SOME NOTES ON ARBITRATION.

By His Honour JUDGE CLYNE.

Arbitration has been defined as "the settlement of disputes by the decision, not of a regular and ordinary Court of Law, but of one or more persons who are called arbitrators."

To create a submission to arbitration, there must be an intention of holding a judicial inquiry in a judicial manner to settle differences which have arisen or may arise between the parties to an arbitration agreement. An agreement to prevent differences from arising cannot create a submission to arbitration. Though it has been suggested that an arbitrator should be the agent of the parties to the arbitration with powers limited only by the terms of their agreement, in England and also in Victoria, an arbitrator in the conduct of an arbitration occupies a judicial position and is bound, as far as practicable, to decide questions submitted to him according to the legal rights of the parties.

Arbitration as a means of settling disputes has been recognised by the Common Law for centuries. In that early dictionary of the law—the Termes de la Ley—it is said that "Arbitrement is an award, determination, or judgment which one or more makes at the request of two parties . . . upon some debt trespass or other controversie had between them . . . and they that make the award or arbitrement are called . . . arbitrators. To every arbitrement five things are incident; sc. matter of controversie, submission, parties to the submission, arbitrators, and giving up of the arbitrement." Under the rules of the Common Law, a submission to arbitration could be made verbally, but it was not satisfactory because either party could, even after proceedings had commenced, at any time prior to the award revoke the arbitrator's authority and refuse to go on, and an arbitrator's award could not, even with the consent of the parties, be made a rule of Court so as to give the Court authority to enforce the award.

At an early period in English history it was not unusual for merchants and traders to submit their disputes to arbitration, and it is recorded that in 1299 two merchants referred to arbitration a dispute "as to a debt to be paid." The desire of merchants and traders to resort to arbitration is not surprising when, as was often the case, the settlement of their disputes by legal proceedings was unconscionably delayed, and it may be added that to the common lawyer, the usages of the merchants were somewhat of a mystery.

The importance of arbitration paricularly to the mercantile community was probably the reason why at the end of the seventeenth century arbitration received the recognition of Parliament. In 1698 there was passed an Act for determining Differences by Arbitration. By this Act, 9 & 10 William III. c.15 it was provided that it "shall and may be lawful for all Merchants and 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, by Arbitration to agree that their submission of their Suit to the Award or Umpirage of any Person or Persons should be made a Rule of any of His Majesty's Courts of

Record . . ." This Act may be described as the first English Arbitration Act and it is perhaps worthy of mention that in 1868 the Supreme Court of Victoria decided that it was in force in the then Colony of Victoria. Since its enactment reference to arbitration has been from time to time rendered more effectual by the legislature. In England the statute law relating to arbitration is now contained for the most part in the Arbitration Act, 1889 and the amending Arbitration Act of 1934, and in Victoria in the Arbitration Act, 1928, which is substanially a reproduction of the English Act of 1889.

Some slight amendment of the law in Victoria was effected by the Instruments (Insurance Contracts) Act 1936, as amended by s.2 of the Statute Law Revision Act, 1937. The provisions of the Instruments (Insurance Contracts) Act relate to arbitration clauses in insurance contracts. The Arbitration Acts 1889 to 1934 and the Arbitration Act 1928 may be said to govern to a substantial extent the law relating to arbitration in England and Victoria respectively, and within the meaning of the English Act 1889 and the Victorian Act, the submission is the written agreement whereby the parties undertake to submit their differences to arbitration. Once entered into, this agreement cannot be revoked except by mutual consent or the order of the Court.

Both Parliament and the Courts appear to regard with approval the settlement of disputes by arbitration, but in earlier days, the Judges viewed arbitration with disfavour, and according to Lord Campbell, this disfavour was not unconnected with their pecuniary interests. In the important case of *Scott v. Avery*[1] which, in effect, decided that a person may covenant that no right of action shall accrue till a third person has decided on any difference that may arise between himself and the other party to the covenant, Lord Campbell in referring to the contention that the agreement in issue in that case was illegal as ousting the jurisdiction of the Courts of Law, said "The doctrine had its origin in the interests of the Judges. There was no disguising the fact that, as formerly, the emoluments of the Judges depended mainly, or almost entirely, upon fees, and as they had no fixed salary there was great competition to get as much as possible of litigation into Westminster Hall, and a great scramble in Westminster Hall for the division of the spoil."

The attitude of the Courts at the present day to arbitration is indicated by the remarks of Bowen L. J. in the case of *Jackson v. Barry Railway Company*.[2] In this case, there was a reference to an arbitrator on the question whether certain work done under a contract was an "extra" or not, and the engineer in charge was named as the arbitrator. In his judgment Bowen L. J., said:—

"It is no part of our duty to approach such curiously-coloured contracts with a desire to upset them or to emancipate the contractor from the burden of a stipulation which, however onerous, it was worth his while to agree to bear. To do so, would be to attempt to dictate to the commercial world the conditions under which it should carry on its business." It may be said generally that all disputes affecting civil

1. 25 L.J. Ex. 308.
2. (1893) 1 Ch. 238.

matters may be referred to arbitration. On the other hand matters such as felonies and offences of a public nature cannot be referred to arbitration though "where a party injured has a remedy by action as well as by indictment, nothing can deter such party from referring the adjustment of the reparation which he is to receive to arbitration, although a criminal prosecution might have been commenced."[3]

It is still a rule of English law that an agreement to arbitrate which ousts the jurisdiction of the Courts is against public policy and void. As Scrutton L.J., once said: "There must be no Alsatia in England where the King's writ does not run." In *Doleman & Sons v. Ossett Corporation*[4] Fletcher Moulton L.J. said: "Very early in the history of arbitration there arose the question whether a party to a contract containing an arbitration clause was precluded thereby from appealing to a Court of law to enforce his rights under the contract. The answer which the Courts gave to this question admits of no doubt. They decided that no provision in a contract which ousted the jurisdiction of the Courts of law could be valid, but that a clause agreeing to refer disputes to arbitration was valid because it did not oust the jurisdiction of the Courts."

The right which persons now have to refer their disputes to arbitration is adjusted to the interests of public policy by the jurisdiction which the Courts possess to refuse to stay proceedings in cases where the parties have agreed to submit their differences to arbitration.

II.

Arbitration now plays an important part in the business world as a method of settling disputes. It is not unusual for trade associations to require their members to submit their disputes to arbitration, and provision is frequently made by the rules of these associations for the settlement of disputes through committees of their own members.

With the growth of modern commerce and industry numerous and complicated questions of a more or less technical nature must necessarily and frequently arise which could not be settled satisfactorily and expeditiously by a Court of law. Where questions of fact are in issue the method of arbitration has much merit. Questions relating to the quality of goods, their conformity to description or sample can be promptly and conveniently settled by skilled arbitrators. Again, where there arises a question as to the existence of a custom in any trade or industry, there is obviously an advantage in having the question decided by arbitrators familiar with the particular trade or industry. On the other hand, questions often arise which are not and cannot be satisfactorily determined by arbitrators untrained in law. It is only necessary to refer to the questions which constantly arise upon the contruction of agreements of various kinds now used in trading and commerce.

In addition to its employment in the settlement of disputes arising out of trading and commercial contracts arbitration is now commonly used as a means of settling disputes arising out of insurance and building contracts.

3. *Baker v. Townshend* (1817) 1 Moore 120 at 124.
4. (1912) 3 K.B. 257 at 267.

It is notorious that insurance companies prefer arbitration to litigation in the settlement of disputes with their policy holders, and it may rightly be said that the majority of insurance contracts now contain an arbitration clause. The practice of insurance companies of requiring their disputes with policy-holders to be settled by arbitration may be traced almost to the infancy of insurance, and no doubt had its origin in a laudable desire to avoid the delay and expense and perhaps the publicity of litigation. Arbitration clauses in insurance policies do not follow a common form; they may stipulate that all disputes between the company and the policy-holder shall be referred to arbitration, or they may provide that disputes as to loss or damage only shall be so determined. It is probably an advantage for an insurance company to have a dispute between it and the policy-holder referred to arbitration, though perhaps it cannot now be said as was said by Lord Campbell in *Scott v. Avery*: "Is there anything contrary to public policy in saying that the Company shall not be harassed by actions, the costs of which might be ruinous."

While arbitration has the merit of providing that disputes arising out of a policy can be settled without delay and with little publicity, it is not an undiluted advantage either to the company or the policy-holder. Occasionally companies defend claims on technical grounds when for good or dubious reasons they suspect the policy-holder to be guilty of fraud. As insurance companies not infrequently rely on technical defences in arbitrations and as arbitrations are conducted in private there has arisen some criticism of arbitration as a means of settling disputes between the companies and their policy-holders, and this criticism has, in some measure, been responsible for the enactment of the Instruments (Insurance Contracts) Act. On the other hand, it may justly be said that many a policy-holder makes a claim against a company in arbitration proceedings which he would not dare to assert in a Court of law, and occasionally fraudulent claims are made against insurance companies which might well be contested without prejudice to the companies before a Judge and jury.

In an arbitration under an insurance policy it is customary for the parties to employ solicitors or counsel, and as the parties have the expense, not only of preparing and fighting their respective cases, but the additional expense of paying the arbitrator's fees, little advantage, in the saving of expense, accrues either to the company or the policy-holder. The expense of an arbitration under a policy was until recently often more burdensome than the expense of litigation, because in many insurance contracts it was provided by the arbitration clause that each party should pay his own costs of the reference and a moiety of the costs of the award including the arbitrator's fees. As arbitration clauses in insurance policies usually provide that disputes under a policy shall be referred to a lawyer as arbitrator, there is some probability that the decision of the arbitrator will be given in accordance with the law.

It is nowadays usual for building contracts to contain an arbitration clause, and this is clearly an advantage to the parties where questions of fact are in issue. Questions such as compliance with specifications, and whether certain work is an extra or not can readily be settled by an

architect or builder, but from time to time questions arising out of building contracts are submitted to an architect or builder which a lawyer would have difficulty in deciding. For an example of such a question a reference might be made to the case of *Kirsch v. H. P. Brady Ltd.*[5] Many building and engineering contracts contain an arbitration clause which is open to criticism; this clause provides in effect that all disputes between the parties shall be determined by an architect or engineer who is in the employment of one of the parties and it is not improbable that the acts of the arbitrator himself may create the dispute which must be referred to him for decision.

As questions of law frequently arise in arbitrations and as arbitrators are required to observe the law provision is made in the legislation relating to arbitration for some control over arbitration proceedings by the Courts. This legislation enables an arbitrator to obtain during the reference the guidance of the Court upon a question of law or in the alternative to state his award in the form of a special case. Where he takes the opinion of the Court for his guidance he does so as a step in arriving at his own ultimate award, but where he states his award in the form of a special case he makes his award in such a form that the opinion of the Court thereon will determine the rights of the parties.[6]

Some other important provisions of this legislation may be referred to briefly. In the English Act of 1889, and the Victorian Act it is provided in substance that where a party to a submission commences legal proceedings against any other party to the submission in respect of any matter agreed to be referred any party to such legal proceedings may subject to certain conditions apply to the Court to stay them. In such an application the Court has a discretion as to whether or not it will exercise its power to stay the proceedings. There are many grounds upon which the Court, in its discretion, will refuse to stay an action. The Court will usually refuse a stay where the determination of the dispute involves solely or mainly a question of law. Two other grounds on which the Court may well be induced to refuse a stay might be mentioned. Where a charge of fraud is made against a party in connection with the matter in dispute and the party so charged is desirous of having the matter dealt with by the Court, the Court will probably refuse a stay.

It will also generally refuse a stay where there is a reasonable probability on the facts that the arbitrator will be biassed.

The Court can also exercise some control over arbitration proceedings by the power which it has to revoke the submission. In the English Act of 1889 and in the Victorian Act, it is provided that a submission unless a contrary intention is expressed therein shall be irrevocable except by leave of the Court or a Judge. Good cause such as misconduct or an obvious bias on the part of the arbitrator must be shown to obtain leave to revoke. In *In re Frankenberg and the Security Company*[7] an insurance company claimed to appoint its own manager as an arbitrator, but Cave J.

5. 58 C.L.R., 36.
6. *In re Knight and Tabernacle Permanent Building Society* (1892) 2 Q.B. 613 at 618-9.
7. 10 T.L.R. 393.

said: "The Company must appoint another arbitrator within a week or the submission to arbitration must be rescinded." He also added: "This company, it appears, issue policies against burglaries. A very bad beginning." It may be said that leave to revoke will generally be given when what has happened in the arbitration proceedings makes it certain that the award if made will be set aside.

III.

Arbitration as a system has much to commend it inasmuch as it enables parties to a contract to choose their own tribunal and obtain a settlement of their disputes inexpensively and without delay. Its obvious advantages no doubt appeal to the business man, but at the same time its disadvantages cannot be overlooked.

It is not in some respects an efficient means of settling disputes. In Victoria the power of an arbitrator is unduly limited and there are many matters incidental to the hearing of a reference with respect to which neither the Court nor the arbitrator has any power. Better provision for dealing with matters of an interlocutory nature would help the parties to a reference to obtain a more effective determination of their disputes. In England such provision has been made in the Act of 1934. By this Act the Court has for the purpose of and in relation to the reference the same power of making orders in respect of any of the matters set out in the First Schedule to the Act as it has for the purpose of and in relation to an action or matter in the Court. Among the matters in the First Schedule in respect of which the Court may make orders are the following:—security for costs; discovery of documents, the issue of a commission or request for the examination of a witness out of the jurisdiction; interim injunctions or the appointment of a receiver. This Act also provides that an arbitrator shall have the same power as the Court to order specific performance of any contract other than a contract relating to land or any interest in land.

There is always the risk in an arbitration that the arbitrator may be biassed, and experience has shown that where each party to a dispute appoints an arbitrator there is usually a tendency that the arbitrators will become advocates. In *Roff v. British and French Chemical Manufacturing Company*[8] Swinfen Eady M. R. said: "It was said by Mr. Matthews that arbitrators appointed in commercial arbitrations often take up the position of advocates of the party by whom they are appointed. This Court, however, has frequently laid down that that is not the proper position for an arbitrator to take up." It is just as important in arbitration proceedings as in legal proceedings that justice should not only be done but should seem to be done.

In England until 1934 a general presumption of bias on the part of an arbitrator was not a sufficient ground for the interference of the Court and this is apparently still the law in Victoria. In England by the Act of 1934 an attempt was made to provide for this weakness in the system of arbitration by enacting that where an arbitrator is named or designated in the agreement to arbitrate and after a dispute has arisen

8. (1918) 2 K.B. 677 at 680.

any party applies on the ground that the arbitrator is or may not be impartial for leave to revoke the submission or for an injunction to restrain any other party or the arbitrator from proceeding with the arbitration it shall not be a ground for refusing the application that the said party at the time when he made the agreement knew or ought to have known that the arbitrator by reason of his relation towards any other party to the agreement or of his connection with the subject referred might not be capable of impartiality and in such a case, too, the Court is empowered to refuse to stay any action brought in breach of the agreement. This provision of the English Act might well be made part of the law of Victoria.

In another respect the arbitration system as it exists in Victoria might be amended. Arbitrations are conducted in private and it does not seem either fitting or desirable where the matter in dispute involves a question of fraud that this question should not in all cases be decided in open Court. This question has been dealt with by the English Act of 1934 which enacts that where an agreement between any parties provides that disputes which may arise in the future between them shall be referred and a dispute which so arises involves the question whether any such party has been guilty of fraud, the Court shall, so far as may be necessary to enable that question to be determined by the Court, have power to order that the agreement shall cease to have effect and power to give leave to revoke any submission made thereunder and may further refuse to stay any action brought in breach of the agreement.

It is possibly the intention of many people who submit their disputes to arbitration that the arbitrators appointed by them should be entirely unfettered by legal considerations and should act in accordance with what they consider general principles of justice. The question whether an arbitrator should be regarded merely as an agent of the parties or as one whose duty is to act judicially and according to the law of the land has been the subject of much judicial discussion in the United States of America, but in England and also in Victoria the arbitrator must decide according to the legal rights of the parties and not according to what he may consider fair and reasonable under the circumstances. It is surely a consideration of some consequence to the community that parties to a contract should have their rights and obligations determined by "the law of the land," and that arbitrators should not be a law unto themselves, and in communities which pride themselves on the rule of law it appears to be both just and proper that persons who submit their disputes to arbitration should not have their rights and obligations determined otherwise than in accordance with the established rules of law.

In *Czarnikow v. Roth Schmidt & Co.*,[9] Banks L.J. said: "That they (arbitrations) will continue their present popularity I entertain no doubt, so long as the law retains sufficient hold over them to prevent and redress any injustice on the part of the arbitrator, and to secure that the law that is administered by an arbitrator is in substance the law of the land and not some home-made law of the particular arbitrator or the particular association." The legislation relating to arbitration was, no doubt, in-

9. (1922) 2 K.B. 478 at 484.

tended to secure that the law administered by arbitrators should be the law of the land, but it may safely be said that the law administered by them is not infrequently a law which may be described in the words of Bankes L.J. as "home-made law."

It should be a matter of some concern to the legal profession that there is a marked preference for arbitration on the part of those engaged in trade and commerce, a preference in large measure, due to the desire of business men to escape the law's delay. The legal profession in its own interests and perhaps in the interests of the community can make some effort to remove this reproach from the administration of justice. This it can do by using its influence to secure some modification of the law relating to the practice and procedure of the Courts and also of the law of evidence. Whether or not this object is achieved the remedy for the law's delay must to some extent depend upon the exertions of the legal profession itself.