought, and of the nature of the claim in respect of which damages shall be sought to be recovered.[6]

The action must be brought in the name of the executor or

[1] Rapson *v.* Cubit, 9 Mee. and W. 710; 1 Car. and M. 64; 6 Jur. 606.
[2] 9 and 10 Vict. c. 93, § 1. [3] Ib. § 2. [4] Ib. c. 93, § 3.
[5] Ib. § 4.

administrator of the deceased, and therefore the will of the deceased must be legally proved, or letters of administration must have been granted to the party bringing the action. In a case in which a married woman was killed, leaving a husband (a mariner absent at sea on a voyage which was to endure for three years), a mother and an infant child, the Court of Probate granted limited administration to the mother of the deceased in the absence of the husband, for the sole purpose of enabling her to bring the action before the expiration of the twelve calendar months limited by the Act.[1]

The rule with respect to actions under the 9 & 10 Vict. c. 93, is the same as if the injured person himself had brought the action. Therefore, if in an action where the death is alleged to have been caused by the negligence of the defendant's servants, it be shown that the deceased, by his own negligence or carelessness, contributed to the accident, the defendant would be entitled to a verdict.[2]

In a more recent case, it has been held that an action is not maintainable by the representative of a deceased workman against his master, if the deceased's own negligence materially contributed to the injury of which he died, even though the master himself be guilty of personal negligence. Thus after the passing of the 18 & 19 Vict. c. 108, special rules were framed and approved for the regulation of a coal-mine, of which the defendant was the proprietor and manager. By one of these rules for the direction of the enginemen and banksmen, every evening before any one descended the shaft, the cage by which they were let down was to be twice run slowly up and down loaded, in order to test the sufficiency of the rope and tackling. This rule was habitually neglected for many weeks to the defendant's knowledge, and even the rope by which the cage was suspended, being before in good repair, was (as it was afterwards discovered) injured by an accidental fire in the mine. The next morning, certain miners employed by the defendant in the colliery, all of whom knew of the rule for testing the rope and of its being habitually violated, presented themselves at the pit to be let down to work, and there not having been any previous testing of the rope, &c., were told by the banksman that they had better examine the rope before they went down; they, however, did not do so, but got immediately into the cage, and the rope breaking as they descended they were all killed. An action having been brought by the representative of

[1] *In re* the goods of Williams, deceased, MS.

[2] Tucker *v.* Chaplin, 2 C. and K. 730.

one of the miners against the proprietor and manager, it was held not to be maintainable, inasmuch as the deceased's own negligence had contributed to the accident. The Court, however, intimated an opinion that but for the deceased's own negligence, the defendant, notwithstanding the deceased and the banksman were both employed in the colliery by the defendant as fellow-labourers, would have been liable by reason of his personal negligence in neglecting the rule and keeping in his employ a banksman who, he knew, habitually violated it.[1]

In a case where a master builder contracted to erect a building, and employed bricklayers for the purpose, and it being the master's duty to provide the proper scaffolding, in his absence entrusted the preparation of it to his foreman, with the assistance of his own workmen, who used an unsound ledger-pole in its construction, in consequence of which the scaffold broke, and one of the bricklayers was killed; it was held in the absence of proof that the foreman was a person deficient in skill, or an improper person to employ for the purpose, that no action was maintainable under the 9 & 10 Vict. c. 93, by the representative of the person killed against the common employer;[2] for a master is not in general liable to his servant for damage resulting from the negligence of a fellow-servant. In this case the unsoundness of the ledger-pole had been previously pointed out to the foreman.

Persons executing works are liable in respect of injuries occasioned by their negligence in not having properly fenced in dangerous parts of the works or places near to which the public have a right to pass; for such works are a public nuisance, and an individual injury arising from such a nuisance is the subject-matter of an action to the person aggrieved, which is a doctrine as old as any known to the Common Law of England. Therefore if a person in the course of building a house on land abutting on a public footway, excavates an area, which, either by his own negligence or by the negligence of his workpeople, is left unfenced, so that a person lawfully passing along the way, in a dark night, without any negligence or default, falls in and is killed, is liable to an action on the part of the representative of the deceased, under the 9 & 10 Vict. c. 93.[3] Such liability, however, would not attach to the owner or occupier of land, along which a right-of-way exists, who leaves unprotected an excavation or reservoir of water, for the injury or death of a person falling into it in the dark, in con-

[1] Senior *v.* Ward, 28 L. J. (N. S.) Q. B. 139.

[2] Wigmore *v.* Jay, 5 Exch. 354; 19 L. J. Exch. 296, 300; 14 Jur. 837.

[3] Barnes *v.* Ward, 9 C. B. 392; 19 L. J. C. P. 195; 14 Jur. 334.

sequence of his straying out of the way by mistake.[1] The true test of legal liability in such cases is whether the works or excavations be substantially adjoining the public way, along which the public have a right to pass. If they be, liability will attach; if they be not, and the person come to misfortune by reason of his trespassing upon the adjoining land, the owner of the land is exonerated. Generally, it may be said that if a person employs another to do that which would be in itself a public nuisance, and injury to a third person is thereby occasioned, the employer would be liable for the injury.[2] The following is a further illustration of this principle.

A declaration alleged that the defendant was in the occupation of a brewery and office, and a passage leading thereto from the public street, used by the defendant for the reception of customers in his trade of a brewer, which passage was the usual means of access from the office to the public street; yet that the defendant wrongfully and negligently permitted a trap-door in the floor of the passage to be and remain open without being properly guarded and lighted; and that the wife of the plaintiff, who had been at the office as a customer of defendant, and otherwise in defendant's business, and was lawfully passing along the passage on her return from the office to the street, fell through the aperture caused by the trap-door being and remaining open and not properly guarded and lighted, whereby she was killed. On demurrer to this declaration it was held that the plaintiff's right to sue as administrator under 9 and 10 Vict. c. 93 sufficiently appeared, without express allegation of pecuniary damage, and that the duty of defendant, and breach of that duty, sufficiently appeared by the declaration.[3]

In an action founded on Lord Campbell's Act, for injury resulting from the death of the party, legal liability alone is not the test of injury in respect of which damages may be recovered; but the reasonable expectation of pecuniary advantage by the relative remaining alive, may be taken into account by the jury; and damages may be given in respect of that expectation being disappointed, and the probable pecuniary loss thereby occasioned. Therefore in an action by a father for injury resulting from the death of his son, through the negligence of the servants of a railway company, it appeared that the son, who was twenty-seven years of age,

[1] Hardcastle *v.* South Yorkshire Railway Company, 1 H. and N. 67; 28 L. J. (N. S.) Exch. 139.

[2] Overton *v.* Freeman, 4 Car. and K. 49; 21 L. J. C. P. 52; 16 Jur. 65.

[3] Chapman *v.* Rothwell, 1 E. B. & E. 168.

and unmarried, but living away from his parents, had for the last seven or eight years been in the habit of visiting them once a fortnight, and of making them on these occasions presents of tea, sugar, and other provisions, besides money, amounting in the whole to about 20*l.* a year; it was held that the jury were warranted in inferring that the father had such a reasonable expectation of pecuniary benefit from the continuance of his son's life, as to entitle him to recover damages under the statute; but that it was not competent to the jury to award him compensation for the expenses incurred by him for his son's funeral, or for family mourning.[1]

In order to maintain an action under Lord Campbell's Act, *actual* damage must have accrued from the death of the deceased. In an action by a father, a working mason, under the statute, as administrator of his son, a boy of fourteen years of age, evidence was given that the deceased had shortly before the accident which caused his death, been earning 4*s.* a week. The jury having found a verdict for the plaintiff, damages 20*l.*, a rule was obtained to set aside the verdict and enter it for the defendant, or to reduce the damages to a nominal amount, on the ground that no such loss or damage was shown to have resulted from the death of the intestate as would entitle the plaintiff to maintain the action, or to recover more than nominal damages if the action lay; it was held that there was evidence to go to the jury of a pecuniary loss to the plaintiff from the death of his son; and that to maintain an action under the statute, actual loss must be proved. The mere proof of the death and relationship of the parties will not entitle a plaintiff to a verdict with nominal damages.[2]

IX.

DIFFERENCES BETWEEN MASTERS AND WORKMEN.

ALL complaints, differences, and disputes which shall happen or arise between masters and artificers, handicraftsmen, miners, colliers, keelmen, pitmen, glassmen, potters, and other labourers (which latter designation comprehends all workmen in other

[1] Dalton *v.* South Eastern Railway Company, 4 C. B. Rep. 296.
[2] Duckworth *v.* Johnson, 33 L. T. 274; 5 Jur. (N. S.) 630.

trades besides the above),[1] employed for any certain time, or in any other manner, are to be heard and determined by one or more justice or justices of the peace having jurisdiction in the place where the master shall inhabit. The justices are, in such case, empowered to examine upon oath any artificer, &c., touching any such complaint, difference, or dispute, and to make such order for payment of so much wages, and within such time, as to the justices shall seem just and reasonable; provided that the sum do not exceed five pounds.[2] In case of refusal or non-payment of any sums so ordered by the space of one-and-twenty days next after the determination of the dispute, the justice shall issue his warrant to levy the amount by distress and sale of the goods and chattels of the master or employer, rendering the overplus to the owner or owners after payment of the charges of the distress and sale.

With regard to complaints by masters against their workmen, it is provided that such justice as aforesaid, upon application or complaint made upon oath by any master or employer against any such artificer, &c., as aforesaid, concerning any misdemeanour, miscarriage, or ill behaviour in such, his, or her service or employment, shall hear, examine, and determine such complaint, and punish the offender by committal to the House of Correction, with hard labour, for a reasonable time not exceeding one calendar month, or otherwise by abating some part of his wages, or by discharging such artificer, &c., from his service, or employment.[3]

In like manner such justice, upon any complaint or application upon oath, by any artificer, &c., as aforesaid, against his master or employer, concerning any misusage, refusal of necessary provision, cruelty, or other ill-treatment of, to, or towards such artificer, &c., may summon such master or employer to appear before him at a reasonable time. The justice or justices shall then examine upon oath into the matter of the complaint, whether the master or employer shall appear or not, and discharge the artificer, &c., of and from his service and employment, which discharge is to be given under the hand and seal, or hands and seals of such justice or justices gratis.[4]

If any person shall think himself aggrieved by such determination, order, or warrant as aforesaid (save and except any order of committal), he may appeal to the next General Quarter Sessions of the Peace, which is empowered to hear and finally determine the appeal, and to award such costs to the appellant or respondent as

[1] Lowther v. Radnor, Earl, 8 East, 113.
[2] 20 Geo. 2. c. 19, § 1; 4 Geo. 4. c. 34, § 5.
[3] 20 Geo. 2. c. 19, § 2. [4] Ib.

the sessions shall judge reasonable, not exceeding forty shillings, to be levied by distress and sale.[1] In such case no writ of *certiorari* shall issue to remove the proceedings.[2] Where, however, an order or determination made under 4 Geo. 4. c. 34, relates to the amount of wages that shall appear due to any artificer, &c., it shall be final and conclusive.[3]

For the better carrying out the above-mentioned provisions, a subsequent statute enacted,[4] that if any of the persons to whom the 20 Geo. 2. c. 19, applies shall contract with any person or persons whomsoever to serve him, her, or them for any time or times whatsoever, or in any other manner, and shall not enter into or commence his or her service according to his or her contract (the same being in writing and signed by the contracting parties), or having entered into such service shall absent himself or herself from the service before the term of his or her contract, whether such contract shall be in writing or not in writing, shall be completed; or neglect to fulfil the same; or be guilty of any other misconduct or misdemeanour in the execution thereof; any justice of the peace of the county or place where the person so offending shall have so contracted, or be employed or be found, upon complaint on oath by the person with whom the contract shall have been made, or by his, her, or their steward, manager, or agent, is empowered to issue his warrant for the apprehension of every such person, and to examine into the nature of the complaint. If the offence charged be proved to the satisfaction of such justice, he shall commit the offender to the House of Correction to hard labour for a reasonable time not exceeding three months, and abate a proportionable part of his or her wages for and during the period of confinement; or in lieu thereof the justice may punish the offender by abating the whole or any part of his or her wages, or discharge him or her from the contract, service, or employment, which discharge shall be given under the hand and seal of the justice gratis.

It frequently happens that the employers reside at considerable distances from the parishes or places where their business is carried on, or are occasionally absent for long periods of time, either beyond the seas or at considerable distances from their places of business, and during the time intrust their business to the management or superintendence of agents, foremen, or managers; in such cases it is provided[5] that any justice or justices of the county or place where the servant, handicraftsman, miner, collier, keelman,

[1] 20 Geo. 2. c. 19, § 5. [2] Ib. § 6. [3] 4 Geo. 4. c. 34, § 5.
[4] 4 Geo. 4. c. 34, § 3. [5] Ib. § 4.

pitman, glassman, potter, labourer, or other person or apprentice shall be employed, upon the complaint of such servant, &c., touching or concerning the non-payment of his or her wages, is or are to summon the steward, agent, bailiff, foreman, or manager, and to hear and determine the matter of the complaint in such and the like manner, as complaints of the like nature against any master or employer are directed to be heard and determined by the first above-mentioned acts, and may also make an order for the payment by such steward, manager, &c., of so much wages as to the justice or justices shall appear justly due, provided that the sum which is in question do not exceed ten pounds. If the money be not then paid within the space of twenty-one days from the date of the order, a warrant may be issued to levy the amount by distress and sale of the goods of the master or employer, the overplus, after defraying the charges of the distress and sale, being rendered to the owner of the goods or to his steward or agent, &c.

Under the 4 Geo. 4. c. 34, § 3, a porter was convicted and sentenced to imprisonment for leaving a service before the time of contract had expired. After his term of imprisonment had expired, but before the original time of contract had expired, he not having returned to the service, was again convicted of having absented himself. Upon a motion for a writ of *habeas corpus* to bring up the body of the prisoner, it was held that the second conviction was good, as the contract continued notwithstanding the first conviction and imprisonment. The following points also arose in the case. The conviction did not expressly state that the servant had entered the service, but it found that he did "misconduct himself in his said service;" and this it was held was a sufficient finding that he had entered into the service. It also stated that it appeared to the magistrate as well on the examination on oath of "M." in presence of the party charged "as otherwise," that the party had absented himself, &c.; and it was held that it was not to be inferred from this that the justice had proceed upon evidence not given in the presence of the party. It further stated that the party misconducted himself, &c., "by neglecting and absenting himself from his said master's service," and this, it was held, was not a finding of two statutable offences, but only of the absenting.[1] Subsequently a writ of *habeas corpus* in the Court of Exchequer was obtained; and on the prisoner being brought up, the Court ordered him to be discharged, the majority of the Court (Pollock, *C. B.*, Martin and Bramwell, *BB.*, dissentiente Watson, *B.*), hold-

[1] *Ex parte* Baker, 7 El. and Bl. 697; 26 L. J. (N. S.) M. C. 193; 3 Jur. (N. S.) 514.

ing that the conviction was bad for not adjudicating any abatement of wages. Pollock, *C.B.*, also held that the contract was put an end to by the first conviction, and that there could be no second conviction; *dissentientibus*, Bramwell and Watson, *BB.*; *dubitante* Martin, *B.*: Bramwell and Watson, *BB.*, held the objections that there was no allegation of entering the service, and that the conviction appeared to have been taken in evidence not given in the presence of the prisoner, invalid.[1]

With regard to proceedings against an infant for a violation of his contract of hiring, in a case relating to the settlement of a pauper,[2] Abbot, *C.J.*, said the contract of an infant, made for his own benefit, according to general principles of law, is not void, but voidable only at the election of the infant; and *per* Bayley and Littledale, *JJ.*, in the same case, an infant may make a contract for his own benefit; he may therefore make a contract for hiring and service, for that will be beneficial to him. It will give him a right to sue for wages. If he does not perform his contract, although no action may lie against him, he will be liable to the statutable regulations applicable to masters and servants. But where a rule had been obtained to quash a conviction, under the 4 Geo. 4. c. 34 (Masters and Servants Act), it appeared that the infant had entered into a contract whereby he agreed to enter into the service of a master for twelve months, at certain weekly wages, and to serve him at all times during that term, and to work fifty-eight hours a week; and in which there was a provision that in case the steam-engine should be stopped from accident, or any other cause, that the master should retain all wages of the servant during that time: it was held that the agreement was void as against the infant, and that a conviction for absenting himself from his master's service could not be supported. An agreement to serve for wages Lord Denman, *C.J.*, said, may be for the infant's benefit; but an agreement which compels him to serve at all times during the term, but leaves the master free to stop his work and his wages whenever he chooses to do so, cannot be considered as beneficial to the servant. It is inequitable, he added, and wholly void.[3] The point as to the competency of an infant to abandon a contract which was for his benefit, was raised in another case,[4] and the Court seemed to entertain a strong impression that the infant could not abandon the contract; no decision, however, was given, as the case went off on another point.

[1] *In re* Baker 2 H. and N. 219.
[2] Rex *v.* Chillesford, 4 B. C. 94; 3 L. J. K. B. 148.
[3] Reg. *v.* Lord, 12 A. and E. 757; 17 L. J. M. C. 181.
[4] Wood *v.* Fenwick and others, 11 L. J. M. C. 127; 10 Mee. and W. 195.

There is no appeal to the sessions against an order made under the 4 Geo. 4. c. 34, § 5, for payment of wages, the sum to be levied by distress in case of non-payment for nineteen days, although the justices, on making the order, may have acted without jurisdiction;[1] and *semble* an order for payment of wages may be made under § 5 of 4 Geo. 4. c. 34, where, by the contract of service, the wages are to be paid partly in money and partly in goods.

Services, however long continued, create no claim for remuneration without a bargain for them, either express or implied from circumstances showing an understanding on both sides, that there should be payment.[2] Moreover, if a workman contract to supply labour, it must be taken to mean that the labour shall be of the quality which would be bestowed by a workman of ordinary skill in his trade or particular calling.[3]

Again, where a skilled labourer is hired in the way of his calling he impliedly contracts, that he has skill reasonably competent for the performance of the task, and an express undertaking or promise to that effect is not necessary. If afterwards he turns out to be incompetent, his employer may at once rescind the contract of hiring, and discharge him.[4]

There must be mutuality, either expressed or implied, in a contract, to make it binding on either party, and it must not be in the unlawful restraint of trade. The following are instances of implied mutuality:—A person contracted to furnish another with a reasonable quantity of work at a fixed rate of wages, and the other person was bound not to work for any other person or persons for a period of seven years.[5] It was held that there was a mutuality of contract implied, and that the master would be bound to furnish work for the whole period of seven years. Again, the plaintiffs agreed in writing with the defendant that he should serve them for seven years as a crown glass-maker; that he should not during that term work for any other person without their license; that they might deduct from his wages any fine he might incur for breach of their rules; that during any depression of trade he should be paid a moiety of his wages; that if he should be sick or lame, the plaintiffs should be at liberty to employ any other person in

[1] Reg. v. Bedwell, 4 El. and Bl. 213; 24 L. J. M. C. 17; 1 Jur. (N. S.) 306.

[2] Reeve v. Reeve, 1 F. and F. 280.

[3] Cousins v. Paddon, 4 Dowl. P. C. 488.

[4] Harmer v. Cornelius, 4 Jur. (N. S.) 1110; C. P. 28 L. J. (N. S.) C. P. 85.

[5] Hartley v. Cummings, 2 Car. and K. 433.

his stead, without paying him any wages; that the plaintiffs should pay him, so long as he should be employed and work as a crown glass-maker, certain wages by the piece, and 8*l.* a year in lieu of house-rent and firing; and that the plaintiffs should have the option of dismissing him from their service on giving him a month's notice or a month's wages. This agreement was held to bind the plaintiffs to employ the defendant during the seven years, subject to the power of dismissal; that there was therefore a good consideration for the contract to serve for seven years, and that it was not in unlawful restraint of trade.[1]

When workmen are hired for a year, at a particular trade, under written agreements, which are silent as to any periods of absence allowed to the workmen, parol evidence may be given that it is the custom of the particular trade for the workmen employed in it to take certain holidays, and to absent themselves on such occasions from their work without the permission of their masters.[2]

Where a trade is regulated by committees of the masters and workmen respectively, which committees make rules from time to time, and if by one of such rules, in case of dispute between a master and his men, an arbitration committee, presided over by a barrister, is to decide; and a particular dispute has been so decided, such decision is not to be considered as imported into all future engagements between masters and men, nor is it binding on persons not parties to that particular reference.[3]

An artificer who, in the exercise of his right of lien, detains a chattel upon which he has expended his labour and materials, has no claim against the owner for taking care of the chattel while so detained. This principle is well illustrated by the following case:—A shipwright received a ship into his dock to be repaired (no separate charge being made for the use of the dock during the repairs), and the repairs being complete, he detained the ship in the dock until the charges were paid, giving notice to the owner that he should demand 21*l.* a day for the use of the dock during the detention; and an action being brought, it was held that the shipwright was not entitled, in the absence of any usage of the trade, to any payment for dock-room during the detention of the ship under his right of lien on it for the sum due for the repairs.[4]

[1] Pilkington *v.* Scott, 15 M. and W. 657.

[2] Reg. *v.* Stoke-upon-Trent, 13 L. J. M. C. 41; 8 Jur. 34.

[3] Levey *v.* Hill, 3 H. and N. 702; 27 L. J. Exch. 259; 4 Jur. (N. S.) 589; in the Exch. Ch. affirming judgment of Exch. 3 H. and N. 7; 4 Jur. (N. S.) 286.

[4] British Empire Shipping Company *v.* Somes, 27 L. J. Q. B. 397; 4 Jur (N. S.) 893, affirmed in error from Q. B.; 5 Jur. (N. S.) 675.

A declaration in trover for carpenter's tools alleged special damage in the following terms:—"By means whereof the plaintiff was prevented working at his trade of a carpenter for a long time, to wit, &c.; the said goods and chattels being the working tools and implements of trade of the plaintiff, and was, and is, by means of the premises, greatly impoverished." At the trial the plaintiff had a verdict for 20*l.*, 10*l.* being given by the jury as the value of the tools, and 10*l.* for the damage sustained by the plaintiff by the detention of them. Subsequently, on a motion for a new trial, or why the damages should not be reduced to 10*l.*, on the ground that the damages in an action of trover must be limited to the value of the things taken, and that no special damage is in such case recovered, it was held that special damage may be recovered in trover, and that it was properly laid in the case.[1] It would seem, therefore, in such a case, that if the tools, the conversion of which is complained of, are restored before the trial, that the action may go on for the special damage only.

X.

COMBINATIONS OF MASTERS AND OF WORKMEN.

It is now necessary to advert to the provisions of the law with respect to the combination of masters and of workmen, the fixing the wages of labour, and deterring workmen from work which are contained in the 6 Geo. 4. c. 129. Such combinations are in the language of the statute "injurious to trade and commerce, dangerous to the tranquillity of the country, and especially prejudicial to the interests of all who are concerned in them;" it is, therefore, in a work which is addressed to a class which is one of the largest employers of workmen, necessary that the law upon the subject should be fully and clearly explained.

The principle of combination among working men for fair and legitimate ends was conceded by the Legislature in later times in a spirit of enlightened consideration and forbearance towards the industrial community at large; and that concession enables them, by means of trade societies, to make laws or bye-laws to control the members of those societies, but not to force workmen who do

[1] Bodley *v.* Reynolds, 15 L. J. Q. B. 319; 10 Jur. 310.

not belong to the particular society to adopt and act upon their rules of trade. The abuse of this principle of toleration conceded by the Legislature is on every account to be deprecated. Every man, it is well said, has a right to work for the best price he can get; but if others choose to work for less than the usual price, the law will not permit that violence should be committed towards them, or towards those by whom they are employed, or those with whom they are connected.[1] The law allows of combination about the terms of labour among persons present or assenting to the combination; but no one is at liberty, either in law or in justice, to exert combined powers against the freedom of others. If, therefore, the persons combining conspire to control the proceedings of others, or to control the proceedings of one or more of themselves who may subsequently dissent from the object for which the combination was formed, such persons will be guilty of an indictable offence and be subject to severe punishment, if convicted. The combination laws do not in any way touch trades unions, which are perfectly lawful in themselves; but the moment that those unions step in, and by means which the law does not sanction, seek to tyrannize over workmen unconnected with them, and to drive them by intimidation and persecution into the observance of the rules and usages of the union, the law also steps in to restrain by severe measures their illegal proceedings.

The object of the Act above referred to is declared to be to make provision, as well for the security and personal freedom of individual workmen in the disposal of their skill and labour, as for the security of the property and the persons of masters and workmen. No one therefore has any right to dictate to another as to the terms on which he will accept work; on the contrary every workman has a perfect right to make any contract with his employer as to the terms of his employment which he may think fit to enter upon; and on the other hand every employer of labour has a right to make his own terms with those who may be willing to enter into his service; and both will be equally protected by the law in so doing.

The following are the offences against which the Act is directed:—If any person shall by violence to the person or property, or by threats or intimidation, or by molesting or in any way obstructing another, force or endeavour to force any journeyman, manufacturer, workman, or other person hired or employed in any manufacture, trade, or business, to depart from his hiring, employment, or work, or to return his work before the same shall be

[1] Rex *v.* Batt, 6 C. and P. 329.

finished, or to prevent or endeavour to prevent any journeyman, manufacturer, workman, or other person, not being hired or employed, from hiring himself to, or from accepting work or employment from any person or persons; or if any person shall use or employ violence to the person or property of another, or threats or intimidation, or shall molest, or in any way obstruct another for the purpose of forcing or inducing such person to belong to any club or association, or to contribute to any common fund, or to pay any fine or penalty, or on account of his not belonging to any particular club or association, or not having contributed or having refused to contribute to any common fund, or to pay any fine or penalty, or on account of his not having complied or of his refusing to comply with any rules, orders, resolutions, or regulations, made to obtain an advance or to reduce the rate of wages, or to lessen or alter the hours of working, or to decrease or alter the quantity of work, or to regulate the mode of carrying on any manufacture, trade or business, or the management thereof; or if any person shall by violence to the person or property of another, or by threats or intimidation, or by molesting or in any way obstructing another, force or endeavour to force any manufacturer or person carrying on any trade or business to make any alteration in his mode of regulating, managing, conducting, or carrying on the same, or to limit the number of his apprentices, or the number or description of his journeymen, workmen, or servants:

Every person offending in any of the above-mentioned respects, or aiding, abetting, or assisting therein, being convicted thereof, shall be imprisoned only, or shall and may be imprisoned and kept to hard labour, for any time not exceeding three calendar months.

In proceedings in respect of any of the above-mentioned offences, the prosecutor must prove acts of violence, threats, intimidation, molesting, or obstructing, or facts from which any of these may be reasonably implied—the purpose for which the threats, &c., were made, and that the workman did in consequence leave his employment, or did not hire himself, or that the manufacturer was in consequence of the threats, &c., forced to alter his mode of carrying on business, or to limit the number of his apprentices. In an indictment for conspiring to commit an offence prohibited by the statute, it will be sufficient to use the words of the statute, although they may be words of a general description; for such a count will be sufficiently certain, even though the manner in which the molestation was to be effected is not stated.[1]

[1] Reg. v. Rowlands and others, 17 A. & E. 671; 21 L. J. (N. S.) M. C. 81; 16 Jur. 268; 2 Den. C. C. 364.

The prohibitions above mentioned, however, do not extend to subject any persons to punishment who shall meet together for the sole purpose of consulting upon and determining the rate of wages or prices which the persons present at such meeting or any of them shall require or demand for his or their work, or the hours or time for which he or they shall work in any manufacture, trade, or business, or who shall enter into any agreement, verbal or written, among themselves for the purpose of fixing the rate of wages or prices which the parties entering into such agreement or any of them shall require or demand for his or their work, or the hours or time for which he or they will work, in any manufacture, trade, or business ;[1] neither does the statute extend to subject any persons to punishment who shall meet together for the sole purpose of consulting upon and determining the rate of wages or prices which the persons present at the meeting, or any of them, shall pay to his or their journeymen, workmen, or servants, for their work, or the hours or time of working in any manufacture, trade, or business, or who shall enter into any agreement, verbal or written, among themselves for the purpose of fixing the rate of wages or prices which the parties entering into such agreement, or any of them, shall pay to his or their journeymen, workmen, or servants, for their work, or the hours or time of working in any manufacture, trade, or business.[2]

By a subsequent statute it is enacted that where any person shall be charged with and convicted of any assault committed in pursuance of any conspiracy to raise the rate of wages, the Court may sentence the offender to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding two years, and may also (if it shall so think fit) fine the offender, and require him to find sureties for keeping the peace.[3] By another Act power is given to the Court to order payment of the costs and expenses of the prosecutor and witnesses for the prosecution, together with a compensation for their trouble and loss of time, in the same manner as in cases of felony; and although no bill of indictment be preferred, the Court, where any person shall have *bonâ fide* attended the Court in obedience to a recognizance, may order payment of the expenses of such person, together with a compensation for his or her trouble and loss of time in the same manner as in cases of felony.[4]

All and every person and persons who shall or may offend against the Act, shall and may, equally with all other persons, be called upon

[1] 6 Geo. 4. c. 129, § 4.
[2] 9 Geo. 4. c. 31, § 25.
[3] 6 Geo. 4. c. 129, § 5.
[4] 7 Geo. 4. c. 64, § 23.

and compelled to give his or her testimony and evidence as a witness or witnesses on behalf of the Crown, or of the prosecutor or informer upon any information made or exhibited under the Act against any other person or persons. In all such cases, every person having given his or her testimony or evidence shall be and is indemnified of, from, and against any information to be laid or prosecution to be commenced against him or her, for having offended in the matter wherein or relative to which he, she, or they shall have given such testimony or evidence.[1]

For the more effectually enforcing and carrying into execution the provisions of the Act, on complaint and information on oath before one or more justices of the peace, of any offence having been committed against the Act, and within six calendar months before the complaint or information shall be made, such justice or justices are authorized and required to summon the person or persons charged with being an offender or offenders against the Act; and if they fail to appear, warrants may be issued for their apprehension; or if they be proved on oath to have absconded, they may be convicted though not appearing.[2] Any person convicted under the Act is at liberty to appeal to the next general Court of Quarter Sessions on entering into a recognizance to prosecute his appeal with effect, and to be forthcoming, to abide the judgment and determination of the Sessions, and pay such costs as shall be awarded.[3]

It is necessary to add that no justice of the peace, being also a master in the particular trade or manufacture in or concerning which any offence is charged to have been committed under the Act, shall act as such justice under the Act.[4]

Different decisions having been given on the construction of the 6 Geo. 4. c. 129, it has since been provided by an Act passed to protect the working-man,[5] that no workman or other person, whether actually in employment or not, shall by reason merely of his entering into an agreement with any workman or workmen, or other person or persons, for the purpose of fixing or endeavouring to fix the rate of wages or remuneration at which they or any of them shall work, or by reason merely of his endeavouring peaceably and in a reasonable manner, and without threat or intimidation, direct or indirect, to persuade others to cease or abstain from work in order to obtain the rate of wages, or the altered hours of labour so fixed or agreed upon, or to be agreed

[1] 6 Geo. 4. c. 129, § 6.
[2] 6 Geo. 4. c. 129, § 7.
[3] Ib. § 12.
[4] Ib. § 13.
[5] 22 Vict. c. 34, § 1.

upon, shall be deemed or taken to be guilty of "molestation" or "obstruction," within the meaning of the 6 Geo. 4. c. 129, and shall not therefore be subject or liable to any prosecution or indictment for conspiracy; but nothing contained in the 22 Vict. c. 34, shall authorize any workman to break or depart from any contract, or authorize any attempt to induce any workman to break or depart from any contract.

From the foregoing provisions of the law, it will be seen that workmen have a right to dictate their own terms to the masters, or to combine on their own account, and to refuse to work if those terms be not conceded; but that third persons have no right to obstruct or intimidate workmen, either hired or about to be hired, so as to prevent them from working, unless they agreed to the terms proposed by such third persons. If one person do so, he may be proceeded against under the statute; and if several conspire to do so, they may be indicted for a conspiracy to injure the person in his trade against whom they have conspired; for an agreement to commit an indictable offence, or one punishable by summary conviction, amounts to an indictable conspiracy. In an indictment for conspiring to commit the several acts prohibited by the statute relating to the combination of workmen,[1] the Court not only held the indictment to lie at Common Law, but that the incidents of fine and imprisonment, as the penalty of a misdemeanour, would attach, though far exceeding the punishment of three months' imprisonment.[2] It follows, therefore, that an agreement to commit such an act may be punished far more severely than if it be actually committed by one only; and such an agreement amounts to a conspiracy to violate an Act of Parliament, which is an offence at Common Law.

Combinations, whether on the part of workmen to increase, or of masters to lower wages, were illegal at Common Law. Though the Legislature has made combinations of workmen, or "strikes," for the purpose of raising wages, or of masters for the purpose of lowering the rate of wages, or of regulating the hours of labour, or simply for maintaining things as they are, dispunishable at law, no legal effect is thereby given to them. Whatever obligations an individual who may have joined the combination, may enter into to continue in it for a given time, or so long as a majority shall require, are not enforceable by a suit at law, or otherwise, inasmuch as it would be contrary to public policy to enforce

[1] 6 Geo. 4. c. 129.

[2] Reg. v. Duffield, 5 Cox, C. C. 404; Reg. v. Rowlands and others, 12 A. and E. 671; 21 L. J. (N. S.) M. C. 81; 16 Jur. 268; 2 Den. C. C. 364.

an obligation for which there is no good consideration. This is illustrated by a case in which a bond was made by eighteen persons, in which each obligor was described as a cotton-spinner, of Wigan, of Hindley, in Lancashire, by which each was separately bound to Caleb Hilton, attorney-at-law, in 500*l.*, subject to the condition—that the obligees were respectively owners of spinning-mills in Wigan and Hindley, and employed in them many workpeople; that there were societies and combinations among divers persons, whereby persons, otherwise willing to be employed, were deterred, by fear of social persecution and other injuries, from hiring themselves to work, and whereby the legal control of the obligees of their property was injuriously interfered with; that these combinations were sustained by funds arbitrarily levied and extorted by way of tax or rate on the persons employed by and receiving wages from the obligees; and in the opinion of the obligees it had become necessary to take measures for vindicating their legal rights to the control of their property, which would also best sustain the rights of the labourer to the free disposal of his skill and industry; therefore the obligees had agreed to carry on their works, in regard to the amount of wages, the times of the engagement of workpeople, the hours of work, the suspending of work, and the general discipline and management of their works in conformity to law, for twelve calendar months, in conformity with the resolutions of a majority of the obligees present at any meeting to be convened; that for the purpose of carrying the agreement into effect, the obligees entered into the bond; and the condition was, that if the obligees for twelve calendar months should carry on, or wholly or partially suspend carrying on their works, in regard to the matters aforesaid, in conformity with the resolutions of a majority of the obligees present at a meeting to be held as mentioned, then the bond as to each person so performing to be void; and the days, place, and other circumstances of the proposed meeting were set out; the obligor to hold the money recovered, in trust, for all the obligees, with power to a majority of the obligees present to release the obligees from performance of the conditions of the bond. An action having been brought on this bond against one of the obligees, it was held by the Court of Queen's Bench, and affirmed in the Exchequer Chamber, that the bond was void, as being in restraint of trade *primâ facie*. Alderson, *B.*, said, in delivering the judgment of the Court of Error, "It is the privilege of a trader in a free country, in all matters not contrary to law, to regulate his own mode of carrying on his trade according to his own discretion and choice. If the law has in any matter regulated or

restrained his mode of doing this, the law must be obeyed. But no power short of the general law ought to restrain his free discretion. Now here the obligees to this bond have clearly put themselves into a situation of restraint."[1]

This chapter may be fitly concluded by the following quotation from the direction of Erle, *C.J.*, to the jury in the case of Reg. *v.* Rowlands and others, *supra*. "The law," he said, "is clear that workmen have a right to combine for their own protection, and to obtain such wages as they choose to agree to demand. I say nothing at present as to the legality of other persons, not workmen, combining with them to assist in that purpose. As far as I know there is no objection, in point of law, to it; and it is not necessary to go into that matter; but I consider the law to be clear so far, only, as while the purpose of the combination is to obtain a benefit for the parties who combine; a benefit which by law they can claim. I make that remark because a combination for the purpose of injuring another is a combination of a different nature, directed personally against the party to be injured; and the law allowing them to combine for the purpose of obtaining a lawful benefit to themselves gives no sanction to combinations which have for their immediate purpose the hurt of another. The rights of workmen are conceded; but the exercise of free will and freedom of action within the limits of the law, is also secured equally to the masters. The intention of the law is at present to allow either of them to follow the dictates of their own will with respect to their own actions and their own property; and either, I believe, has a right to study to promote his own advantage, or to combine with others to promote their material advantage." His lordship then went on to say that in this case, upon undisputed evidence there had been a combination to force the prosecutors to agree to a uniform book of prices; that upon the facts before the jury they would have to give their opinion upon three classes of counts charging conspiracies: first, to prevent workmen from working for the prosecutors by intimidating the workmen; second, to force the assent of the prosecutors to certain alterations by intimidating the prosecutors; third, to induce workmen to leave the prosecutors' employment, contrary to their contract; and he stated that, if the jury thought these counts sustained by the evidence, they should convict upon them. He then went on to say, "But supposing any of the defendants are acquitted as to all those classes, and you should still be of opinion that a combination existed for the purpose of obstructing the prosecutors in carrying on their business, and

[1] Hilton *v.* Eckersley, 6 El. and Bl. 47.

forcing them to consent to this book of prices, and in pursuance of that concert, they persuaded the free men and gave money to the free men to leave the employment of the prosecutors, the purpose being to obstruct them in their manufacture and to injure them in their business, and so to force their consent, with no other result to the parties combining than gratifying ill-will, I am of opinion that that would also be a violation of the law, and warrant a conviction upon the counts directed against that form of offence."* The above directions, it should be added, afterwards met with the full concurrence of the Court.

XI.

THE TRUCK SYSTEM.

It is now necessary to advert to the provisions of the 1 and 2 W. 4. c. 37, known as the "Truck Act," which prohibits the payment in certain trades of wages in goods, or otherwise than in the current coin of the realm; and renders null and void any contract which provides that the whole or any part of the wages of any artificer in any of the trades to which the Act applies, shall be made payable in any manner other than in the current coin of the realm; as well as any contract which provides directly or indirectly respecting the place where, or the manner in which, or the person or persons with whom, the whole or any part of the wages due, or to become due, to any artificer, shall be laid out or expended. The Act requires that all wages shall be paid to the workmen in the current coin, and declares payment in goods to be illegal, null, and void. It also enables the artificer to recover from his employer the whole or so much of the wages earned as shall not have been actually paid to him by his employer in the current coin, against which no set-off in respect of goods supplied shall be allowed. Moreover, the employer cannot recover the value of goods supplied contrary to the Act; and if the artificer's wife or children (not being of the full age of twenty-one years) become chargeable to the poor rates, the overseers may recover from the employer any wages earned within the three months preceding the chargeability and not paid in cash.

Any employer of any artificer who shall, by himself or by the agency of any other person or persons, directly or indirectly enter

into any contract or make any payment declared illegal by the Act, for the first offence is liable to a penalty not exceeding 10*l.* nor less than 5*l.*; for the second offence, any sum not exceeding 20*l.* nor less than 10*l.*; and for the third offence shall be declared guilty of a misdemeanour and punishable by fine at the discretion of the Court; so that the fines shall not in any case exceed 100*l.* Partners are not however to be liable in person for the offence of their co-partner; but nevertheless the partnership property is liable for the penalty, which may be recovered by distress and sale of the goods of the co-partnership.

The following are the trades in connexion with the subject of this work to which the Act applies;

The making, casting, converting, or manufacturing of iron or steel, or any parts, branches, or processes thereof;

The working or getting of any mines of coal, ironstone, limestone, salt rock; or in or about the working or getting of stone, slate, or clay; or the making or preparing of salt, bricks, tiles, or quarries;

The making or manufacturing of any kinds of nails, chains, rivets, anvils, vices, spades, shovels, screws, keys, locks, bolts, hinges, or any other articles of hardware made of iron or steel, or of iron and steel combined; or of any plated articles of cutlery, or of any goods or wares made of brass, tin, lead, pewter, or other metal, or of any japanned goods or wares whatsoever;

The making or otherwise preparing, ornamenting, or finishing of any glass, porcelain, china, or earthenware whatsoever, or any parts, branches, or processes thereof, or any materials used in any of these trades or employments.

The provisions of the Act do not extend to any domestic servant or servant in husbandry, and particular exemptions are made to the generality of its enactments.

The provisions of the Truck Act apply only to agreements for personal services; and the distinction between contractors and artificers depends upon the fact whether by the engagement they were labourers within the meaning of the Truck Act 1 & 2 W. 4. c. 37; therefore persons who engage to do certain work at per yard, as butty colliers,[1] and employ others under them to increase the quantity, and must themselves work personally, and are treated as workmen, are within the Act; the distinction between contractors and artificers depending on the fact whether by the

[1] The "Butty" is a contractor or middleman between the master and the men. He has under him an agent called the "doggy," who superintends the work in the butty's absence.

engagement they were labourers ;[1] it would, however, be different if the persons were not bound by contract to do any part of the work personally.[2] It seems, however, to be doubtful whether if they were bound to labour personally, but were at liberty to hire labourers to assist them, they would be within the Act. The rule is, that the person to be an "artificer" within the meaning of the Act, must contract to do the work himself—that is, give his personal services (but not necessarily manual services), for which he is to be paid wages ;[3] and therefore a person who merely contracts to procure the work to be done is not such an artificer, although, in fact, he assists in doing the work himself.[4]

Moreover, the provisions of the Truck Act do not apply to agreements for the performance of a certain quantity of work which the contractor cannot perform except by making use of the labour of others ;[5] and the mode of paying wages as specified in the agreement will not prevent a case from coming within the Act.

The 19th section, which contains the specification of trades, is, as before observed, applicable only to those persons who contract as labourers—viz., such as contract to use their personal services, and to receive payment for such services in wages ; therefore a person who contracted as a sub-contractor to make a cutting on a projected line of railway at a certain sum per cubic yard, and employed others with whom he himself worked in making the cutting, was not a "workman or labourer" within the meaning of the section. In an action for such work and labour, the defendants are not deprived of their right of set-off for goods sold and delivered.[6]

The facts of the above-mentioned case, as they appeared at the trial, were as follows :—The defendants had contracted with a railway company to make a portion of their intended line, and the plaintiff had engaged with the defendants to do a portion of the work they had undertaken, consisting of a cutting which he engaged to make at a certain sum per cubic yard. He employed several men who worked with him in making the cutting, and he

[1] Bowers v. Lovekin, 6 El. and Bl. 584 ; 25 L. J. Q. B. 371 ; 2 Jur. (N. S.) 1187.

[2] Ingram v. Barnes, 7 El. and Bl. 115, 132 ; 26 L. J. Q. B. 82, 339 ; 3 Jur. (N. S.) 15, 861.

[3] Riley v. Warder, 2 Exch. 59 ; 18 L. J. Exch. 120.

[4] Sharman v. Sanders, 22 L. J. C. P. 86 ; 17 Jur. 765 ; Sharman v. Union Iron Works Company, 3 Car. and K. 298.

[5] Floyd v. Weaver, 21 L. J. Q. B. 151 ; 16 Jur. 289.

[6] Riley v. Warder, *supra*.

received from the defendants from time to time tickets for goods which he gave to his men as wages, and for which they received value in goods from the defendants. It was proved that a quantity of the earth removed in order to form the cutting was clay, which was deposited in a particular spot, and was used by the defendants in manufacturing bricks for their works on the line. At the trial, Coleridge, *J.*, told the jury that if they thought the defendants had in view the removal of the clay for the purpose of making bricks, that part of the case came within the meaning of the 19th section; but he directed them to find a verdict for the defendants on the plea of set-off, which was proved, inasmuch as he thought the Act did not apply to the case of a sub-contractor, and he gave the plaintiff leave to move.

The following is an illustration of what will amount to payment of wages contrary to the Truck Act:—An artificer to whom wages were due was paid by his master by means of a note for payment in goods, the master knowing that the payment would be made in goods, and not in the current coin of the realm. The agent of the master delivered the goods in obedience to the note, and the master was convicted before the justices of an offence under the 1 & 2 W. 4. c. 37. Although the place where the goods were delivered was not within the jurisdiction of the justices, on a case stated by the justices for the opinion of the Court of Queen's Bench, it was held that the conviction was right, as under the circumstances the offence was complete when the note was given.[1]

[1] Ashlersmith *v.* Drury, 23 L. J. M. C. 5.

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