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## ARBITRATION UNDER THE ARBITRATION STATUTES OF TEXAS†

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This is a review and critique of the legislation of Texas relating to arbitration of civil controversies. The legislation consists chiefly of an arbitration statute providing for the arbitration of disputes generally and a separate statute providing for the arbitration of controversies arising between employers and employees (or their unions).

These pieces of legislation are examined from the viewpoint of determining how well they facilitate the arbitral process and how well they are designed to assure the integrity of that process. Questions also occur as to whether the statutes provide a superior or less useful system of arbitration than common law arbitration. If parties desire to arbitrate, should they choose the statutory or the common law system? Has the judicial administration of the statutes through court decisions facilitated or deterred their use?

This review of the arbitration legislation of the State is invited not only by the foregoing questions, but also by Article 16, § 13 of the Constitution of Texas, which provides that: "It shall be the duty of the legislature to pass such laws as may be necessary and proper to decide differences by arbitration, when the parties shall elect that method of trial."<sup>1</sup> How well does the foregoing legislation carry out the duty assigned to the legislature by this constitutional provision?

### GENERAL ARBITRATION STATUTE

The general arbitration system of Texas appears in articles 224-238 of the statutes.<sup>2</sup> This legislation is sometimes referred to herein as the general arbitration statute, and is reprinted and considered in

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<sup>1</sup> The provision first appeared in the Constitution of 1845. Why it was included has not been discovered. The Journal of the Constitutional Convention of 1845 indicates that the section was adopted from committee report without debate.

<sup>2</sup> TEX. CIV. STAT. (Vernon, 1948) arts. 224-38.

detail below at pages 842-864. The present statute dates back to 1846.<sup>3</sup> There have been comparatively few substantial amendments since then. It relates only to agreements to submit existing controversies; it does not purport to embrace arbitration provisions in commercial contracts or in collective bargaining agreements between employers and employees (or their unions) providing for settlement of future disputes which may arise in connection with such contracts or agreements.

Parties may submit "any dispute, controversy, or right of action supposed to have accrued to either party"<sup>4</sup> by signing "an agreement in writing"—with various matters set forth therein<sup>5</sup>—and filing it with a justice of the peace or clerk of a county or district court, depending upon the amount in dispute.<sup>6</sup>

*Effect of Statute Upon Common Law Arbitration.* The statute expressly reserves the validity of common law arbitration. Article 238 provides that "Nothing herein shall be construed as affecting the existing right of parties to arbitrate their differences in such mode as they may select."<sup>7</sup> Accordingly, if parties do not enter into a submission agree-

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<sup>3</sup> Tex. Laws, 1846 p. 127, approved April 25, 1846. The Arizona arbitration statute relating to submission of existing controversies and originally enacted in 1901 (Rev. Stats. 1901, Tit. 111, effective April 19, 1901) is substantially similar. ARIZ. CODE ANN. §27-301-11 (1939). Sections 27-309-11 of the Arizona statute were grafted on the earlier statute in 1929 (Ariz. Laws 1929, c. 72). They relate to provisions in written contracts (except collective bargaining agreements) providing for arbitration of future disputes and are a partial copy of similar provisions in the more modern arbitration statutes of California, Connecticut, Hawaii, Louisiana, Massachusetts, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Washington, Wisconsin, and in the United States arbitration statute. Unfortunately the grafting of the 1929 provisions on the older Arizona statute was not very well done; ambiguities and burdensome technicalities of the total act make it fully as uninviting to parties who may desire to use arbitration in Arizona as did the original act.

While the process of adding provisions of the more modern arbitration statutes to older arbitration statutes may be more expedient in some instances than undertaking the enactment of a wholly new statute, the Arizona attempt exemplifies the hazards of such plan.

<sup>4</sup> TEX. CIV. STAT. (Vernon, 1948) art. 224.

<sup>5</sup> TEX. CIV. STAT. (Vernon, 1948) art. 225.

<sup>6</sup> TEX. CIV. STAT. (Vernon, 1948) art. 226.

<sup>7</sup> The courts have, of course, recognized that both common law and statutory arbitration are available in Texas. *Myers v. Easterwood*, 60 Tex. 107 (1883); *Owens v. Withee*, 3 Tex. 161 (1848); *Lone Star Cotton Mills v. Thomas*, 227 S.W.2d 300 (Tex.Civ.App. 1949); *Ferguson v. Ferguson*, 93 S.W.2d 513 (Tex.Civ.App. 1936); *Temple v. Riverland Co.*, 228 S.W. 605 (Tex.Civ.App. 1921); *Hill v. Walker*, 140 S.W. 1159 (Tex.Civ.App. 1911); and see *Tejas Development Co. v. McGough Bros.*, 165 F.2d 276 (5th Cir. 1947).

ment which qualifies under the statute, the agreement and any arbitral proceedings and award thereunder will be judged at common law.<sup>8</sup>

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<sup>8</sup> If parties appear to invoke the statute and enter upon a conforming submission agreement, but they, or the arbitrators, fail thereafter to follow the prescriptions of the statute so that the award does not qualify for enforcement by the statutory method, may it, notwithstanding, be enforced by common-law remedies as a common-law award? May it be vacated by the statutory or by the common-law method?

Concerning the diversity of judicial decisions on these points in other jurisdictions, see Sturges, *Commercial Arbitrations and Awards* 5-6 (1930); *Park Const. Co. v. Independent School Dist.*, 209 Minn. 182, 296 N.W. 475 (1941); *Sandford Laundry, Inc. v. Simon*, 285 N.Y. 488, 35 N.E.2d 182 (1941).

The Supreme Court of Texas, in an early case, *Myers v. Easterwood*, 60 Tex. 107 (1883) sustained an award in such a case, the arbitration and award meeting common-law requirements. The decision was made on cross motions, one to enter judgment on the award and the other to set it aside. The submission agreement comprehended the subject matter of a pending action between the parties, declared that it was under the arbitration statute and contained certain express provisions for proceedings thereunder in conformity with the statute. Only one person, however, was named by the parties as arbitrator and he was to act as sole arbitrator. The court declared that the award was not in compliance with the statute because the submission was to only one arbitrator, but sustained it as a valid execution of the parties' submission. The court recognized the problem at hand and the diversity of the authorities as follows: "We do not propose to enter into an extended consideration of the vexed question as to whether an arbitration intended by the parties to be under the statute, but for some reason not carried out in accordance with the statute, should be enforced as a common law award. The authorities upon this question are conflicting." *Id.* at 109.

In sustaining the award as at common law the court stated the rationale of its ruling in these words: "Though the arbitration cannot be sustained as one under the statute, for the reason that the matter was submitted to one sole arbitrator, while the statute provides for two, and, in case of their disagreement, for an umpire, yet we are of the opinion that the parties must be held to have intended that such an arbitration should be made as would effectually settle the matter of difference between them, and should be enforceable by the courts.

"In other words, they must be held to have known that their agreement was not good for an arbitration under the statute; held to have known the law applicable to their agreement, and to have intended that their agreement should have effect, which can be given it only by considering it as an arbitration and award good at law, and without reference to the statute." *Id.* See also *Park Const. Co. v. Independent School Dist.*, *supra*. Compare *Owens v. Withee*, 3 Tex. 161 (1848).

In *Ferguson v. Ferguson*, 93 S.W.2d 513 (Tex.Civ.App. 1936), a court of civil appeals approached this general problem but did not pass upon it. An elaborate submission agreement purported in various provisions to invoke the statute, but in other provisions matters were stipulated in waiver or contradiction of the statute. A bill in equity to vacate the award failed. Said the court: "In our opinion, the arbitration provided for in the arbitration agreement was not a *strictly* statutory arbitration and was not intended to be . . . We do not hold that the award was not sufficient as a statutory award, but we do hold that if it was not, then as against the attack made upon it, it was sufficient as a common-law award." *Id.* at 516. Concerning the ex-

The availability of common law arbitration is of real importance because the Texas statute—according to its text—is not very inviting to parties who may desire to arbitrate. Indeed, it seems to have many of the requirements which parties most desire to escape by arbitration. And it is notable that the Texas courts have recurringly emphasized that common law arbitrations, free as they are from the formalities and technical requirements of the statute as to the agreement, the arbitral board, the arbitral hearings and award, are to be favored and accorded every reasonable intendment for validity.

The statute fashions a statutory arbitration as an amicable action. Control over the initiation of the arbitral proceedings, to the extent of fixing the time and place thereof, is vested in the justice or clerk with whom the submission agreement is filed.<sup>9</sup> A provision of uncertain scope and effect further prescribes that the arbitration "shall proceed in like manner with trials in the courts of this State."<sup>10</sup> Provisions as to the make-up of the arbitral board and for a second and successor arbitral board make probable the necessity of a repeat arbitration before a cause can be finally determined.<sup>11</sup> There also is some uncertainty as to whether or not causes arbitrable under the statute are limited to those consisting of disputed money claims.<sup>12</sup> It also is open to question whether the arbitral board is expected to decide "according to the evidence adduced and the law and equity applicable to the facts proved," as the members of the board are required to take oath to do.<sup>13</sup> If the oath must be followed, judicial review of statutory arbitrations and awards is extended quite beyond that at common law; and laymen, it seems, generally will be unqualified to serve as arbitrators under the statute. In an early case involving the statute the supreme court recognized that "It is difficult to form a clear view of the meaning of many parts of this act."<sup>14</sup>

These general criticisms are particularized below, pages 842-864, in comments upon the several articles of the statute. Court decisions which

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tended course of litigation between the Ferguson brothers, see further, *Ferguson v. Ferguson*, 127 S.W.2d 1018 (Tex.Civ.App. 1939).

In *Bell v. Campbell*, 143 S.W. 953 (Tex.Civ.App. 1912) the court remarked generally that the award which was rendered in that case under a future disputes provision in a building contract should, as to the objections raised against it, be sustained "both at common law and under the statute."

<sup>9</sup> TEX. CIV. STAT. (Vernon, 1948) art. 227.

<sup>10</sup> TEX. CIV. STAT. (Vernon, 1948) art. 230.

<sup>11</sup> TEX. CIV. STAT. (Vernon, 1948) arts. 225, 232.

<sup>12</sup> TEX. CIV. STAT. (Vernon, 1948) art. 226.

<sup>13</sup> TEX. CIV. STAT. (Vernon, 1948) art. 228.

<sup>14</sup> *Owens v. Withee*, 3 Tex. 161 (1848).

have affirmed, clarified or displaced the foregoing provisions of the statute also are reviewed there.

*Causes Which May Be Submitted.* Article 224 suggests that a wide variety of commercial causes and labor controversies may be submitted under the statute, by providing that parties shall have the right to submit "any dispute, controversy, or right of action supposed to have accrued to either party." It may be observed, however, that the text of the statute lends itself to a construction to the effect that it embraces the submission of disputed money claims only. Article 226 provides that the submission agreement shall be filed with a justice of the peace if "the amount in dispute is two hundred dollars or less," or with the clerk of the district or county court if "the matter in dispute exceeds two hundred dollars, exclusive of interest." A court predisposed to apprehension for arbitration and arbitration statutes<sup>15</sup> might readily conclude that submissions looking to a declaratory award, such as, for example, of title, right of possession, of seniority rights, or "just cause" for discharge of an employee, or to an award of things to be done or not to be done other than the payment of money, may not be determined under the statute.<sup>16</sup> In determining how comprehensive the statute is the Texas courts may well be aided by reference to the foregoing Article 16, § 13 of the Constitution. It seems that a liberal construction of the statute as to what causes may be arbitrated thereunder would clearly serve the purpose of that constitutional requirement. And the supreme court early declared, while dealing with another issue under the statute, that it should receive a liberal construction.<sup>17</sup>

*Revocability and Enforceability: Future Disputes Provisions and Submission Agreements.* Some decisions in the courts of civil appeals have accorded traditional common law revocability to agreements in commercial contracts to arbitrate disputes which may arise in the future.<sup>18</sup>

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<sup>15</sup> See e.g., *Goldstein v. Ladies' Garment Workers' Union*, 328 Pa. 385, 196 A. 43 (1938); *Sturges and Ives, Some Confusing Matters Relating to Arbitration in Pennsylvania*, 99 U. OF PA. L. REV. 727 (1951). The review of the Texas decisions on the Texas statute as set out later in this article indicates a more liberal attitude by the courts.

<sup>16</sup> In *Ferguson v. Ferguson*, 93 S.W.2d 513 (Tex.Civ.App. 1936) the court did not rule out of the statute a submission which it regarded as involving, among other things, partition of a decedent's estate of which the parties to the submission were beneficiaries. The question whether the cause was arbitrable under the statute was not put in issue, however, nor did the court purport to pass upon the question. Similarly, see *Myers v. Easterwood*, 60 Tex. 107 (1883); *Alexander v. Witherspoon*, 30 Tex. 291 (1867); *Crouch v. Crouch*, 70 S.W. 595 (Tex.Civ.App. 1902); *Smith v. Clark*, 54 S.W. 1052 (Tex. Civ.App. 1900).

<sup>17</sup> *Forshey v. Galveston, H. & H. R. R.*, 16 Tex. 516 (1856).

<sup>18</sup> *Dozier v. City of Gatesville*, 4 S.W.2d 131 (Tex.Civ.App. 1928) (revocability

The supreme court does not appear to have decided the matter. In 1888, while ruling that a provision for appraisal of loss and damage in a fire insurance policy is not revocable by action, it did declare that:

"If the stipulation was to deny or repudiate the jurisdiction of the courts to determine the rights and liability of the parties arising upon the contract, we would hold, with the weight of authority, such stipulation void. But here the stipulation does not divest the courts of jurisdiction, but only binds the parties to have the *extent* or *amount* of the loss determined in a particular way, leaving the question of liability for such loss to be determined, if necessary, by the parties."<sup>19</sup>

Later, in 1897, in a similar case, with a comparable issue as to a provision for appraisal of loss and damage in a fire insurance policy and a like decision thereon, the court remarked in passing that it "seems to be generally held that a stipulation that the question of liability shall be determined by arbitration is contrary to public policy and void."<sup>20</sup> It is doubtful that these ancient dicta necessarily commit the court to rule that the arbitration provisions in current usage are subject to traditional common-law revocability.

There does not appear to be even a dictum in Texas cases concerning the revocability of arbitration provisions in collective bargaining agreements between employers and their employees (or their unions).

Even if the supreme court finally holds that arbitration provisions in commercial contracts or collective bargaining agreements are irrevocable by action and irrevocable by notice, it may be doubted—in the absence of statutory provision—that positive enforcement would be accorded, such as an injunction requiring a recalcitrant party to carry out his arbitration agreement, or to participate in the original appointment of the arbitral board or in filling vacancies therein, or that, upon his default in such appointment, a court would make the appointment.<sup>21</sup>

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by action); *Queiroli v. Whitesides*, 206 S.W. 122 (Tex.Civ.App. 1918) (same); see also *Tejas Development Co. v. McGough Bros.*, 165 F.2d 276 (5th Cir. 1948). Compare some of the views expressed in *Ferguson v. Ferguson*, 110 S.W.2d 1016 (Tex.Civ.App. 1937).

An award once rendered under a future disputes provision will, of course, be sustained notwithstanding revocability of the provision up until award. *Bell v. Campbell*, 143 S.W. 953 (Tex.Civ.App. 1912); see also *Tejas Development Co. v. McGough Bros.* *supra*; *Florida Athletic Club v. Hope Lumber Co.*, 44 S.W. 10 (Tex.Civ.App. 1898).

<sup>19</sup> *Scottish Union and National Ins. Co. v. Clancy*, 71 Tex. 5, 9-10, 8 S.W. 630, 631 (1888); (Italics by the court).

<sup>20</sup> *American Central Ins. Co. v. Bass Bros.*, 90 Tex. 380, 382, 38 S.W. 1110 (1897).

<sup>21</sup> For further specification of traditional common-law revocability and non-enforceability of arbitration agreements, see *Sturges and Murphy*, *Some Confusing Matters*

Apparently it is the intent of the statute that an agreement to submit an existing controversy, executed and filed in compliance with the statute, shall thereupon be irrevocable, at least by action. Article 236 provides as much.

The statute makes no express provision for more positive enforcement of such agreements, such as by injunctive order for compliance or by court appointment of the arbitral board when the recalcitrant party refuses to participate in setting up or maintaining the board. Such enforcement is provided, however, in a quite limited particular in article 232. If the two arbitrators, chosen as they are by each party designating one, fail to agree, they shall appoint an umpire, and article 232 provides that if they cannot agree upon an umpire then "the justice or clerk shall select such umpire." Of course this provision appears to be of narrow scope; it does not purport to touch a case arising, for example, by reason of the failure or refusal at any time of a recalcitrant party's appointee to serve, nor one calling for appointment of a substitute arbitrator or umpire to fill a vacancy otherwise occurring in the board.

Traditional common-law revocability has been accorded a common law submission agreement.<sup>23</sup>

#### ARBITRATION OF LABOR CONTROVERSIES

In addition to the general arbitration statute, Texas has a statute relating especially to the arbitration of controversies between an employer and his employees (or their unions).<sup>24</sup> This legislation dates back

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*Relating to Arbitration Under the United States Arbitration Act, 17 LAW & CONTEMP. PROB. 580 n. 2 (1952)*

The more modern arbitration statutes embrace provisions in written contracts to arbitrate future disputes arising in connection with the contract and written agreements of submission of existing controversies. In these arbitration statutes it is declared that arbitration agreements qualifying thereunder "shall be valid, irrevocable and enforceable." This is mandatory language; it is a legislative mandate to the courts to make them so. The declaration alone is sufficient to overcome common-law revocability by notice. Precise remedies also are accorded the parties to overcome fully common-law revocability by action and to provide more positive enforcement. These remedies include the power (1) to stay the trial of any action, suit or other proceeding brought upon a cause embraced in such arbitration agreement, (2) to obtain an order against a recalcitrant party requiring him to proceed in compliance with the arbitration agreement, and (3) to procure court appointment of arbitrators to act under the agreement when a party fails or refuses to participate in the original appointment or to fill a vacancy occurring in the arbitral board.

<sup>22</sup> TEX. CIV. STAT. (Vernon 1948) arts. 225-6.

<sup>23</sup> Hill v. Neese, 160 S.W. 314 (Tex.Civ.App. 1913).

<sup>24</sup> TEX. CIV. STAT. (Vernon, 1948) arts 239-49.

to an Act of 1895.<sup>25</sup> There have been no substantial amendments since its original enactment.

The statute is not inviting to employers and employees who may desire to arbitrate. This is true because, among other reasons, of the burdensome, technical requirements which the statute imposes. It prescribes an unwieldy arbitral board of five members: the employer and the employees each select two; then the four thus selected "shall designate a fifth person as arbitrator, who shall be chairman of the board."<sup>26</sup> When the board is selected it is required to present a written petition signed by a majority to the district judge of the county where the dispute arose "praying the license or order of such judge establishing and approving of said board of arbitration." If the judge shall find "that all requirements of this law have been complied with," he shall make an order "establishing such board of arbitration and referring the matters in dispute to it for hearing, adjudication and determination."<sup>27</sup> Each arbitrator "shall sign a consent to act as such" and subscribe to an oath before some officer authorized to administer oaths "to faithfully and impartially discharge his duties as such arbitrator," and such "consent and oath shall be immediately filed" in the office of the district clerk.<sup>28</sup>

Art. 242 provides for the submission of controversies in the following manner:

"The submission shall be in writing, shall be signed by the employer or receiver and the labor organization representing the employes, or any laborer or laborers to be affected by such arbitration who may not belong to any labor organization, shall state the question to be decided, and shall contain appropriate provisions by which the respective parties shall stipulate as follows:

1. That pending the arbitration, the existing status prior to any disagreement or strike, shall not be changed.

2. That the award shall be filed in the office of the clerk of the district court of the county in which said arbitration is held, and shall be final and conclusive upon both parties, unless set aside for error of law, apparent on the record.

3. That the respective parties to the award will each faithfully execute the same, and that the same may be specifically enforced in equity so far as the powers of a court of equity permit.

4. That the employes dissatisfied with the award shall not, by reason of such dissatisfaction, quit the service of said employer or receiver before the expiration of thirty days, nor without giving said employer or receiver thirty days written notice of their intention to quit.

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<sup>25</sup> Tex. Laws 1895, c. 61.

<sup>26</sup> TEX. CIV. STAT. (Vernon, 1948) art. 239.

<sup>27</sup> TEX. CIV. STAT. (Vernon, 1948) art. 240.

<sup>28</sup> TEX. CIV. STAT. (Vernon, 1948) art. 243.

5. That said award shall continue in force as between the parties thereto for the period of one year after the same shall go into practical operation; and no new arbitration upon the same subject between the same parties shall be had until the expiration of said one year."

It is further provided that during the pendency of an arbitration under the act:

"it shall not be lawful for the employer or receiver party to such arbitration, nor his agent, to discharge the employes parties thereto, except for inefficiency, violation of law, or neglect of duty, or where reduction of force is necessary nor for the organization representing such employes to order, nor for the employes to unite in, aid or abet strikes or boycotts against such employer or receiver."<sup>29</sup>

There are other impracticable provisions (at least as of today), such as those fixing the fee of each arbitrator at the low rate of "three dollars per day for every day in actual service, not to exceed ten days," and witness fees at "fifty cents for each days attendance and five cents per mile traveled by the nearest route."<sup>30</sup>

An award shall be filed in the district clerk's office and, upon being filed, "shall go into practical operation, and judgment shall be entered thereon accordingly, at the expiration of ten days from such filing, unless within such ten days either party shall file exceptions thereto." Such exceptions shall lie to "matter of law apparent on the record."<sup>31</sup> From the decision by the district court upon such exceptions either party may appeal to the court of civil appeals holding jurisdiction thereof; the decision of the latter court is final.<sup>32</sup>

No Texas decisions have been found relating to the administration of this statute.<sup>33</sup>

#### CRIMINAL LAWS APPLICABLE TO ARBITRATIONS

Three articles of the Penal Code relating to bribery are expressly applicable to arbitrations.<sup>34</sup>

"Whoever shall bribe or offer to bribe" any arbitrator or umpire, "with intent to influence his decision or bias his opinion in relation to any cause or matter which may be pending before, or may thereafter by

<sup>29</sup> TEX. CIV. STAT. (Vernon, 1948) art. 246.

<sup>30</sup> Apparently witness fees (per diem) for "attendance on the court" and mileage allowance are more generous. See TEX. CIV. STAT. (Vernon, 1948) art. 3708.

<sup>31</sup> TEX. CIV. STAT. (Vernon, 1948) art. 248.

<sup>32</sup> TEX. CIV. STAT. (Vernon, 1948) art. 249.

<sup>33</sup> It is mentioned in *Tejas Development Co., v. McGough Bros.*, 165 F.2d 276 (5th Cir. 1948).

<sup>34</sup> TEX. PEN. CODE (Vernon, 1948) arts. 163-5.

law be submitted" to such arbitrator or umpire shall, upon conviction, be imprisoned in the penitentiary not less than two nor more than five years.<sup>35</sup>

If any arbitrator or umpire "shall accept, or agree to accept, a bribe offered for the purpose of biasing or influencing his opinion or judgment, as set forth in the preceding article" he shall, upon conviction, be imprisoned in the penitentiary not less than two nor more than five years.<sup>36</sup>

To complete an offense under the foregoing two articles it is not necessary that the arbitrator or umpire "shall have been actually selected or appointed; it is sufficient if the bribe be offered or accepted with a view to the probable appointment or selection of the person to whom the bribe is offered, or by whom it is accepted."<sup>37</sup>

No Texas decisions have been found involving any of these penal provisions.

THE GENERAL ARBITRATION STATUTE—THE CRITIQUE PARTICULARIZED  
*Article 224. Right to Arbitrate*

All persons desiring to submit any dispute, controversy, or right of action supposed to have accrued to either party, to arbitration, shall have the right so to do in accordance with the provisions of this title.

*Article 225. Agreement*

Such persons shall sign an agreement in writing, as plaintiff and defendant, to arbitrate their differences or matters in dispute, and in such agreement each party shall name for himself one arbitrator, who shall be over the age of twenty-one years, not related to either party by consanguinity or affinity, possessing the qualifications of a juror, and who is not interested in the result of the cause to be submitted for his decision.

*Designation of parties as litigants.* Probably the statute imposes this apparent duty of self-description by the parties to assimilate statutory arbitration to an amicable action. "Plaintiff" and "defendant" are, of course, traditional and useful words to designate parties in civil litigation, but they serve no useful purpose in arbitrations. The basis of the designations for litigation is absent in arbitrations—even those under this statute. The impediment of this requirement will be especially noticeable when parties undertake a submission of their disputes over title, ownership, or rights of possession,<sup>38</sup> boundary lines, interpretations of documents, or money claims with counterclaims.

<sup>35</sup> TEX. CIV. STAT. (Vernon, 1948) art. 163.

<sup>36</sup> TEX. CIV. STAT. (Vernon, 1948) art. 164.

<sup>37</sup> TEX. CIV. STAT. (Vernon, 1948) art. 165. A "bribe" is defined in article 177 of the penal code.

<sup>38</sup> See, e.g., the submission in *Myers v. Easterwood*, 60 Tex. 107 (1883).

Parties will think twice before agreeing upon their respective designations, since some advantages and disadvantages may attend their respective designations. This appears from article 230 relating to procedure at the hearing. It provides that "the trial of the cause shall proceed *in like manner with trials in the courts of this State, the plaintiff holding the affirmative, and entitled to open and conclude the argument.*"<sup>39</sup> But just what "the affirmative" involves is not clear unless it may indicate that the Rules of Civil Procedure, including the law of evidence, with presumptions and burdens of proof, control or have some significance in the arbitral hearing. That the views of the courts tend to belie such control is indicated by the discussion of article 233, below, pages 861-864.

In short, the parties may be apprehensive in styling themselves, one as "plaintiff" and one as "defendant," since the significance of doing so is not at all evident. At all events, it seems clear that this requirement does not facilitate the use of the statute nor contribute, in any respect to the integrity of the arbitral process.

The supreme court once indicated that it was puzzled by the foregoing requirement. It speculated that the designations "may have been intended and used in reference to the party claiming satisfaction, compensation, or redress of a supposed wrong, and the party from whom it was sought to be obtained."<sup>40</sup> No further conclusion on the matter has been discovered in the Texas cases. While the text says that the parties "shall" sign "as plaintiff and defendant," perhaps the supreme court ultimately will conclude that "may" is all that is intended—and that the provision is of no significant consequence. If so, why have it in the statute?

*Concerning the arbitral board.* It is not clear why the statute should make any such prescription as to the arbitral board and the formalizing of it in the submission agreement. Why should the parties be required to *name* their arbitrators in the agreement? Why should the statute prescribe the constituency of the arbitral board? These questions are prompted by the over-all consideration of how such provisions facilitate the arbitral process or assure its integrity.

To hold that the text of article 225 is mandatory so as to preclude the parties from naming a single arbitrator, or an odd number of arbitrators, would be to create the unfortunate situation in which arbitrations under the statute might result in no award, if there were disagreement between the two arbitrators (each party appointing one). Indeed, the statute appears to anticipate as much in article 232. Provision is

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<sup>39</sup> Italics supplied.

<sup>40</sup> Owens v. Withee, 3 Tex. 161, 165 (1848).

they "shall select an umpire"; if they cannot agree in the choice of an umpire, "the justice or clerk shall select such umpire"; and then "the cause may be tried anew at such time as the board of arbitration thus constituted may designate" and "with like proceedings" as are prescribed in the preceding article for the original proceedings.

If these provisions of the statute are to be taken at face value, it is doubted that greater deterrents could be devised to discourage arbitration under the statute.

It also should be noted that the "umpire" selected by the two arbitrators, or by the justice or clerk, as the case may be, must have like qualifications as an arbitrator.<sup>41</sup> As appears from article 225 an arbitrator must, among other things, possess "the qualifications of a juror." The vague and technical requirements (both qualitative and factual) for jury duty<sup>42</sup> provide inviting opportunity for a recalcitrant party to tie up any repeat arbitration by litigating the qualifications of the "umpire" so selected or appointed.

The Texas decisions have wrought a little clarification of the statute on the foregoing matters; it is doubtful that more could reasonably have been expected. The supreme court took account in an early case of the frailties of the provision of article 225 regarding the probable necessity of a repeat arbitration following the failure of the original two arbitrators to agree upon an award. In *Forshey v. Galveston, H. & H. R.R.*<sup>43</sup> the submission agreement provided that each party should select one arbitrator and that the two so chosen should select a "third man." It was further provided that all three should "sit and act as arbitrators," but that a decision by all three or any two of them should be final and binding. Apparently all three participated in the arbitral hearing; and it is reported that "the award purported to be the decision of a majority of the arbitrators, but was signed by all." Whether the third man chosen by the original two constituted part of the majority does not appear. Neither the names of the two arbitrators appointed by the parties nor that of the third man appointed by the two were given in the submission agreement. Their names were, however, subsequently indorsed upon the agreement—but when or by whom does not appear.

The lower court denied enforcement of the award for want of compliance with the statute. The supreme court reversed, holding that the

<sup>41</sup> TEX. CIV. STAT. (Vernon, 1948) art. 232.

<sup>42</sup> For example, he must be "of sound mind and good moral character" TEX. CIV. STAT. (Vernon, 1948) art. 2133; and may be disqualified for a cause which, in the opinion of the court, renders him unfit to sit. TEX. CIV. STAT. (Vernon, 1948) art. 2144; and consult *Johnson v. Korn*, 117 S.W.2d 514 (Tex.Civ.App. 1938); *Brulay v. Brooks*, 50 S.W. 647 (Tex.Civ.App. 1898).

<sup>43</sup> 16 Tex. 516 (1856).

award was a valid statutory award and enforceable by the statutory procedure. It posed the issue before it as follows:

"If the Court [below] was right in its judgment, it must be because, by the agreement of the parties, the two arbitrators chosen by them were empowered to choose and did choose a third arbitrator or umpire, before they had heard the evidence and ascertained that they could not agree; for in every other respect there was literal compliance with the statute."<sup>44</sup>

The court took occasion to emphasize that the statute should be liberally construed at least to the point, in this case, of sustaining the advance selection of the third man so as to obviate a potential repeat arbitration. Said the court:

"It cannot be doubted that the parties have adopted and pursued, substantially, the statutory remedy. If they have not entitled themselves to all the benefits of that mode of trial, it is because there has not been a technical compliance with the very letter of the statute, in respect to the time of choosing an umpire; and because the proceeding under the statute is to be construed strictly so as to require an exact, technical and literal compliance with its provisions. It must be admitted that this would be to apply to this statute and the proceedings under it, a strictness of construction which has never been applied, and is not warranted by any principle by which Courts are governed, in the construction of statutes regulating civil proceedings in general. . . . To call that a liberal construction, in furtherance of the remedy, which should deny parties the benefit of that remedy, merely because, for their mutual convenience, they had anticipated and provided in advance, against the necessity of a second trial, in the event of the disagreement of the arbitrators chosen by them would be an abuse of terms. . . . What is the substance of the provision to be complied with according to its fair and obvious meaning and intent? It is that each party shall choose an arbitrator; and to ensure a decision, if they disagree, they shall select an umpire (Hart. Dig. Art. 10, 12). All this has been done. Can it make any difference in effect and substance, that, with the consent of the parties, the arbitrators chose the umpire before they had disagreed? Can that be a fatal departure from any indispensable or essential requirement of the statute? It seems, there was a disagreement; for the award, though signed by all, purports to be the award of a majority. That majority must have been, either the two chosen by the parties; in which case there having been an umpire chosen was a merely unnecessary and immaterial matter; or it was the concurrence of one of them with the umpire; in which case the event must have happened, which rendered the choosing of an umpire necessary: and whether he was chosen before or after the disagreement, it

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<sup>44</sup> *Id.* at 526. It may be noted in passing that it does not appear from the report of the submission agreement that the parties had designated themselves as "plaintiff" and "defendant"; the matter was not mentioned.

there made that "if the arbitrators chosen as aforesaid cannot agree" would seem, was a matter equally unimportant and immaterial. Upon either supposition, the award was rendered precisely in the manner, which the statute contemplates. The course pursued was convenient and expedient; ensuring a decision, without the trouble and expense of two trials: and convenience and expediency are always consulted in administering remedies in civil proceedings."<sup>45</sup>

Prior to the *Forshey* case, in 1848, in *Owens v. Withee*,<sup>46</sup> the court had ruled an award invalid under the statute and non-enforceable by the statutory method. Although the submission agreement recited that the arbitration was to be had "according to the statute in such case made and provided," it named seven arbitrators. It further recited that the parties agreed to abide the award "under the penalty of two thousand dollars for the forfeiture of the party failing to comply with said award." The court appears to have based its decision chiefly upon two grounds, namely, (1) that the naming of seven arbitrators did not conform to the statutory provision for two, and, (2) that, by the penalty stipulation, the parties planned to forego the statutory remedy for enforcing a valid statutory award. Said the court:

"The law provides for only two arbitrators, unless an umpire should become necessary; they have chosen six [seven]. The law provides the mode of enforcing the award. The agreement does not seem to have contemplated that it would be made the judgment of the court [the statutory method of enforcing a statutory award, Art. 231], but provides a penalty for the non-performance of either party, of what should be required of him by the award.

"It seems very clear, therefore, that the proceedings were not in conformity to the statute, and the award could not legally be made the judgment of the court."<sup>47</sup>

In the *Forshey* case the court concluded that *Owens v. Withee* was "plainly distinguishable" and pointed out that

"instead of three arbitrators, that is, two, with a third as an umpire, as the statute contemplates, seven were chosen and named in the agreement; which, moreover, provided that their award should be 'final, under the penalty of two thousand dollars, for the forfeiture of the party failing to comply with said award.' The award was signed by five only of the arbitrators. The submission and proceedings in that case, were not at all in conformity to the statute; and, consequently, it was held that the award was not a good statutory award."<sup>48</sup>

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<sup>45</sup> *Id.* at 526-8.

<sup>46</sup> 3 Tex. 161 (1848).

<sup>47</sup> *Id.* at 165.

<sup>48</sup> *Forshey v. Galveston H. & H. R. R. Co.*, 16 Tex. 516 (1856). The submission agreement in the *Forshey* case stipulated that the award should be paid in cash within ten days after notice of the award. The court held that this stipulation did not displace

Several years after the *Forshey* case the supreme court in *Myers v. Easterwood*,<sup>49</sup> was called upon to determine the validity of an award rendered under a submission agreement wherein the parties named one and the same person to act as sole arbitrator. It declared that the award could not be enforced under the statute.

In *Owens v. Withee* it is readily inferred that the parties appeared at the arbitral hearings; in *Myers v. Easterwood* such inference is, to say the least, more speculative. At all events the objection to the constituency of the arbitral board first appeared in the trial court. No consideration was given these matters by the supreme court, nor suggestion made as to the possibility of "waiver" of the defect in the arbitral boards resulting from participation in the arbitral hearing without pertinent objection.

Quite clearly the foregoing decisions by the supreme court teach that the parties, to comply with the statute, must commit their submission to an arbitral board of not more than three nor less than two. While the *Forshey* case is not free from all doubt as to its scope of application,<sup>50</sup> it probably may be said that parties may submit to two named "arbitra-

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the statute and distinguished the stipulation from that in *Owens v. Withee* as follows: "If, in this case, as in the case of *Owens v. Withee* . . ., the parties had contemplated a different remedy from that given by the statute, by the very terms of the agreement securing performance of the award by a penalty, there might be more reason to hold that they had waived their right to enforce performance in the mode provided by the statute. But they had not done so, but have simply agreed to perform within a specified time. In the absence of any express agreement, the law would imply one; and it is because of this express agreement that the legal remedy is given where there is no express agreement; but it would be quite preposterous to hold that an express agreement to perform an award within a specified time would deprive the party entitled to demand performance of the remedy provided in case of its breach." *Id.* at 531.

In *Ferguson v. Ferguson*, 93 S.W.2d 513 (Tex.Civ.App. 1936) the submission agreement stipulated that "if either of said parties shall neglect, fail or refuse to adhere to the provisions of these agreements, or to carry into effect, or abide the award of said Board of Arbitration, he shall forfeit to the opposite party \$35,000 as liquidated damages." The court does not appear to have given any special attention to the provision—certainly not as to its significance in determining whether or not the award rendered thereunder constituted a valid statutory award. The stipulation was later held enforceable in *Ferguson v. Ferguson*, 110 S.W.2d 1016 (Tex.Civ.App. 1937).

<sup>49</sup> 60 Tex. 107 (1883)

<sup>50</sup> If the submission were to three named arbitrators (rather than to two who were to select a "third man") the question would arise whether it would qualify as a submission under the statute when a submission naming seven arbitrators or only one arbitrator does not. In *Crouch v. Crouch*, 70 S.W. 595 (Tex.Civ.App. 1902), the submission was to three named arbitrators, but the point was not considered; see further, *Bell v. Campbell*, 143 S.W. 953 (Tex.Civ.App. 1912).

Or suppose, for example, that the two arbitrators originally appointed (one by each party) had been unable to agree upon or select the "third man" who was, by the submission agreement, to "sit and act" as one of the arbitrators—would the justice or clerk

tors" with authority or direction to select a third "arbitrator" before they start the hearings, and, by authorizing a majority award, they can avoid the hazard of a repeat hearing. Whether or not the third member must be "named" in the submission agreement, or endorsed thereon by authority, express or implied, of the parties is not clear. If the submission stipulates an additional sanction (such as a penal sum) for performance of the award, there is hazard to its enforceability by the statutory method.

*Filing of submission agreement and control of the arbitral proceedings.* The next two articles of the statute, 226 and 227, providing for the filing of the submission agreement with a justice of the peace or clerk of the district or county court and delegating control to the justice or clerk over the arbitral proceedings, are, when taken literally, probably the most likely deterrents to the use of statutory arbitration. The text of these two articles will be observed together with an account of the Texas decisions which may be said to have more or less displaced their requirements. The articles read as follows:

*Article 226. Agreement filed*

If the amount in dispute is two hundred dollars or less, exclusive of interest, such agreement shall be filed with some justice of the peace of the county in which the defendant resides or in which the controversy arose. If the matter in dispute exceeds two hundred dollars, exclusive of interest, then such agreement shall be filed with the clerk of the district or county court of the county in which the controversy arose, according as the amount involved, or matter in dispute, may come within the jurisdiction of one court or the other.

*Article 227. Day of Trial designated*

When such agreement is filed, the justice of the peace or the clerk of county or district court, as the case may be, shall forthwith designate a day for the trial of the cause, not less than two days thereafter, and shall issue process for such witnesses as either party may desire, returnable on the day fixed for trial.

Why should an arbitration statute require that the submission agreement be filed with any justice of the peace or the clerk of any court?

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be authorized under Article 232 *infra*, to select him—and to do so before the original hearings?

It also should be noted that distinctions are frequently drawn, on certain issues, between "arbitrators," "additional" or "third arbitrator," and "umpires"; between an "umpire" to decide the whole cause and an "umpire" to decide only items of disagreement as they occur from time to time between the arbitrators in the course of their proceedings. See STURGES, *COMMERCIAL ARBITRATIONS AND AWARDS* 144 (1930).

Whether the "umpire" contemplated by article 232 may or may not be an "arbitrator" or "third arbitrator" as seems to have been planned in the submission agreement in the *Forshey* case, see the discussion of article 232, *infra*.

Parties are not likely to desire to make their controversy or their submission of it to arbitration a public record. There is no such requirement at common law. How does such a provision facilitate the arbitral process or assure its integrity?

Article 226 also provides that the submission agreement shall be filed in the county "in which the controversy arose," except that when it shall be filed with a justice of the peace, it shall be filed either in such county or in the county in which "the defendant" resides. It seems likely that many controversies which otherwise might qualify for submission under the statute will be clouded by uncertainty as to their county of origin; and the provision for filing in the county in which "the defendant" resides adds further challenge to the process whereby the parties are to style themselves as "plaintiff and defendant" as prescribed in article 225, above. Granting that the parties are successful in coming to original agreement upon their respective designations as "plaintiff" and "defendant," these further uncertainties as to where it shall be filed invite litigation which may bring an otherwise honest and competent arbitration and award to an abortive ending.

Article 227 purports to nullify the flexibility for arranging the time and place of hearings accorded the parties and arbitrators in common law arbitrations and in statutory arbitrations in most jurisdictions. Seemingly, neither the arbitral board nor the parties are to arrange the time or place of the arbitral hearings; the justice or the clerk, as the case may be, is designated to handle these matters. Moreover, according to the text of the next succeeding article (Article 228) a quorum of the arbitrators is expected to assemble at the time and place of hearing, as scheduled by the justice or clerk, and take the prescribed oath. This seems to be required even if no more is expected than that they will postpone the time of hearing. The arbitrators, being sworn by him, may postpone and adjourn hearings as provided in article 229; there is no provision for the justice or clerk to do so. Article 229 provides in this respect that "after being sworn" the arbitrators may "for good cause shown, continue the hearing to some other day," and "for good cause may adjourn the same over to some other time."

Why is there this division of authority in regard to fixing the original time and place of the arbitral proceedings and their postponement and adjournment? Why should the justice or clerk be vested with power to fix even the original time ("not less than two days thereafter") and place of hearing when such matters concern only the mutual convenience of the parties and the arbitrators? Are the arbitrators less competent to fix the original hearing than a continuance? And even if the justice or clerk is inclined to speed up the proceedings by setting an early date of hearing

may it be made abortive at the hands of the parties and arbitrators? If the justice or clerk should see fit to fix a date in the distant future or otherwise frustrate an early arbitration, what can the parties do, other than change over to a common law arbitration?

This division of authority over the initiation and the continuance of the arbitral proceedings seems to serve no useful purpose.

"Waiver" of the requirements of articles 226 and 227. If the foregoing provisions of articles 226 and 227 may be stipulated away by the parties without taking an award out of the statute and displacing the statutory method of enforcing it, the utility of the statute will be remarkably improved. If the provisions may be stipulated away the question should be emphasized: why should they be included in the statute at all?

There is some authority in the Texas cases to the effect that the submission agreement need not be filed until the award is rendered and ready to be filed in connection with statutory proceedings to have judgment entered upon the award. It has been said that the provision for the earlier filing "may be waived."

Thus, in *Temple v. Riverland Co.*<sup>51</sup> it was said to be no defense to the enforcement of an award by the statutory procedure that the submission agreement was not filed with the clerk of the court until after the award had been rendered and was ready to be filed. On motion to enter judgment on the award the trial court made findings of fact that the submission agreement was not filed with the clerk until after the award, "nor did the clerk of the district court have anything to do with said arbitration other than the filing with him of the agreement to arbitrate and the award of the arbitration, which was done several days after the award was made." Nevertheless, on statutory motion therefor, judgment was entered upon the award in the court below. The judgment was sustained on appeal. The court, on the appeal, observed that:

"The fact that the agreement was not filed with the clerk before the award was a matter which could be waived. The arbitrators were sworn, set the hearing, and all the parties appeared before them without any objection appearing either then or afterwards that the agreement had not been filed."<sup>52</sup>

In short, the parties and arbitrators seem to have by-passed the clerk and his role as prescribed in articles 227 and 228. The arbitrators (rather than the clerk under Article 227) set the hearing. Who swore the arbitrators and by what authority does not appear.

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<sup>51</sup> 228 S.W. 605 (Tex.Civ.App. 1921).

<sup>52</sup> *Id.* at 606; see *Hall v. Little*, 11 Tex. 404 (1854).

In ruling that the filing of the submission agreement after the award did not preclude entry of judgment upon the award as provided in the statute the court said, "Articles 58 and 59, R. C. S. (now arts. 226 and 227) provide that the agreement shall be filed with the clerk, but these matters of procedure may be waived." The court added that the objection had not been taken in the court below and that "the appellate court will presume the matter was waived."

If the filing of the submission agreement as prescribed in article 226 and the role of the justice or clerk under articles 227 and 228 can be so completely "waived" in retrospect (after the parties have engaged in the arbitral hearings without objection), the question naturally occurs: Can the parties safely stipulate the "waiver" in advance without prejudice to the award and without displacing the statutory remedy of enforcing it? And if the parties may so stipulate away those articles, why put them to the occasion of doing so; in other words, why are the requirements in the statute? Clearly enough, they do not simplify the arbitral process.

It seems doubtful that *Temple v. Riverland Co.* can be fully relied upon to support an advance stipulation of waiver of the statutory requirements; probably it is safest to conclude that the "waiver" in that case was derived chiefly from the thesis of the court that "the appellate court will *presume* that the matter was waived," the objection not having been raised in the court below.

Possibly *Hall v. Morris*<sup>53</sup> should be recognized as ruling that parties may stipulate away in advance the preliminary filing of the submission agreement as provided in article 226, the roles of the justice or clerk in initiating the arbitral hearing as prescribed in article 227, and the swearing in of the arbitrators before they proceed with the hearing as provided in article 228. The supreme court there declared that they are "merely directory" and may be "waived."

The defendant in that case pleaded an award in bar to an action brought upon the cause which had been submitted to arbitration. The arbitration and award were proved and it was made to appear that both parties had appeared before the arbitrators. It did not, the court observed, "affirmatively appear that any day was assigned by the district clerk for the trial." The court held that the trial court was in error in charging that the award was invalid for want of compliance with the statute. In so holding, the court declared that the provision of the statute for the clerk to initiate the arbitral hearing by fixing the date thereof is "directory only" and may be "waived" by the parties. "They may waive this action on the part of the clerk," said the court, "and fix their own

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<sup>53</sup> 30 Tex. 280 (1867).

day for the trial, and an award made under these circumstances will be good under the statute."

While the course of conduct of the parties by engaging in the arbitral hearing without objection made it too late, after award, for the party (the plaintiff) to object to the award on the given ground (that after such course of action by the party there was a "waiver" in retrospect), it is not clear that the court thereby became committed to the proposition that parties can stipulate in advance so to by-pass the justice or clerk and still not displace the award as a statutory award and its enforcement under the statute. And of course the award in this case was being used by the defendant to defeat the action on the cause which was submitted; no positive aid by statutory remedy was sought. The court indicated moreover that the objecting party (the plaintiff) might readily have obviated the "waiver" as follows:

"The proper time to raise this objection is when the arbitrators are about to proceed with the trial, provided the parties are present. But if the arbitrators go on with the trial, without either or both the parties being before them, then the objection that there was no day assigned by the clerk for the investigation, as provided by the statute, may well be taken for the first time in the district court."<sup>54</sup>

Of course, if the party objecting to the award (the plaintiff) had originally stipulated away the matters found to have been "waived" in retrospect by his engaging in the arbitral hearing without objection, it is not difficult to understand that the party could not deny the "waiver" with good grace toward the stipulation under either of the foregoing circumstances indicated by the court.

In *Alexander & Beauchamp v. Mulhall & Scaling*<sup>55</sup> the Commission of Appeals went a long way, at least, toward ruling expressly and precisely that advance stipulation by the parties displacing the role of the justice or clerk under articles 226 and 227 is permissible without taking the award out of the statute and its enforcement procedure. It was stipulated in the submission agreement that a named justice of the peace should swear the witnesses and arbitrators and that the award should be entered as a judgment of the district court and that "*It shall only be necessary for the person or persons in whose favor the award may be made to file in said court this agreement and the award. . .*"<sup>56</sup> It is further reported in the case that the named justice certified to swearing the arbitrators and witnesses; also that the parties engaged in the hearing. After the award the submission agreement and award were

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<sup>54</sup> *Id.* at 282-3.

<sup>55</sup> 1 POSEY UNREP. CAS. 764 (Tex. Comm. App. 1881).

<sup>56</sup> *Id.* at 765 (Italics supplied).

filed in the district court with motion by the successful party to have judgment entered on the award. Objections to the motion included, among others, that the submission agreement had not been previously filed with the clerk of the court and that the clerk had not fixed the day of the original hearing by the arbitrators. The objections were overruled in the court below. On exceptions duly taken the ruling was affirmed by the commission of appeals. Said that court, "It was perfectly competent for these parties to waive the antecedent filing of the agreement, *as they did by expressly providing for its filing with the award*, with the further agreement attaching to the proceedings all the qualities of the statutory award. A substantial compliance with the statute is all that is required to make it such."<sup>57</sup>

Of course, the objecting party had participated in the arbitral proceedings without questioning their validity so that the decision might for that reason have been put on the rationale of "waiver" as used in the foregoing earlier cases. The court did not, however, purport so to restrict its ruling, but, instead, seems to have placed it upon the express provision in the submission agreement "for the filing with the award." Perhaps it did so intending positively to indicate that the objecting party cannot subsequently raise objection on the point in the face of his stipulation, either before the arbitrators or in the court below under the circumstances indicated in the concluding part of the opinion in *Hall v. Morris*, quoted above, in which there was no such stipulation.<sup>58</sup>

In view of the role purported to be assigned to the justice or clerk in articles 226, 227 and, indeed, in article 228, one is hesitant to conclude that so much of this statute can be by-passed by stipulation alone without disqualifying the award under the statute and displacing statutory enforcement of it. Perhaps the strongest test of the matter will occur when attempt is made to revoke a submission agreement deferring the filing of the agreement until award is rendered (or later) and displacing the functioning of the justice or clerk, and the revocation is resisted by endeavor to qualify it under article 236, *infra*, page 863. That article provides that "after an agreement to arbitrate is filed" it is irrevocable by action. It is not likely in such case that there will have occurred any

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<sup>57</sup> *Id.* at 768 (Italics supplied).

<sup>58</sup> When the record in proceedings under the statute to enforce or to vacate the award is silent on the matter and no objection to the point is taken in the trial court, apparently it will be presumed, on appeal, that there has been compliance with articles 226 and 227. This presumption seems to be even stronger when the record discloses that the parties engaged in the arbitral proceedings without raising the objection there. See *McHugh v. Peck*, 29 Tex. 141 (1867); *Hall v. Little*, 11 Tex. 404 (1854); *Offeciens v. Dirks*, 2 Tex. 468 (1847); *Temple v. Riverland Co.*, 228 S.W. 605 (Tex.Civ.App. 1921).

"waiver" in the retrospect of the parties having participated without objection in an arbitral hearing until the award.<sup>59</sup>

*Article 228. Oath of Arbitrators*

On the assembling of the arbitrators on the day of trial, the justice or clerk shall administer an oath to each, substantially as follows: "You do solemnly swear that you will fairly and impartially decide the matter in dispute between the parties, according to the evidence adduced and the law and equity applicable to the facts proved. So help you God."

If this article means what it says and the arbitrators are to follow their oath, they must decide according to "the law and equity applicable to the facts proved." Moreover, in article 230 it is provided that "the trial of the cause shall proceed in like manner with trials in the courts of the state, the plaintiff holding the affirmative, and entitled to open and conclude the argument." This further suggests that the arbitral board may be bound by the law and equity of the case and by the law of evidence, including presumptions and burdens of proof, applicable to trials of such causes in the courts of the state.

On the other hand, there is no provision in the statute for vacating an award because the arbitral board committed error in determining "the law and equity applicable to the facts proved" or for failure to follow the manner of trials in the courts of the state. (If the parties stipulate for appeal from an award as provided in article 233, the cause will be open to "trial de novo" in the courts.) The decisions of the Texas courts<sup>60</sup> indicate that awards are not (in absence of stipulation for appeal) subject to judicial review on such grounds and that they may be set aside only for limited causes which do not include these errors.

If the arbitral board may disregard "the law and equity applicable to the facts proved" and if it may disregard the law, including the law of evidence and the presumptions and burdens of proofs applicable to trials of like causes in the courts of the state, it is not clear why the arbitrators should be required to take the oath in article 228, nor why the requirement should be written in article 230 that their hearings shall be in like manner as trials in the courts. Texas decisions indicate, however, that the prescribed oath is mandatory unless the parties "waive" it. It is

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<sup>59</sup> In passing, reference may be made to *Warren v. Tinsley*, 53 Fed. 689 (5th Cir. 1893), to question whether the clerk of a federal court may carry out the role of the clerk under the Texas statute. It appears to have been taken for granted in that case that parties to a suit in federal court could effectively invoke the Texas arbitration statute and refer the pending cause to arbitration thereunder by executing the prescribed submission agreement and filing it in that court rather than with a justice or clerk of a county or district court of Texas.

<sup>60</sup> These cases are reviewed in the discussion of Article 233, *infra*.

inferred further that under the decisions the parties may waive it by stipulation in advance and that they can do so without displacing the statute. Again the question recurs, if this oath is inconsequential to the course of conduct of the arbitrators or if it may be waived by the parties, why should they be required to take it?

According to the decisions, if either an arbitrator or an umpire is not duly sworn and the objection is duly taken, the award is unenforceable under the statute. It was so held in one case even though there was a stipulation to dispense with the oath, when it was not made to appear that the attorney who represented the objecting party had any authority to waive the requirement.<sup>61</sup>

#### *Article 229. Continuances permissible*

After being sworn, the arbitrators may, for good cause shown, continue the hearing to some other day, and during the progress of any trial, for good cause, may adjourn the same over to some other time.

While pleadings, such as, for example, an "answer" setting forth a counterclaim, probably are not required in arbitrations under the statute, quite clearly the party against whom the counterclaim is asserted is entitled not only to reasonable opportunity to contest it when it is presented before the arbitrators but also, if necessary, to have the arbitral hearings postponed to enable him to organize his evidence to meet it.<sup>62</sup>

#### *Article 230. Procedure on trial*

Any arbitrator shall administer the necessary oath to the witnesses, and the trial of the cause shall proceed in like manner with trials in the courts of this State, the plaintiff holding the affirmative, and entitled to open and conclude the argument.

#### *Article 231. Award entered as judgment*

After hearing the evidence and arguments, if any, the arbitrators shall agree upon their award and reduce the same to writing, specifying plainly their decision, which award they shall file with the justice or clerk as the case may be, and at the succeeding term of the court if no appeal is applied for such award shall be entered and recorded as the judgment of the court, with like effect as other judgments of said court.

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<sup>61</sup> Anderson v. City of Fort Worth, 83 Tex. 107, 18 S.W. 483 (1892). The report of the case does not mention whether the parties engaged in the arbitral hearing. See also, Warren v. Tinsley, 53 Fed. 689 (5th Cir. 1893). Compare Alexander & Beauchamp v. Mulhall & Scaling, 1 Posey Unrep. Cas. 764 (Tex.Comm.App. 1881) discussed in the comment on Article 227, *supra*. When the record in proceedings under the statute to enforce or to vacate an award is silent on the matter, and the objection has not been raised in the court below, it will be presumed, on appeal, that the arbitrators and umpire were duly sworn. Hall v. Little, 11 Tex. 404 (1854). See also Offeciers v. Dirks, 2 Tex. 468 (1847).

<sup>62</sup> See McHugh v. Peck, 29 Tex. 141 (1867).

*Concerning the award, its enforcement and impeachment.* Probably an award need not be itemized as to the matters which are determined by it unless the parties stipulate therefor.<sup>63</sup>

It is reversible error to enter judgment upon an award at the same term of a district court as when it is filed. The supreme court remarked upon the effect of the foregoing provision of the statute as follows:

"The meaning of this section of the statute is unmistakable: it authorizes the rendition of judgment at the first regular term of the court after the award is made, and not before. . . . The plaintiff in error could have waived the time and consented to the entry of the judgment of that term. But the record does not show that she did this, and such consent or waiver cannot be presumed."<sup>64</sup>

But apparently, judgment may be entered *after* the succeeding term, and it has been held that an award may be pleaded in bar to an action upon the cause which was submitted, although the award has not been made a judgment of court, and although the next succeeding term of the court has passed. To quote the supreme court:

"The statute requiring judgment at the first regular term after award made was evidently intended to prevent it from being taken before the losing party should have an opportunity of filing his objections to the award. The fact that he has been allowed six months' additional time within which to make the objections cannot certainly furnish him with grounds of complaint.

This suit [on the cause submitted] was brought to the second term of the court after the award was made. It was the privilege of the defendant, in whose favor it was rendered, to have it entered up as the judgment of the court at that term. She pleads it as a bar to the demand of the plaintiff, and, in effect, asks that it may then be made a judgment final and decisive of the controversy between the parties."<sup>65</sup>

The motion to have judgment entered upon the award has been distinguished from an action or suit, and the entry of judgment has been described as being "only a ministerial act." A foreign corporation was allowed to maintain the proceedings although it was not authorized to do business in the state prior to that time, and although the arbitration and award concerned business transactions between the parties in the state. With respect to the application of the provisions of the statutes which provide that a foreign corporation cannot "maintain any suit or action, either legal or equitable, in any of the courts of this state, upon any demand" unless the corporation has been duly authorized to do business in the state, the court declared that the proceeding by motion to have

<sup>63</sup> See *Smith v. Clark*, 54 S.W. 1052 (Tex.Civ.App. 1900).

<sup>64</sup> *Alexander v. Witherspoon*, 30 Tex. 291, 295 (1867). See also *Crouch v. Crouch*, 70 S.W. 595 (Tex.Civ.App. 1902); *Brulay v. Brooks*, 50 S.W. 647 (Tex.Civ.App. 1899).

<sup>65</sup> *Hall v. Morris*, 30 Tex. 280, 283 (1867).

judgment entered upon the award was not within those provisions. It said:

"We conclude that, in entering into an agreement to arbitrate, the trial before the arbitrators and the award is not, within the meaning of the statute, the maintenance of a suit or action in a court of this state, from which a foreign corporation would be excluded. That the judgment entered on the award by the district court was only a ministerial act and not a judicial determination of the rights of the parties, growing out of the original contract made by the parties in this state."<sup>66</sup>

A judgment setting aside an award is an equally "final judgment" for purposes of appeal.<sup>67</sup> And the court, on appeal, will, if error is found, enter such judgment as the court below should have entered. Thus, in *Forshey v. Galveston, H. & H. R.R. Co.*,<sup>68</sup> the supreme court, after holding that the district court erred in setting aside an award and refusing to enter judgment upon it, further held that, upon reversing the judgment, it would "proceed to render such judgment or decree as the court below should have rendered." A court of civil appeals has held likewise when error was found on the part of the lower court in not setting aside an award. Said the court:

"This court should render the judgment which should have been entered by the trial court. Judgment of the trial court is, therefore, reversed, and judgment here rendered setting aside the award of the arbitrators entered as the judgment of that court, without prejudice, however, to any rights of either party arising under their contract."<sup>69</sup>

#### *Article 232. Umpire selected*

If the arbitrators chosen as aforesaid cannot agree, they shall select an umpire with like qualifications as themselves, or in case they disagree in the choice of an umpire, the justice or clerk shall select such umpire, and he shall be sworn in like manner as the arbitrators; and the cause may be tried anew at such time as the board or arbitration thus constituted may designate, with like proceedings as are prescribed in the preceding article.

The Texas decisions, as well as the statute, leave considerable uncertainty as to who this "umpire" is. Is he in fact an "umpire," or an additional or third "arbitrator;" is he to decide the whole cause once the two arbitrators originally appointed have failed to agree; or is he

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<sup>66</sup> *Templeton v. Riverland Co.*, 228 S.W. 605, 610 (Tex.Civ.App. 1921). See also *Fortune v. Killebrew*, 86 Tex. 172, 23 S.W. 976 (1893).

<sup>67</sup> *King v. Grey*, 31 Tex. 22 (1868).

<sup>68</sup> 16 Tex. 516 (1856).

<sup>69</sup> *Evans v. DeSpain*, 37 S.W.2d 231, 233 (Tex.Civ.App. 1930). See further *Fortune v. Killebrew*, 86 Tex. 172, 23 S.W. 976 (1893); *King v. Grey*, 31 Tex. 22 (1868); compare *Brulay v. Brooks*, 50 S.W. 647 (Tex.Civ.App. 1899).

to decide only items of disagreement as they occur from time to time between the two arbitrators? Is he a proper party to the quorum of the two arbitrators before they disagree; are he and they both necessary, or proper, to a quorum after they have disagreed and he has been selected? Must, or may, both arbitrators and umpire join in an award?

In 1856 in the *Forshey* case reviewed above, the supreme court ruled that the provisions in a submission agreement providing for the selection of an umpire (the "third man") before the two arbitrators disagreed, and permitting him to sit and to act with the two arbitrators as appointed by the parties from the beginning of the arbitral hearings as an arbitrator, did not transgress the provisions of the statute as to the constituency of the arbitral board. His selection before disagreement by the two and his participation with them in the hearing also appears to have been regarded as not being an infringement of their quorum or of his status and role as "an umpire" as contemplated by the statute. A majority award was authorized by the submission agreement, and in sustaining the majority award under the statute the Court appears to have been indifferent as to whether or not one of that majority was the "umpire."

In 1868 in *King v. Grey*,<sup>70</sup> the supreme court gave more express attention to the identification of this umpire. Art. 65, Paschal's Digest (now Art. 232) read as follows:

"That if the arbitrators chosen as aforesaid cannot agree, the arbitrators shall select an umpire, and in case they disagree in the choice of an umpire, the justice or clerk may appoint an umpire, *who shall be competent to serve as an arbitrator*, and who shall in like manner be sworn."<sup>71</sup>

The court seemed certain, especially in view of the italicized portion of the foregoing article, that the umpire took up the role of an arbitrator. Said the court:

"This article expressly declares that this third person, called an umpire, whether selected by the other arbitrators or the clerk, after being duly sworn, shall be competent to serve as an arbitrator. Of course his powers as arbitrator are neither greater nor less than those of the other arbitrators; and from the fact that the original arbitrators could not agree, it is evident that it was contemplated by the statute that the award would not be unanimous when a third party should be so selected, and hence the proceedings by the arbitrators, after the appointment of the umpire, would be precisely as if the three had been originally chosen, and a majority was sufficient to form an award."<sup>72</sup>

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<sup>70</sup> 31 Tex. 22 (1868).

<sup>71</sup> Italics supplied.

<sup>72</sup> *Id.* at 27.

It also is readily inferred from the report of this case that the court considered that both the original arbitrators and the umpire were necessary to a quorum for the hearing. It may be noted in passing that it is worthy of doubt that the italicized portion of article 65 as quoted by the court had other reference than to the umpire *having the qualifications of an arbitrator* as the matter is now expressed in article 232.

In the year prior to *King v. Grey*, however, in *McHugh v. Peck*,<sup>73</sup> the supreme court identified the umpire selected by the two arbitrators after their disagreement as being an umpire to decide the total cause by himself without the arbitrators, indicated that he may do so without further notice to the parties, and that he may decide on the evidence as presented to the arbitrators, at least unless and until further hearing before him is sought by the parties. Said the court in this connection:

“The record does not show certainly that the clerk appointed a time for the umpire to enter upon the discharge of the duties incumbent on him under the appointment. *And, as he may act alone, there does not appear to be any necessity for the clerk to designate the time the umpire shall hear and determine the matter to be submitted to him.*”

“There is no provision in the law that a clerk shall appoint the time for the umpire to enter upon the discharge of the duties incumbent on him under the appointment.”<sup>74</sup>

And:

“If there were sufficient facts in the record upon which the umpire might act with certainty in deciding the questions before him, no reason is perceived why he might not make his decision on the facts which have been ascertained by the arbitrators.”<sup>75</sup>

On the other hand:

“If witnesses are to be examined, if testimony is to be received which had not been previously submitted to the arbitrators, the parties should have notice of the time and place *the umpire* would act under his appointment. *The umpire* should see that all parties interested had notice, so that they might appear before him.”<sup>76</sup>

The court did not mention the *Forshey* case in connection with its foregoing views or otherwise. Nor was *McHugh v. Peck* mentioned by the court in *King v. Grey*.

A case holding contrary to *McHugh v. Peck*—especially as to the foregoing views in that case relating to the right of rehearing before the um-

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<sup>73</sup> 29 Tex. 141 (1867).

<sup>74</sup> *Id.* at 147-8. Italics supplied.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* Italics supplied.

pire—is *Warren v. Tinsley*.<sup>77</sup> A United States circuit court held that, when the arbitrators named by the parties had failed to agree after hearing and an umpire was selected, there must be further hearing before the umpire and arbitrators and due notice thereof given the parties. For failure to accord such notice and hearing, and for failure to swear either the arbitrators or the umpire “until after hearing and deciding the case,” the award was vacated. The court reported the case and its ruling as follows:

“The evidence in the case establishes that the arbitrators and the umpire were not sworn until after hearing and deciding the case; also that after the umpire was selected there was no notice given to the parties of any hearing, nor was there any hearing or rehearing before the arbitrators and umpire; but, as stated by the umpire himself in the affidavit on file, “the arbitrators gave him ‘the court papers’ and told him that ‘they included all the evidence and depositions submitted to them’ and ‘he then examined very carefully and thoroughly every paper in said case, including the said depositions, and having arrived at a conclusion reported to said arbitrators that’ he ‘was ready to decide the case.’”<sup>78</sup>

The court concluded, after quoting the text of pertinent articles of the statute as they were then worded that “the preliminary swearing of the arbitrators and umpire and a rehearing and notice when the arbitrators disagree and an umpire is chosen, are plainly required.” The court went on to add that “there may be some reason for holding that the failure to swear the arbitrators in accordance with the statute was waived, but, in our opinion, the failure to give a hearing to the parties cannot, under the circumstances, be taken as waived.”

The court further reported that the decisions in the *Forshey* case and in *McHugh v. Peck*, were cited against its views in this case. The detail of this citation is not reported. In this connection, however, the court observed that those cases were decided before the addition to article 232 of the last clause thereof, providing that “the cause may be tried anew at such time as the board of arbitrators thus constituted may designate, with like proceedings as are prescribed in the preceding article,” but it noted that the clause was in the statute and effective when the submission in this case was concluded. It is not clear (nor did the court explain) just why the addition of the foregoing clause to the text article had significance in distinguishing those earlier cases from the present one with respect to the issue before the court.

The foregoing decisions leave much to be desired as to the identification of the “umpire.” It seems clear that the statute with its frailties of

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<sup>77</sup> 53 Fed. 689 (5th Cir. 1893).

<sup>78</sup> *Id.* at 691-2.

draftsmanship is first in fault; and that still, notwithstanding the endeavors of the courts, it places undue burden upon the courts and especially upon litigants to give it useful meaning.

*Article 233. Appeal from award*

If a right of appeal is not expressly reserved in the original agreement to arbitrate, no such right shall exist, but the decision of the arbitrators shall be final. If such right of appeal is reserved and either party desires to appeal from such decision or award, he shall file his written application to that effect with the justice or clerk, as the case may be, on or before the return day of the term of the court next thereafter.

By omitting a reservation of right of appeal from an award, quite clearly the statutory award can be made conclusive and final like a common law award. The matter was put as follows in *Temple v. Riverland Co.*:<sup>79</sup>

"Article 65 [Art. 233] provides if a right of appeal is not expressly reserved in the original agreement to arbitrate, no such right shall exist, "but the decision of the arbitrators shall be final." . . . If no right of appeal is reserved and if the agreement is in substantial compliance with the statute, then the award will, on motion, be made the judgment of the court, unless it is impeached on equitable grounds for fraud, or the like. . . . Our courts, from the earliest, have held under statutory arbitration, in the absence of fraud, misconduct, and the like, the award is final and conclusive upon matters submitted for the determination of the arbitrators."<sup>80</sup>

In another case (in which there was no reservation of right of appeal from the award) the court outlined the status of the award as follows:

"From the fact that the parties to the arbitration did not reserve the right of appeal in the agreement for arbitration, there could be no appeal from the award, and the proceedings of the arbitrators were final in their nature, and the duty of the judge was to enter up a judgment on the same, or, if it should be apparent that such causes exist as would not authorize a court to enter such judgment, then to declare the proceedings null and of no effect, either in whole or in part, and recommit for further award."<sup>81</sup>

Even though right of appeal from the award is expressly stipulated against, the trial court should allow common law and equitable grounds

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<sup>79</sup> 228 S.W. 605 (Tex.Civ.App. 1921); *Evans v. DeSpain*, 37 S.W.2d 231 (Tex.Civ. App. 1930) (award set aside because the arbitrators were found to have exceeded their authority under the submission, and the matters awarded in excess of their authority were not severable from those that were within the submission); *semble*, *Fortune v. Killebrew*, 86 Tex. 172, 23 S.W. 976 (1893).

<sup>80</sup> *Id.* at 607.

<sup>81</sup> *King v. Grey*, 31 Tex. 22, 26 (1868).

for vacation of the award to be asserted against it. In *Payne v. Metz*<sup>82</sup> the submission agreement expressly provided that there should be no appeal from the award. Motion was made by the successful party to have the award entered as the judgment of the court. Before this motion was granted the defendant filed a petition in which he alleged, to quote the reported statement of facts, "gross mistakes, stating the particulars, on the part of the arbitrators, which resulted in great injury to him and prayed that the award be not entered as the judgment of the court, but be set aside . . . and for general relief." The supreme court remarked as follows:

"The appellant [moving to have judgment entered] . . . insisted on having the award made the judgment of the Court, not because it was not as inequitable, unjust and iniquitous as it was charged to be, but simply because it was the award of the arbitrators, and the parties, confiding in their integrity, impartiality and intelligence, as the Judges of their own choice, had not reserved in their submission the right of appeal, but had expressly waived it. But though no appeal was reserved, and though the right of appeal was expressly waived, that was not a waiver of the right to have an award which should be free from the just imputation of fraud, partiality or flagrant injustice and wrong. . . .

"The Court could not revise the decision of the arbitrators, as upon appeal, it is true; but, as a Court of Equity, could interpose its power of preventive justice, to arrest the commission of flagrant wrong; and could set aside the award, for the causes which, according to the well settled principles which govern a Court of Chancery in such cases, would warrant and require the setting aside of an award. The application was made in the proper manner by petition, and was in due and proper time. If the party aggrieved had acquiesced in permitting the award to be made the judgment of the Court without objection, it could only have been questioned for the causes for which any other judgment of the Court may be impeached. . . . but not having been made the judgment of the Court, it could be impeached for the causes which in a Court of Chancery are held to be sufficient for such purpose. And it derives no additional sanctity from the fact that the statute has prescribed no mode by which it may be impeached."<sup>83</sup>

Concerning the final action to be taken the court continued as follows: "Where such a case is made out, the court should not, as in this case, simply refuse to make the award the judgment of the court, but should set it aside."

By way of caution to this exercise of general equitable powers over statutory awards as set forth above, the court added these further general comments in the foregoing opinion:

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<sup>82</sup> 14 Tex. 56 (1855).

<sup>83</sup> *Id.* at 58-9.

"But the court should interpose in this class of cases with great caution; and never, except in a case of urgent necessity to prevent the consummation of a fraud, or some great and manifest wrong and injustice. It is not every error or mistake of law or fact, which will warrant the setting aside of an award. . . . The law, therefore, requires that, to authorize the interference of a Court of Equity in the case of awards, there must appear to have been fraud or partiality, misconduct or gross mistake committed on the part of the arbitrators, to the manifest injury of the party complaining."<sup>84</sup>

The Texas courts also have emphasized that objections to an award must be pleaded specifically and distinctly or they will be disregarded. In *Alexander & Beauchamp v. Mulhall & Scaling*<sup>85</sup> the Commission of Appeals declared the rule as follows:

"While our courts allow matters to be pleaded to set aside an award upon the hearing of the motion to enter it as a judgment, they also require that such matters shall be specifically charged, that the fraud, or misconduct or mistake made by the arbitrators, shall be set out distinctly. . . . Here misconduct is attempted to be charged, but how? In hearing unsworn testimony; but what the testimony was, or whether it was material, we are not informed. Again, that the arbitrators allowed documents to be submitted to them after the case had been closed. What documents? Were they material? How did they or were they calculated to affect the result? We think the court did right in disregarding this answer."<sup>86</sup>

In *Bowden v. Crow*,<sup>87</sup> the objections charged "in general terms that the arbitrators in making same were actuated by gross partiality, fraud and mistake." Exception to the petition for its generality was sustained. The court said:

"It is well settled in this state, that where it is sought to set aside an award by arbitrators on the grounds above set forth, the facts constituting the objection to the award must be specifically averred; and in order to prevent the award from being made the judgment of the court in compliance with the agreement, it is necessary that the facts alleged be sufficient to vacate it when impeached in a court of equity."<sup>88</sup>

Concerning an arbitration and award under a submission providing for an appeal from the award and the "trial de novo," the supreme court remarked as follows in the case of *Shultz & Bro. v. Lempert*.<sup>89</sup>

"An examination of the statute makes it plain that by this right of appeal is meant a right, on making written and timely application therefor,

<sup>84</sup> *Id.* at 60.

<sup>85</sup> 1 POSEY UNREP. CAS. 764 (Tex.Comm.App. 1881).

<sup>86</sup> *Id.* at 768.

<sup>87</sup> 21 S.W. 612 (Tex.Civ.App. 1893).

<sup>88</sup> *Id.* at 613; see also, *Eubank v. Bostick*, 194 S.W. 214 (Tex.Civ.App. 1917).

<sup>89</sup> 55 Tex. 273 (1881).

and having the opposite party served with citation, to have the cause "stand for trial de novo, as in ordinary cases." Rev. St. Arts. 51, 52.

"Trial de novo does not mean a trial on appeal and on nothing but the record to correct errors, but does mean a trial of the entire case anew, hearing evidence, whether additional or not. . . . Strangely, yet clearly, the statute allows the parties, by reserving the right of appeal, the power of nullifying the award, if dissatisfied therewith, and of having the case tried anew without regard to the agreement to arbitrate or the award made. With this right of appeal reserved, the arbitration becomes nothing more than an experimental attempt to satisfy both parties; and when the failure of that attempt is shown by the application and citation before spoken of, the case stands for trial as if there had been no agreement to arbitrate."<sup>90</sup>

The remaining articles of the arbitration statute are set out in the notes.<sup>91</sup>

#### CONCLUSIONS

Certainly the Texas courts have done their part to make the general arbitration statute a useful facility for the arbitration of causes thereunder. Perhaps, moreover, the shortcomings of the statute are more noticeable now than at the earlier times when it was enacted and, from time to time, amended. In view of the significance of the State of Texas both commercially and industrially, it is submitted that the legislature, in furtherance of article 16 of the Constitution, should conceive and en-

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<sup>90</sup> *Id.* at 277.

<sup>91</sup> Art. 234. *In case of appeal.* When an application for appeal is filed, as prescribed in the preceding article the same shall be noted on the docket of the court, and the opposite party served with a citation, as in ordinary cases of suit by petition. Upon return of service upon the opposite party, the cause shall stand for trial de novo as in ordinary cases.

Art. 235. *Costs.* The arbitrators may award the costs to either party; and, if their decision or award is silent as to costs, the same shall be taxed equally against both parties.

Art. 236. *Refusing to proceed.* After an agreement to arbitrate is filed, the parties thereto shall be bound to that mode of trial under the following penalties, to wit: Such agreement may be pleaded in bar to any suit thereafter brought by a plaintiff in such agreement for the same cause of action, when such plaintiff has refused to proceed under such agreement; and said agreement may be pleaded in bar to any right claimed or defense set up by defendant in such agreement who has refused to proceed thereunder, where such right or defense existed at the time of filing such agreement.

Art. 237. *Corporation, etc., may arbitrate.* The provisions of this title shall apply to corporations as well as natural persons; and executors, administrators and guardians may also consent to an arbitration of any controversy or matter of dispute relating to or affecting their respective trusts, with the consent of the court in which such administration or guardianship is pending.

Art. 238. *Mode not exclusive.* Nothing herein shall be construed as affecting the existing right of parties to arbitrate their differences in such mode as they may select.

act a more comprehensive and flexible arbitration statute. It should, it is believed, embrace written provisions in commercial contracts and in collective bargaining agreements to arbitrate future disputes and written agreements of submission of existing disputes and provide summary remedies to make them irrevocable and specifically enforceable, also provisions governing the conduct of the arbitration to assure fully the minimum standards of full opportunity of hearing after reasonable notice, also for summary remedies to enforce honest and competent awards and summary remedies to vacate awards designated causes embracing dishonest and incompetent arbitral proceedings and awards. In this connection it is suggested consideration be given to the general pattern of the more modern arbitration statutes of California, Connecticut, Hawaii, Louisiana, Massachusetts, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Washington, Wisconsin, and of the United States arbitration statute.<sup>92</sup>

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<sup>92</sup> See further, Sturges, *Some General Standards for a State Arbitration Statute*, 7 ARBITRATION JOURNAL 194 (1952).