LLOYD A. MAGNEY
ATTORNEY AND COUNSELLOR AT LAW
FOLEY, ALABAMA

October 10, 1930.

Hon. F. W. Hare,
Judge of the Circuit Court,
Monroeville, Alabama,

RE: EICHBERGER V. FEURST.
BALDWIN COUNTY.

Dear Judge Hare:-

I enclose herewith my brief in the above case.

I have tried to anticipate Mr. Roach's argument from his oral argument before you the other day, but do not suppose that I have been able to do so fully and will probably find it necessary to file a reply brief after his is in.

I understand that you will be unable to give the matter consideration until after December 1st, but wanted to get my brief in Mr. Roach's hands as soon as possible and am mailing it to you now for consideration at your leisure.

Very truly yours,

LAM:L.

Lloyd A. Magney

JOSEPH EICHBERGER, Complainant, VS. MATHEW FEURST and MATHEW C. FUERST, Respondents.	)	IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA. In Equity.

This cause coming on to be heard is submitted for decree on demurrer to the original bill of complaint, as amended, and upon a consideration of the same, I am of the opinion that said demurrer is not well taken.

It is, therfore, ordered, adjudged and decreed by the Court that said demurrer be, and the same hereby is, overruled.

The respondents are allowed thirty days from the date hereof within which to file answer.

This 2nd., day of October, 1929.

F. W. Hare
Judge.

Eichberger
vs
Pickett

RECORDED

Deed of Release

Filed Oct 2/1929
T. M. Patterson
Clerk

Recorded on Minutes

JOSEPH EICHBERGER,

Complainant,

-vs-

MATHEW FEURST, at al,

Respondents.

IN EQUITY.
IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA.

STIPULATION.

It is hereby stipulated and agreed by and between the parties hereto, by their respective counsel, that Complainant may amend for the second time the bill of complaint herein, by addition to Paragraph Two of said bill as heretofore amended, and application for leave of Court so to amend, notice and hearing and all other formalities are hereby expressly waived by Respondents, and receipt of copy of the amendement is hereby acknowledged.

Dated this ____ day of June, 1929.

R. P. Roach.
Solicitor for Respondents.

Solicitor for Complainant.

6

No. 489.

IN THE CIRCUIT COURT OF

BALDWIN COUNTY, ALABAMA.

IN EQUITY.

RECORDED

JOSEPH EICHBERGER,

Complainant,

-vs-

MATHEW FEURST, et al.,

Respondents.

S T I P U L A T I O N.

Filed June 26 1929
T. M. Rikerson
Register

Lloyd A. Magney,
Solicitor for Complainant.

NOTE OF EVIDENCE

No.....

JOSEPH EICHBERGER and JOSEPHINE EICHBERGER, Complainant,

VS.

MATHEW FEURST and MATHEW C. FEURST,

Respondents.

At the hearing of this cause the following note of evidence was taken to-wit:

FOR COMPLAINANT

1. Original Bill of Complaint.
2. Bill of Complaint as amended first time.
3. Bill of Complaint as amended second time.
4. Bill of Complaint as amended third time.
5. Answer of the Respondents.
6. Deposition of A. W. Keller, taken the first time.
7. Deposition of A. W. Keller, taken the second time.
8. Decree on Demurrer, dated October 2nd, 1929.
9. Stipulation of parties, filed December 26th, 1930.

FOR RESPONDENT

1. Demurrer, filed February 13th, 1925.
2. Plea, filed same day.
3. Answer, filed same day.
4. Amended answer filed September 24th, 1930.
5. Demurrer filed September 24th, 1930.
6. Decree on Demurrer, sustained to bill.
7. Demurrer re-filed to bill as amended the third time.
8. Answer filed December 23rd, 1930, to the bill as amended the third time.
9. Testimony of Mathew Fuerst taken in open court.
10. Testimony of Lloyd Eichelberger taken in open court.

Attest: T. M. Reamer

Register.

CIRCUIT COURT OF MOBILE COUNTY

Mobile, Alabama

IN EQUITY

No.....

.....

.....

.....

Vs. } Note of Evidence.

.....

.....

Read and filed May 6th 1931

D. M. Ricemon

Register.

Entered Minutes..... Page.....

8587 SUMMONS—Original. Gill Ptg. Co., Mobile

The State of Alabama
BALDWIN COUNTY.

CIRCUIT COURT OF BALDWIN COUNTY,
IN EQUITY.

To Any Sheriff of the State of Alabama—GREETING:

WE COMMAND YOU, That you summon Mathew Feurst

of Chicago, Ill. County, to be and appear before the Judge of the Circuit Court of Baldwin County, exercising Chancery jurisdiction, within thirty days after the service of Summons, and there to answer, plead or demur, without oath, to a Bill of Complaint lately exhibited by Joseph Eichberger.

against said Mathew Feurst.

and further to do and perform what said Judge shall order and direct in that behalf. And this the said Defendant shall in no wise omit, under penalty, etc. And we further command that you return this writ with your endorsement thereon, to our said Court immediately upon the execution thereof.

WITNESS, T. W. Richerson, Register of said Circuit Court, this 31st day of December,

192 4.

T. W. Richerson
Register.

N. B.—Any party defendant is entitled to a copy of the bill upon application to the Register.

Serve on Chas Kyser Clerk

Circuit Court of Baldwin County
In Equity

No.

SUMMONS

Joseph Edelburger

vs.

Matthew C. Hurst

Richardson Boone & Hall
Solicitor for Complainant.

Recorded in Vol. Page

THE STATE OF ALABAMA
BALDWIN COUNTY

Received in office this
day of 192
Sheriff.

Executed this day of
192
by leaving a copy of the within summons with

Defendant.

Sheriff.

By Deputy Sheriff.

Jan 2nd 1929.
Copy of bill & Summons
sent by registered to
Deft Matthew 69440
Prairie Ave Chicago
Ill. J. W. Bienne
Clerk

Copy

Serve on .....

Circuit Court of Baldwin County
In Equity

No. .....

SUMMONS

Joseph Edelburg

vs.

H. Mathew C. Hurst

Rickarby, Beebe & Hall.
Solicitor for Complainant.

Recorded in Vol. ..... Page .....

THE STATE OF ALABAMA
BALDWIN COUNTY

Received in office this .....
day of ..... 192...

..... Sheriff.

Executed this ..... day of
..... 192....
by leaving a copy of the within summons with

.....
..... Defendant.

..... Sheriff.

By ..... Deputy Sheriff.

Jan 26th 1929.
Copy of bill & Summons
sent by Registered Mail to
Dept 69440
Prairie Ave Chicago Ill.
J. W. Bowman
Clerk

8581 NOTE OF TESTIMONY

JOSEPH EICHBERGER and JOSEPHINE EICHBERGER, Complainant,

vs.

MATHEW FEURST and MATHEW C. FEURST Respondents.

THE STATE OF ALABAMA,
BALDWIN COUNTY

IN EQUITY,
CIRCUIT COURT OF BALDWIN COUNTY.

This cause is submitted in behalf of Complainant upon the original Bill of Complaint, the complaint as amended and re-amended, the answer of the Respondents and the deposition of A. W. Keller, duly published; the decree of October 2nd, 1929, on demurrers, also amendment to bill by adding party plaintiff dated September 24, 1930.

demurrer "true is not equity in bill" filed 9/24/30

and in behalf of Defendant upon demurrer filed February 13, 1925, plea filed same date and answer filed same date, and amended September 24, 1930 by striking out the words "nor delivered." Demurrer filed to the bill as amended, decree sustaining demurrer and demurrer filed to bill as amended second time and decree on this demurrer; additional answer filed Sep. 24, 1930, testimony of Mathew Feurst and Lloyd Eichelberger, and exhibits thereto.

Register.

No. _____

THE STATE OF ALABAMA
BALDWIN COUNTY

IN EQUITY,
CIRCUIT COURT OF BALDWIN COUNTY.

_____

vs

_____

NOTE OF TESTIMONY

Filed in Open Court this 24

day of Sept. 1930

D M Rochelle

Register

MOORE PTG CO

IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA IN CHANCERY.

Joseph Eichberger

Complainant

-vs-

Mathew C. Feurst, et al

Respondents

STIPULATION

It is hereby stipulated and agreed by the parties hereto by their respective solicitors that the submission heretofore made herein be set aside and complainant permitted to ammend his Bill of Complainat in the following respects:

1. By adding to Paragraph Second of said Bill of Complainat the following: that a true copy of said award was made and signed by the said arbitrators, P. J. Cooney and A. W. Keller and on September 18, 1924 the same was delivered by the arbitrators to Mr. John Stelk, the attorney for the respondent, Mathew Feurst, as required by said agreement to arbitrate hereinbefore mentioned.

2. By striking from said Bill of Complaint the name of Josephine Eichberger as a party complainant.

3. By striking from the Second Amendment to the Bill heretofore filed the words "present in person and " so as to make said amendment read as follows:

"And complainant further alleges that hearings were held by the arbitrators after said April 1, 1924, in which the respondent, Mathew Feurst, participated and at which he was represented by council, and that said respondent made no objection to the action of the arbitrators in assuming to act and continue in authority as arbitrators after said April 1, 1924, but on the contrary, said respondent continued to participate in said arbitration after said date and made no objection that the award was not made on April 1, 1924, as agreed, until long after said award was finally rendered by the arbitrators on September 18, 1924, and complainant alleges that by reason thereof, said respondent waived his right to object that the award was not rendered within the time limited in the agreement to submit the arbitration."

It is further stipulated and agreed that the complainant be allwed ten days after the formal order of Court setting aside the submission and allowing such amendments in which to take and file such depositions as he may desire and the the solicitor for respondents be given five day's notice of the time and place of taking such depositions.

IN WITNESS WHEREOF THE parties have hereunto set their hands this 19th day of December, 1930.

Solicitor for Complainant.

Solicitors for Respondents.

2 Engelberger
vs
Feurst

RECORDED

Stipulation

Filed Dec 26 1930
D J Richmond
Register

RECORDED

IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA IN CHANCERY.

JOSEPH EICHBERGER)
)
Complainant.)
)
-vs-)
)
MATHEW C. FEURST, et al)
)
)
Respondents.)

ORDER.

This cause coming on to be heard on the motion of the complainant and the stipulation of the parties and upon consideration of the same.

It is ordered, adjudged, and decreed by the Court that said motion be granted, and that the submission heretofore made herein be, and the same hereby is, set aside; that complainant be, and he hereby is, granted leave to amend his Bill of Complaint; that respondents be and they hereby are allowed ten days within which to answer said Bill as amended and the complainant be, and he hereby is, allowed ten days in which to take his proof in said Bill as amended.

This 24th day of December, 1930.

J. W. Ware

Judge.

In
Englewood
vs
Jewett

RECORDED

order

Filed Dec 26/30
D. A. Robinson
Deputy

RECORDED

IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA IN CHANCERY.

JOSEPH EICHBERGER)
)
Complainant.)
)
-vs-)
)
MATHEW C. FEURST, et al)
)
)
Respondents.)

MOTION.

Comes now the complainant by his solicitor and moves the court for an order setting aside the submission heretofore made herein and permitting said complainant to file another amendment to his said Bill of Complaint and fixing the time within which complainant may take further testimony and in support of said motion complainant submits herewith the stipulation and agreement of the parties hereto.

Solicitor for Complainant.

Eisenberger
vs
Perrott

Motion

RECORDED

Filed Dec 26th 1930
T. J. Reimann
Register

RECORDED

JOSEPH EICHBERGER)
PLAINTIFF)
vs)
MATHEW FEURST, et al)
DEFENDANTS)

IN THE CIRCUIT COURT OF
BALDWIN COUNTY ALABAMA
IN CHANCERY

Interrogatories on behalf of
Plaintiff, to A. W. Keller.

1. State your name, post-office address and occupation.

2. Are you the same A. W. Keller who previously gave a deposition in this case on May 31, 1930?

3. In that first deposition given by you you testified, "Mr. Cooney wrote up the award and we both signed it". You did not, however, state what was done with the award after you and Mr. Cooney signed it. Will you please tell us now just what was done about writing up the award, who was present at the time it was written and to whom, if to anyone, copies of the award were delivered after you and Mr. Cooney had signed it?

Solicitor for Plaintiff.

STATE OF ALABAMA)
)
BALDWIN COUNTY.)

TO HONORABLE R. B. ROACH, ATTORNEY FOR DEFENDANTS:

You are hereby notified that interrogatories have been filed in the office of the clerk of said County to A. W. Keller, material witness for the plaintiff in the above stated cause. A copy of said interrogatories will be furnished upon application to the clerk, and you may file cross-interrogatories, if you think proper, within ten (10) days after the service of this notice, at the expiration of which time (if no cross-interrogatories shall have been filed) a commission will issue to L. F. Farrell, the proposed commissioner, to take the deposition of said witness, A. W. Keller. The witness, A. W. Keller, resides in Foley, in the County of Baldwin, in the State of Alabama, and the commissioner, L. F. Farrell, resides in Foley, in the County of Baldwin, in the State of Alabama.

Witness my hand and official seal at office in Bay Minette, Baldwin County, Alabama, this the 29 day of December, 1930.

T. M. Rickman
Clerk.

Original

Joseph Eichburger
vs.
Matthew Feurst
et-al

RECORDED

Filed Dec 29/930
T. M. Richardson
Clerk

P 12/30/30
1/1 X

Serve Copy on
Hon R. P. Roach
Attorney at Law
First National Bank
Bldg Mobile Ala

RECORDED

Received Dec 30, 1930, and on
Jan 1st, 1931, I served copy
within on R. P. Roach.
Sheriff
D.S.

8587 SUMMONS—Original. Gill Ptg. Co., Mobile

The State of Alabama
BALDWIN COUNTY.

CIRCUIT COURT OF BALDWIN COUNTY,
IN EQUITY.

To Any Sheriff of the State of Alabama—GREETING:

WE COMMAND YOU, That you summon Mathew Feurst

of Chicago, Ill. County, to be and appear before the Judge of the Circuit Court of Baldwin County, exercising Chancery jurisdiction, within thirty days after the service of Summons, and there to answer, plead or demur, without oath, to a Bill of Complaint lately exhibited by Joseph Eichberger,

against said Mathew Feurst,

and further to do and perform what said Judge shall order and direct in that behalf. And this the said Defendant shall in no wise omit, under penalty, etc. And we further command that you return this writ with your endorsement thereon, to our said Court immediately upon the execution thereof.

WITNESS, T. W. Richerson, Register of said Circuit Court, this 31st day of December,

1924.

T. W. Richerson
Register.

N. B.—Any party defendant is entitled to a copy of the bill upon application to the Register.

Original

Serve on .....

Circuit Court of Baldwin County
In Equity

No. .....

SUMMONS

Joseph Eichelberger

vs.

L. Mattison Hurst

Beckerley, Beebe & Hall
Solicitor for Complainant.

Recorded in Vol. ..... Page .....

THE STATE OF ALABAMA
BALDWIN COUNTY

Received in office this .....

day of ..... 192...

.....
Sheriff.

Executed this ..... day of

..... 192...

by leaving a copy of the within summons with

.....

.....
Defendant.

.....
Sheriff.

By .....
Deputy Sheriff.

IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA.

JOSEPH EICHBERGER, et al, Plaintiffs, -vs- MATHEW FEURST, et al, Defendants.	INTERROGATORIES ON BEHALF OF PLAINTIFF, TO A. W. KELLER.

1: State your name, post office address and occupation.

2: Are you the same A. W. Keller who was named in that agreement, dated February 20, 1924 between Mathew Feurst of Chicago, and Joseph Eichberger and Josephine Eichberger, as one of the arbitrators therein agreed upon?

3: Who was the other arbitrator?

4: Which of the parties chose you as an arbitrator and which chose Mr. Cooney?

5: Mr. Cooney is dead, is he not?

6: After the signing of the agreement referred to, did you and Mr. Cooney proceed to hear and determine the matters in dispute between Mr. Feurst and the Eichbergers?

7: Was Mr. Feurst represented by counsel, an attorney?

8: Who was that attorney?

9: You will please state whether the paper Marked "Plaintiff's Exhibit A" now handed to you is the award which you and Mr. Cooney made as arbitrators in this matter?

10: Is that your signature appearing upon it?

11: This award bears date of September 18, 1924. Please state why it was not made earlier and by April 1st, 1924 as agreed.

12: Did you and Mr. Cooney, as arbitrators, have meetings between yourselves and the parties and their witnesses at any time after April 1st, 1924?

13: When was the last of such meetings with reference to the date of the award?

14: Did Mr. Feurst, by his attorney Mr. Stelk, participate in these meetings?

15: Did he participate, take a part in, the last of such meetings held shortly before September 18, 1924 which you have told us about?

16: Did he at any time object to going on with the arbitration, or to you and Mr. Cooney assuming to act as arbitrators, because you had not made your award by April 1st, 1924, as agreed?

17: Did his attorney Mr. Stelk, ever make any such objection?

STATE OF ALABAMA

BALDWIN COUNTY

HONORABLE R. P. ROACH, ATTY. FOR DEFENDANT.

You are hereby notified that interrogatories have been filed in the office of the clerk of said court to A. W. Keller material witness for the Plaintiff in the above stated cause. A copy of said interrogatories will be furnished upon application to the clerk, and you may file cross-interrogatories, if you think proper, within ten days after the service of this notice, at the expiration of which time (if no cross-interrogatories shall have been filed) a commission will issue to E. Frank Sanders, the proposed commissioner, to take the deposition of said witness A. W. Keller. The witness A. W. Keller resides in Foley, in the county of Baldwin, in the state of Alabama, and the commissioner, E. Frank Sanders resides in Foley, in the county of Baldwin, in the State of Alabama.

Witness my hand at office in Bay Minette, Baldwin County, Alabama, this the, 5th day of March, 1930.

T. M. Rutherford

CLERK

No. 489

Joseph Eichberger, et al,

Plaintiffs,

-vs-

Mathew Feurst, et al,

Defendants.

Interrogatories on Behalf Of Plaintiff, To. A. W. Keller.

Received 12 Day of Mar 19 32

and on 17 Day of Mar 19 32

I served a Copy of the within Interrogatories

on A. W. Roark

by service on

as

PAT BYRNE Sheriff

By C. Bridges D.S.

JOSEPH EICHBERGER,

Complainant,

VS.

MATTHEW FUERST and MATTHEW C. FUERST,

Respondents.

IN THE CIRCUIT COURT
BALDWIN COUNTY, ALABAMA.
IN EQUITY.

DECREE

This cause coming on to be heard is submitted for final decree upon the pleading and proof as noted by the Register, and from a consideration thereof, I am of the opinion that the complainant is entitled to relief.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Complainant, Joseph Eichberger, have and recover of the defendant, Mathew Fuerst, the sum of TWO HUNDRED, TWENTY-NINE AND 73/100 ($229.73) DOLLARS, the amount of said award, together with interest at eight per cent per annum from September 18th., 1924, the date of the rendition of said award, or a total sum of THREE HUNDRED FIFTY-THREE AND 50/100 ($353.50) DOLLARS, for which let execution issue.

IT IS FURTHER ORDERED ADJUDGED AND DECREED THAT the deed from Mathew Fuerst and Mary J. Fuerst, dated October 9th., 1924, and filed for record in the Office of the Judge of Probate of Baldwin County, Alabama, on October 13th., 1924, and recorded therein on October 18th., 1924, and conveyingto Mathew C. Fuerst, the following described real property in Baldwin County, Alabama, towit:

The East half of the Southeast quarter of the Southeast quarter of Section Four (4), Township Eight (8) South, Range Four (4) East

and that the further deed executed by Respondent, Mathew Fuerst, and Mary J. Fuerst, on October 9th., 1924, which was filed for record in the Office of the Judge of Probate of Baldwin County, Alabama, on October 13th., 1924, and recorded therein on October 18th., 1924, and conveying to Respondent, Mathew C. Fuerst, the

following described real property in Baldwin County, Alabama, to-wit:

The East half of the Northeast quarter of the Southeast quarter of Section Four (4), Township Eight (8) South, Range Four (4) East

are void and inoperative as against Complainant's said indebtedness and the costs of this suit, and that the same be, and hereby are, declared to be of no operation and effect as against execution issued on this judgment, and the said real estate conveyed by said deeds are subject to execution in this cause.

The costs herein are taxed against the respondents for which let execution issue.

This the 29th., day of July, 1931.

F. W. Hare
Judge.

- - - - - - - - - - -

THE STATE OF ALABAMA
BALDWIN COUNTY

CIRCUIT COURT, IN EQUITY.

I, T. W. Richerson, Register of said Circuit Court of said County, Alabama, do hereby certify that the above is a full, true and correct copy of the decree rendered by said Court on the 29th day of July, 1931, in the cause of Joseph Eichberger, Complainant, vs. Matthew Fuerst and Matthew C. Fuerst, Respondents, as appears of record in said Court.

Witness my hand and the seal of said Court, this the 31st day of July, 1931.

T. W. Richerson REGISTER

CERTIFIED COPY OF DECREE

in the cause of

(2) JOSEPH EICHBERGER,

Complainant,

VS.

(1) MATTHEW FUERST and MATTHEW C. FUERST,

Respondents.

THE STATE OF ALABAMA }
BALDWIN COUNTY } PROBATE COURT

Filed in office this 1 day of Aug 1931 4:50 P.M.
and duly recorded in Deed Book No. 51 NS
page 139-40, ~~and I certify that $..... cts ..... license or privilege tax, paid as required by an Act of the Legislature, approved September 14, 1923, and $..... cts ..... license or privilege tax, paid as required by an Act of the Legislature, approved August 24, 1923.~~

G. W. Humphries
Judge of Probate

By J. L. Keeler Clerk

29
3

FILED July 31st, 1931.

T. W. Richerson,

Register.

T. W. Richerson
Circuit Clerk

7/31/31

Rec 80 Pl

JOSEPH EICHBERGER and
JOSEPHINE EICHBERGER,

Complainants,

-vs-

MATHEW FEURST and
MATHEW C. FEURST,

Respondents.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA.
IN CHANCERY.

BRIEF OF COMPLAINANT ON
FINAL SUBMISSION.

The rights of the complainants in this matter depend entirely upon whether or not there was a valid and binding award of arbitrators made in the submission of the matters in controversy to arbitration, which was attempted, at least, as is admitted by respondents.

The award of arbitrators which is the foundation of this proceeding has been attacked by respondents on numerous grounds set forth in the nine demurrers and one plea, all of which have been finally disposed of, adversely to respondents, by the Court in its decree of October 2, 1929.

It is now proposed by Mr. Roach, as I understand his argument before the Court and his offer of testimony (which the Court received subject to objection) to attack the award on various other grounds, which are in no way pleaded by him, unless they be pleaded by that part of his answer, as follows: "Respondents deny that Mathew Feurst is indebted to the complainants in any sum whatsoever."

With this bald denial as the cure-all for the ommissions of his pleadings, he now contends that this award is not valid and binding and that he is entitled to have considered the evidence, or testimony, rather, as to the identical matters considered and decided by the arbitrators, why? Because, he says, this award was not made "Substantially in compliance with the provisions of this chapter," etc (Sec. 6169, Code 1923) and hence is not binding and conclusive and he is within his rights in taking up again the items of dispute which, he admits, are concluded against him if the award be legal and binding.

Mr. Roach argues two reasons why this award was not made in substantial compliance with the Code provisions, (in addition to those decided against him), 1: The award has never been entered up

as the judgment of this Court, as may be done under the provisions of Sec. 6157, Code 1923, and 2: The successful party (this complainant) has never, as he is permitted to do by Sec. 6161 of the Code, caused the submission and award to be returned to the Clerk of the Circuit Court. There is still another reason that with the same logic Mr. Roach might (and probably will) advance why this award does not substantially comply with the provisions of the Code, viz., that neither the bill nor the award show that the arbitrators were sworn.

These three grounds of attack, combined with those heretofore disposed of, would seem to exhaust the resources of human ingenuity in picking flaws in this award.

Without conceding that these matters constitute such a departure from Code requirements as to fail of "Substantial compliance", complainants are willing to submit this entire matter on the theory that they do so fail, and to treat this as a common law arbitration and award, since it has already been necessary to resort to litigation in order to avoid the fraudulent transfers of all of respondents' property.

It can make no difference in complaints' rights if this be considered as a common law arbitration, and this, of course, is permissible.

> "Nothing in this chaptercontained shall prevent any person or persons from settling any matters of controversy by a reference to arbitration at common law." Sec. 6171, Code 1923.

If it can be shown that the three new objections are not fatal to a common law award, this award, then it would seem that it must be conceded that the award is valid and binding, and to begina consideration of complainants' rights on that basis.

What, then, is the difference between a common law and a statutory arbitration and award?

> (#1) A. ORIGIN AND NATURE OF ARBITRATION AS A PROCEEDING-1. IN GENERAL. The settlement of controversies is an ancient practice at common law. In its broad sense it is a substitution, by consent of parties, of another tribunal for the tribunals provided by the ordinary processes of law; a domestic tribunal, as contradistinguished from a regularly organized court proceedingaccording to the course of the common law, depending upon the voluntary act of the parties disputant in the selection of judges of their own choice. Its

object is the final disposition, in a speedy and inexpensive way, of the matters involved so that they may not become the subject of future litigation between the parties."

5 C.J., page 16, and cases cited.

(#3) 3. CLASSES OR KINDS OF ARBITRATION-a. IN GENERAL. Arbitration may be classified under three heads: (1) Where in the absence of regardless of any statutory provisions, the parties to any controversy submit the decision thereof to mutuallychosen arbitrators; (See note 9, as follows: "In these cases the successful party must resort to the courts in an action on the award, to enforce it, and is benefitted by the arbitration only in that he may base his action on the award instead of on the original cause of action, and such award, unless impeached, is conclusive evidence in his favor." Miller vs. Brumbaugh, 7 Kan. 343) (2) where, by statute, authority is given to parties to a controversy not in court, to submit the same to arbitrators and, by agreement, have the submission entered as a rule of court, and the award enforced, or, on motion, entered as the judgment of a designated court; (see note 10, as follows: "Here the successful party has not only the advantage of a determination of the disputed questions, but an easy and expiditious method of placing that determination in a position where the law will enforce it. This was the aim and scope of the statute 9 & 10 Wm.III-to put controversies out of court on the same footing as those in court. Lucas v. Wilson, 2 Burr, 701, 97 Reprint, 522. The statutes in the United States differ, but, as a general rule, they are bottomed upon the statute of 9 & 10 Wm. III, and look to the same end." Miller vs. Brumbaugh, supra.) 3: where a court in which a controversy is pending sends it for determination, by consent of the parties, to arbitrators chosen by the parties or selected by the court.

5 C. J., Page 17.

No oath is required of the arbitrators in a common law arbitration.

"The authority to act as arbitrator under a submission at common law does not require that the arbitrators be sworn." 5 C. J. #139, page 69.

See also, Gardner vs. Newman, 135 Ala. 522, 33 So. 179.

Even where an oath is required by statute, in a statutory arbitration, it may be waived.

However, the general rule, established in most of the states is that the authority of arbitrators to act under a statute requiring an oath to be taken is derived, not from the statute but from the agreement to submit to arbitration, that the oath is prescribed for the benefit of the parties to secure to them, if they desire, a greater obligation upon the arbitrators to faithfully discharge their duties, and that therefore the requirement may be waived.....

5 C. J. #143, pages 70 and 71

> In the absence of a statutory provision on the subject, a waiver may be established by any competent evidence of the fact, or it may be implied from the fact that the parties appear before the arbitrators and proceed with the hearing without objection, provided such proceeding is had with knowledge of the omission to take the oath.
>
> 5 C. J. #145, page 71.
>
> "And going into the arbitration after the refusal of the arbitrators to be sworn or to admit counsel amounted to a waiver of objection by the plaintiff."
>
> Gardner vs. Newman, 135 Ala. 522, 33 So. 179.

Of course, the provisions of section 6157 and 6161 (it is not conceded that they are <u>requirements</u> to a substantial compliance with the Code provisions as to a statutory arbitration) have no application at all to a common law arbitration, and this would seem to dispose of Mr. Roach's three new objections to this award.

If, then, this be a valid common law award, as of course, it is, what is the effect of it? Let the Supreme Court of Alabama answer:

> "Now the ground upon which the jurisdiction to enforce the specific performance of an award is entertained is said by Judge Story to be that 'it is but the execution of the agreement of the parties ascertained and fixed by the arbitrators'. McNeil vs. Magee, 5 Mason, 244, 256, Fed. Cas. No. 8,915. So Chief Justice Parker of the Massachusetts court syas that the subject, on its 'true footing' is 'the specific performance of a contract in writing; for the submission is the agreement. It is virtually a contract to do what is awarded'. Jones v. Boston Mill Corp, 4 Pick. (Mass.) 515, 16 Am. Dec. 358. This status and character of the proceedings to enforce an award in equity has been fully recognized by this court."
>
> Black v. Woodruff, 193 Ala. 327, 69 So. 97.

It is established that this court has jurisdiction to enforce a common law award, and complainant is not confined to the exclusive remedy of having his award entered as a judgment and enforcing it by execution. In this case, of course, the latter remedy would be wholly useless to complainant since it is admitted by Respondent that he has conveyed away all of his property, for a consideration of One Dollar, and an execution could avail complainant nothing until this court has set aside this fraudulent transfer.

> McCLELLAN, C. J. "The law favors, and by express statute it is made the duty of courts to encourage, the settlement of controversies by reference thereof to arbitrators

chosen by the parties. Code, 1896, #508. The theory upon which the law and courts encourage such settlements is that they facilitate and expedite the adjustment of disagreements between citizens, they save the time of the courts and the costs of regular judicial proceedings, and being made pursuant to the agreement of the parties, and by persons of their own selection, they are likely to be more satisfactory to all concerned and to assuage and heal animosities, thereby conserving the general good. To conserve these ends, and to justify their favor and encouragement of the law and the courts, it is necessary that such settlements should settle the controversies involved, close them up, and conclude them out of court. If any party dissatisfied with a settlement made by arbitrators may bring the controversy into court, and there have it reinvestigated, and litigated and determined over again, the whole scheme and theory and purpose of arbitration would be thwarted and defeated; there would be no basis for the favor and encouragement of the law and the courts; and instead of time and costs being saved, and animosities being allayed, litigation would be repeated and drawn out, costs would be increased and ill-feeling engendered, intensified and prolonged beyond what would be incident in any of these respects to suits in the courts in the first instance. In other words, the submission to arbitration might well in every case, and certainly would in many, operate to the creation or aggravation of the very evils which it is the purpose of the law to avoid or to lessen by recognizing, providing for and encouraging this mode of settling controversies among the parties. But apart from the foregoing considerations it is altogether illogical that a party to an arbitration should be allowed to take the controversy into the courts after it has been submitted to arbitrators and decided by them. His submission of it is entirely voluntary. There is no coercion or compulsion about it. The consideration for his agreement of submission is a like agreement on the part of his adversary. Their minds come together to the conclusion that this is the best way to adjust their differences. They select the person or persons who shall determine the issues between them, and they contract one with the other that the arbitrators thus selected shall determine and declare their rights and duties in the premises, and they bind themselves to abide by and perform whatever award may be made. It is not their contemplation nor their contract that the award shall be tentative merely, or evidential merely, or merely preliminary to litigation in the courts; but it is their contemplation and undoubtedly their binding contract, that the award shall finally settle and forever determine the controversy. Each of them is as much bound by the award as if each, without controversy or arbitration, had agreed, contracted and promised in writing to pay the money or do the thing each is required by the award to pay or do. It is as much an agreed settlement of their case dispute in the one case as in the other, and neither can any more avoid or escape the duty imposed by the award than he can avoid or escape the obligation imposed by his contract. If he made the contract and has not performed it, and is sued upon it, he has no defense to such suit. He may show if he can, that he did not sign it or that he has performed it, but, failing in this, he is absolutely bound by it. So with an award. If he has submitted a matter to arbitrators, and they have jointly considered the matter and determined it, and made their award accordingly, and he is sued upon that award, he has no defense to such suit. He may show, if he can, that they have not considered the matter submitted, or that their award is corrupt; but, failing this, he cannot have a reinvestigation of the controversy and a retrial of its issues in any court, because he has foreclosed all that by a valid and binding contract that those issues shall once for all be investigated by

judges of his own selection, and that their conclusion upon them shall determine and forever settle the controversy. He has no right to have his controversy tried by a court, because he has contracted away this right in consideration of having it settled by judges of his own selection, and the law recognizes and the courts will hold him to this contract, whether the award be a common-law or a statutory award. The controversy has been settled as he voluntarily and upon valuable consideration agreed that it should be settled, and there it must and does end. It is therefore subversive not only of the whole theory of arbitration, the emasculation of the whole system, altogether illogical and even absurd, to allow a retrial of the controversy in the courts, by appeal or otherwise, but it involves the participation by the courts in a flagrant violation of the express, valid and binding contract of the parties.

We have been discussing awards generally, without special reference to out statutory provisions on the subject of arbitration....."

Wilbourn v. Hurt, 139 Ala. 557, 36 So. 768.

"Now the Code provides, that an award made in substantial compliance with its provisions, is conclusive between the parties thereto and their privies, as to the matters submitted, and cannot be inquired into or impeached for want of form or irregularility, if the award determines the matter or controversy submitted; and such award is final, unless the arbitrators were guilty of fraud, partiality or corruption in making it. Code #3232 (6169). The statutory provision as to the conclusiveness of awards, is but declaratory of the common-law rule on the subject. Chambers v. Crook, 42 Ala. 171; Elrod vs Simmons, 40 Ala. 274; Davis vs Forshee, 34 Ala. 107; Wright v. Bolton, 8 Ala. 548; Bumpass vs Webb, 4 Port. (Ala.) 65. The award when legally made is the judgment of a court constituted by the parties themselves and cannot be impeached except for the reasons such as are specified in the statute; and, like judgments of other courts, all reasonable presumptions are to be made in its favor. The decisions of arbitrators are to be liberally construed and every reasonable intendment is made to support them."

Edmundson vs. Wilson, 108 Ala. 118; 19 So. 367.

Tested by these rules it is obvious that this award, whether it be considered a statutory or a common-law award, is legal and binding and is so disclosed to the Court by the averments of the bill, the admissions of the answer and the testimony on behalf of complainants, and that the testimony offered by respondents, to which timely and proper objections were interposed, should not be considered by the Court to over-turn the findings which the arbitrators made on the same facts with which such testimony deals.

With this testimony out of the case then, and upon the averments and admissions of the pleadings and the evidence for complainants, we have 1: a valid award; 2: transfers of all of respondent's property which the Court has already held to be fraudulent by its decree of October 2, 1929, and 3: complainant's prayer

that the transfers be declared fraudulent and set aside and the property subjected to complainant's debt established by the award.

The original amount of the award to complainants was $229.73; with interest it now amounts to $345.01; there should be a decree awarding a judgment in this amount to complainants against respondent Mathew Feurst and declaring void the deeds makred Exhibits "C" and "D" and attached to the bill and that the title to the real estate described in the bill is still in respondent Mathew Feurst and subject to execution in favor of complainants.

The record justifies it, equity and good conscience demand it, the law approves and the Court will doubtless so decree.

Respectfully submitted,

Attorney for Complainants.

I hereby certify that I mailed a copy of the above brief to Mr. R. P. Roach, solicitor for respondents, this 10th day of October, 1930.

ATTorney for Complainants.

JOSEPH EICHBERGER

COMPLAINANT.

vs

MATHEW FEURST and
MATHEW C. FEURST,

RESPONDENTS.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA.
IN CHANCERY.

REPLY BRIEF OF COMPLAINANT
ON FINAL SUBMISSION

By their last amendment to the Answer, the Respondents have abandoned all of their various objections to the validity of the award, in fact they admit in this amendment, "That both the submission and the award were made substantially in compliance with the provisions of Chapter 258 of Code 1923 of Alabama, except in the following particular:" viz, that the award was not delivered to the clerk to be entered up as a judgement.

This so narrows the scope of the inquiry that it should be simple to determine the precise legal point involved which is: Given a valid statutory award does it lose its character as such because suit is brought on it instead of delivering to the clerk to be entered up as a judgement?

This question can be determined by an examination of the Alabama statutes and decisions without the necessity for consulting authorities from other jurisdictions with entirely different statutory provisions.

Section 6157 of the 1923 Code provides that an "award made pursuant to the provisions of this chapter (Chapter 258) must be entered up as the judgement of the proper court, if the award is not performed".

This is a mandatory provision, but it is only mandatory upon the court, for when we come to consider Section 6161, the section which authorizes the successful party to return the award and other papers to the clerk, we find that the language is not mandatory but directory or permissive merely, "the successful party may" etc.

Now while it is true that in some cases of statutory construction, for instance when it is essential to give any force or meaning to the statute, courts will construe the permissive may as though it were the mandatory must, such cases are rare and such construction will be indulged only when necessary to give any effect to the statute. And it is an elementary rule of statutory construction that when the legislature

uses both words, they must be given effect according to the usual meanings.

And so by the precise and express wording of the statute Respondent's position is determined against him. The successful party may deliver the award to the clerk but is not compelled to do so.

Respondent argues that it is his duty to do so, else the defeated party may lose his right of appeal, and if it were true that the unsuccessful party might be deprived of a valuable right, the right to appeal, by the failure of the successful party to file the award with the clerk, there would be strong reason to hold that it is, indeed, a duty of the successful party to deliver the award and file of papers to the clerk.

But the legislature realised that it had made the filing of the award with the clerk directory or permissive only by the enactment of Section 6161, and that there would be cases in which the successful party would not so file the award; it did not believe nor intend that the award would thereby become invalid as Respondent contends, for in such a case no right of appeal in the defeated party would be necessary; if filing with the clerk be essential to the validity of the award, the failure to file it would anhiliate it, it would cease to exist and so the defeated party would not need nor desire to appeal from it. Realising, however, that in every case in which the successful party did not choose to file the award with the clerk the defeated party would be deprived the right to appeal and confronted with an unappealable, conclusive award, unless some further provision were made, the legislature, as a part of the same chapter, adopted 6170 which is as follows:

> "Either party may, however, within ten days after receiving notice of the award, file in the office of the clerk, register, or judge of the court in which the cause is pending, or, if no suit is pending, in the office of the clerk of the circuit court to which the award is returnable under the provisions of this chapter, a notice of appeal to the court of appeals or supreme court and may tender to the arbitrators a bill of exceptions setting forth all the evidence in the cause, which, with the conclusions of law of the arbitrators and their award thereon, shall be certified by them or a majority of them, and returned with the file of papers, or with the submission, as the case may be, to the court to which the award is returnable; and either in term, time or vacation, the clerk, register or judge of the court may enter it up as the judgment or decree of the court, and it shall stand as the judgment or decree of the court,

> unless set aside for some of the causes specified in the preceeding section or for the failure or refusal of the arbitrators to certify a correct bill of exceptions as herein provided; and from the judgment or decree so entered up, or from the judgment setting aside the award, an appeal shall lie as in other cases."

If the legislative may is to be construed as must in this chapter, there is just as much reason for so construing it in Section 6170 as in Section 6161 and it is just as much the duty of the Respondent to file an award with the clerk as it is of the Complainant; but the right to so file it was intended to be and is permissible in both cases and to both parties; permitted to Complainat if he desires the award to have the force and effect of an judgment, permitted to Respondent if he desires to appeal, but a valid, binding and conclusive award, obviously, though neither party chose to deliver it to the clerk.

The Supreme Court has held just this in effect, in the following language:

> "Without this provision for the running of an execution ~~an award (Section 6161)~~, the successful party to the arbitration to enforce it would have to sue upon his award. Even in such an action, as we have seen, the controversy determined by the award could not again be inquired in to. There could not be a retrial of the issues passed on by the arbitrators, but the award would be final and conclusive of those issues. The purpose of this section was to provide a more expeditious and inexpensive method to accomplish the same end. Recognising that the award had settled the matters at issue between the parties, so that they cannot be again opened and retried in any sort of proceeding, and therefore appreciating that no good end could be subserved by putting the successful party to his action on the award, this statute gives him without such action the same relief he would be entitled to at the end of it, namely, an execution for the enforcement of the award. That is the sole purpose and operation of the statute." Wilbourn vs Hurt 139 Ala. 557 36 So. 768.

Obviously, then, the law in this State, whatever it may be elsewhere, is that filing the award with the clerk is not essential to its validity but merely a means provided for its enforcement.

Complainant requests that the court will consider that part of the former brief which deals with this point, in connection with what is said here.

Now to pay some attention to the authorities cited by Respondent.

He says on Page Ten of his brief:

> "It is held in many, and it is submitted, the best jurisdictions, that it is the law, that where it clearly appears, either by express stipulation or otherwise, that the parties intended to be bound by the award, only in case it should conform to the statute, then, if it fails to comply with the statute, it cannot be enforced at common law, because to do so would change the contract of the parties." Citing 5 C J. 236, Section 645.

Just what it takes to deserve the appelation of a "best" jurisdiction is not made clear by Respondent's brief but the desperate straits to which his solicitor has been driven in his attempts to avoid the unaboidable are made perfectly clear by a reading of the rest of Section 645, 5 C J which he cites. It begins as follows:

> "(#645) b. Effect of Statutes On Right To Common Law Remedies. As heretofore shown a statute providing for arbitration proceedings does not, in the absence of an express provision to that effect, abrogate the common law. The methods are cumulative and the parties may still proceed in accordance with the common law. And <u>according to the weight of authority</u> an award not enforceable in the manner provided by statute, because of failure to comply with the statutory requirements, may nevertheless, be enforced at common law....." Citing the Alabama case Lamar vs Nicholson, 7 Port 158.

While sorry, indeed, that the State of Alabama cannot deserve the Respondent's title of a "best" jurisdiction, the writer finds himself strangely content to be defending a position in accordance with the weight of authority and which the supreme court of Alabama approves.

Respondent cites cases from several of his "best" or minority jurisdictions in support of his position. His first is the Massachusetts case of Erie Telegraph and Telephone Company vs Bent 39 Fed. 409. The citation discloses that this is a very old case and the report of it is not available to the writer but even the brief quotation from the opinion quoted by Respondent evidences the fact that it is not authority for his position for he says (Page Ten Brief): "The supreme court of the state (Massachusetts) rejected the award on the ground that it was not returned to the superior court <u>within the time specified in the submission.</u>" It is undoubtedly true that if it were specified in the submission in this case that the award must be returned to the court within a specified time and this had not been done, that this court as did the Massachusetts court, would hold that

an essential part of the contract had not been complied with, but there is no such specification in the submission in this case which merely provides, "and are desirous of submitting their controversy to arbitration."

The next case cited by Respondent is another very old Massachusetts case, Deerfield vs Arms, 20 Pickering 480, 32 American Decisions 228, and from this case he quotes as follows:

> "Submission attempted to be made under the provisions of the statute and providing that judgment thereon be entered in the court of common pleas, if inoperative as a statutory, is not valid as a common law submission to arbitration."

And again the essential difference between the two submissions, the one in the Massachusetts case <u>providing</u> that judgment must be entered in the court while the submission in the case the bar contains no such provision, must and does completely differentiate the cases, so that one can be no authority for the other.

The Federal case cited by Respondent (Erie Telephone and Telegraph Company vs Bent, supra) does not state the general federal rule, for it is held in McLaurin vs McLaurin, 215 Fed. 545, 131 C. C. A. 487:

> "An arbitration under an agreement which, although stating that it is under a statute, differs materially from the requirements of the statute is a common law arbitration."

This is even further than Alabama goes, for here it is held that if the agreement of submission <u>expressly states</u> that it is under the statute, that evidences an intent to have the statutory requirements treated as though written into the agreement.

T. C. I & Ry. vs Roussell 155 Ala. 435 46 So. 866.

This case is not authority, however, for the proposition which Respondent states on Page Fourteen of his brief, citing this case as his authority, because there is in the submission in this case no such language as is found in the Roussell case. To quote from the opinion:

> "The employment of the expression, 'whereas the said parties are desirous of settling said controversy by arbitration in accordance with the statutes of Alabama', clearly evinces the common intent, in a material respect, to have been to make the statutory provision for a statutory (as distinguished from a common law) arbitration an integral part of their alleged agreement to arbitrate in the premises. We are therefore required to treat the pleas setting up

> the asserted arbitration and award as if the requirements of the statute in this regard were written, in extenso, into the agreement....."

The language which the court, in the Roussell case, holds to "clearly evince" the intent to enter into a statutory as distinguished from a common law award, is wholly lacking in this case and the parties cannot be held to the same strict compliance as in the Roussell case. That case, however, does not deal with nor touch upon Respondent's contention that filing the award with the clerk is essential to its validity.

On Page Eleven of his brief Respondent cites a California case reported in 9 Cal. 143-147. A much later California case announces the rule in that state as follows:

> "An agreement that arbitrators named should have the right and power to take evidence as to the question to be settled, and to render a statement of the amount of money due to the parties to the agreement from each other, while not in compliance with the arbitration agreements provided for by Code Civ. Proc. #1283 is a valid stipulation for common law arbitration."
> Melroy vs Imperial Land Company 163 Cal. 99 124 P. 712.

The writer will not attempt to read and discuss each of the cases from foreign jurisdictions cited by Respondent believing that enough has been said already concerning the citations of such authorities made by Respondent, to show the inaccuracy of them, particularly when applied to our own code with reference to arbitration and award which differs from those of the other states.

Complainant again requests that the court will read and consider in connection with this brief that part of the brief filed May 4, 1931 dealing with this same proposition, being Pages 9-13, both inclusive, of said brief.

From the Alabama authorities there and herein cited it seems to be demonstrated beyond a possibility of doubt that a valid award of arbitrators, as this is conceded by Respondents to be, may be enforced either by filing it with the clerk to be entered up to have the force and effect of a judgment or by bringing action upon it, either in law or in equity, to enforce it.

The decree heretofore entered by the court in this case was in entire accord with the law of the State of Alabama and should be re-

entered to finally dispose of this controversy.

Respectfully submitted,

Solicitor for Complainant.

I hereby certify that a copy of the within brief was served on R. P. Roach, solicitor for Respondents, by mailing copy thereof this 1st day of July, 1931.

Solicitor for Complainant.

JOSEPH EICHBERGER,

Complainant,

-vs-

MATHEW FEURST and
MATHEW C. FEURST,

Respondents.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA.
IN EQUITY.

Brief of Complainant as to
Demurrers of Respondents.

This is an action to enforce an award of arbitrators, not made in a pending suit, and to cancel and set aside certain conveyances of real estate as being in fraud of complainant, a creditor by reason of the award.

To the bill demurrers are filed by the Respondents on numerous grounds, the first of which is that the bill is multifarious in that it seeks to set aside conveyances, define a boundary line, asks for an injunction and seeks to settle the title to personal property, "inconsistent reliefs not growing out of the same transaction or subject matter nor founded on the same contract or related to the same property between the same parties."

It is possible that a bill which prays for all this relief, unaided by an arbitration, might be considered multifarious, but that is not the situation here where, if the award be a valid and binding one, the various matters have already been settled and determined between the parties and this Court is asked merely to validate and enforce the award, although in order to do so the various reliefs prayed for in the bill are all necessary.

The basis of the action is the award and it is no objection to a submission to arbitration nor to the award based upon it, that either is multifarious and so it must follow that a bill to enforce an award cannot be multifarious even though the submission and award, tested by the ordinary rules of Chancery pleading, might have been so considered.

Two of the four reliefs prayed for, viz., to define a boundary and settle the title to personal property, were expressly submitted by the parties and finally decided by the terms of the award. Another, the prayer to set aside the fraudulent conveyances,

is merely asking the Court to make effective the settlement concluded by the award and is necessary else all relief to Complainant is substantially denied, while the injunctions asked are merely that the Respondents be enjoined from interfering with the rights fixed in Complainant by the terms of the award. All are a part of the same transaction, the arbitration, and all are founded on the same contract, the agreement Exhibit "A", to submit to arbitration.

> The Code says: "....A bill is not mutifarious which seeks alternative or inconsistent relief growing out of the same subject matter, or founded on the same contract or transaction, or relating to the same property between the same parties." Sec. 6526.

The various reliefs prayed for here are not inconsistent, but if they wer e this bill is not multifarious since they all grow out of the same subject matter, are founded on the same contract or transaction and relate to the same property between the same parties.

> "A bill is not multifarious which unites several matters distinct in themselves, but which together make up the complainant's equity and are necessary to complete relief."
>
> Stone vs. Knickerbocker Life Ins. Co., 52 Ala., 589.
> *See page 2½ following.

There would seem to be no merit in Respondent's first ground of demurrer.

The second ground is that the arbitration and award are void because "the parties did not concisely state in writing the matter in dispute bewween them and which they desired to leave to the determination of the arbitrators."

> The language of the submission agreement is as follows:
>
> "The parties hereto are unable to agree upon a statement of an account rendered from one to the other and upon the ownership of a row of orange trees and the disposition of certain personal property owned by them in common and are desirous of submitting their controversy to arbitration."
>
> The Code is as follows:
>
> "The parties must concisely state in writing, signed by them, the matter in dispute between them, and that they desire to leave the determination thereof to certain persons, naming them, as arbitrators;....."
>
> Code of Alabama, 1923, #6158.

The only objection of Respondent is that this agreement did not "concisely state" the matter in dispute, all of the other requirements being complied with or, at least, not objected to by

"The decisions as to what constitues multifariousness are so exceedingly various as to make it difficult, if not impracticable, to educe any general rules by which to test the objection, the courts seeming to regard what is convenient and just in the particular case, always discouraging the objection where, instead of advancing it would defeat, the ends of justice. 3 Mayf. Dig. 288.

Multifariousness is incapable of exact definition; it is frequently a matter of discretion; every case must be governed by its own peculiar facts, subject to certain equity jurisprudence; in determining this question multiplicity of suits should be avoided, as equity delights to do justice, and not by halves. It is left in a large measure to the sound discretion of the court. Sicard vs. Guyllou, 147 Ala. 239, 41 So. 474; 6 Mayf. Dig. 318."

Ford vs. Borders, 200 Ala. 70; 75 So. 398.

"Multifariousness is incapable of exact definition, and the impossibility of laying down any general rule whereby it may be determined in all cases whether the objection is well taken has often been recognized. 'The objection is frequently a matter of discretion, and so the circumstances under which it is allowed to prevail, so that every case must in a measure be governed by what is convenient and equitable under its own peculiar facts, subject to the recognized principles of equity jurisprudence; and it is always proper to excercise this discretion in such a manner as to discourage future litigation about the same subject matter and to prevent a multiplicity of suits, and never so as to do plain violence to the maxim that courts of equity 'delight to do justice and not by halves.'" Adams vs. Jones, 68 Ala. 117. No universal rule in regard to multifariousness can be or has been attempted to be established. 'The substance of the rules on the subject appears to be that each case is to be governed by its own circumstances, and must be left in a great measure to the sound discretion of the court. 1 Daniell Ch. Pl. & Pr. 334, note 2.'"

Sicard vs. Guyllou, 147 Ala. 239, 41 So. 474.

Respondent, and the objection to this phase of the submission seems to be that the statement is too concise, so much so as to be general, indefinite and vague.

The dictionary defines "concise" as "brief","terse", and "condensed", and all of these characteristics naturally tend to indefiniteness and vagueness, but it was obviously not the Legislative intent to require the parties to an arbitration to plead with any degree of particularity the matters in dispute but merely to set them out very briefly or concisely, and if in so doing the parties fell somewhat short of the requirements of legal pleading it was not intended that this should be a fatal objection to the arbitration. Certainly, if the matter in dispute between two parties is an account between them, it is unnecessary to do more than say so in so many words and unnecessary to set out the items or details of the account, and these parties have done this with reference to that part of their dispute.

But they had other items in controversy; they could not agree which one owned a certain row of orange trees, or in other words, they could not agree upon the precise dividing line between their respective properties, and they certainly stated that fact, although in a very few words, as they did the further item that they could not agree on the ownership of certain personal property in which they were jointly interested. These three items constituted all of the matters in dispute, each was set out specifically in the submission agreement althoug, of course, very briefly, generally or as the statute has it "concisely."

No complaint is made by Respondents that the arbitrators adjudicated matters not before them, nor that they exceeded the authority that both parties understood they were granting in any way (except by withholding their award beyond the date fixed) and the submission agreement obviously performed its function perfectly.

> "The parties, as is shown, under this submission appeared and submitted and offered proof touching all their partnership transactions,-thier books, accounts, notes, choses in action, and the real estate owned and held by them or either of them, as belonging to the partnership, and as to which their disputes related,-and the award was made in reference to and in settlement of

> all such matters. Such proceedings rendered the submission certain and definite as to the matters submitted, and to them the award must be referred."

Edmundson vs. Wilson, 108 Ala. 118, 19 So. 367.

The proceedings in this case rendered the submission certain and definite as to the matters actually submitted, even though it be conceded that the original agreement of submission was defective because too concise and too general in its description of the matters in dispute.

The third ground of demurrer is that while the agreement of submission specifies that the award be made by April 1st, 1924, the award shows on its face that it was not made until September 18th, 1924, and is consequently void.

It must be admitted that this demurrer to the original bill was good, and it was undoubtedly on this ground that Judge Leigh sustained the demurrers although there is nothing in the record to show which of the assigned grounds, the same as are assigned to the bill as amended, he based his ruling on. But parties have a right to limit the time in which the arbitrators shall have and possess authority and having done so the Courts will enforce the limitation .

But the right to repudiate an award because not made within the time stipulated is a right which may be waived, and the bill as amended, pleads a waiver of the right to repudiate by the Respondents on this ground and the demurrer, of course, admits the facts alleged as the basis of the waiver if they are properly pleaded and no objection is made to the manner of pleading the waiver.

That a right to repudiate an award because it was not made within the time limited may be waived is settled law in this state.

In Anderson vs. Miller, 108 Ala., 171, 19 So. 302, it is said:

> "When the plaintiff introduced in evidence, as a basis for the award upon which he sued, a submission to arbitration which disclosed that the arbitrators were required to make an award in writing, under their hands, and to deliver to the parties a copy thereof on or before the 15th day of February, 1892, it became necessary for him to establish, not only that an award

had been made but that a copy thereof had been delivered to the defendant within the time prescribed, unless it appeared the stipulation had been waived. It is perfectly competent for parties who submit their differences to arbitration to limit the duration of the authority of the arbitrators. 1 Am. & Eng. Enc. Law, p. 688. So, also, they may prescribe the manner in which the award must be published or delivered. And while, in the absence of such stipulation, actual delivery is not necessary, yet if the submission requires delivery of the original award or a copy, then, in the absence of a waiver nothing short of a compliance with the terms of the agreement will satisfy the requirement"

This is the only case found in which the right of repudiation was identical with the right in this case, but that other grounds for repudiation may be waived, seems to be settled.

That the right may be waived when the ground for repudiattion is fraud and mistake, see Dunham Lumber Co. vs. Holt, 123 Ala. 336, 26 So. 663.

That the right may be waived when the ground for repudiation is that the arbitrators refused to be sworn, see Gardner vs. Newman, 135 Ala., 522, 33 So. 179.

That continuing to participate in the arbitration proceedings after the objection to it, or the ground for repudiating the award arises, constitutes a waiver, see Dunham Lumber Co., vs Holt, supra, in which it is said:

"The complainant should have repudiated the submission when it discovered the mistake or fraud. Instead it went on in execution of the submission to a final award, which has been entered as a judgment of a competent court. In such case the complainant cannot now attack the award and judgment for infirmities of the submission. The doctrine is thus broadly stated by the authorities: 'The court, on motion, will set aside a submission which has been obtained by fraud, or where there is a mistake made in drawing it up, or where the arbitrator is prejudiced, interested or neglects to act; but an award will not be set aside because of fraud or mistake in the submission.' 2 Am. & Eng. Enc. Law, 594. We need not adopt this proposition to its fullest extent for the purposes of this case. It is only necessary here to hold, as we do, that, where the fraud or mistake in the submission to arbitration comes to the knowledge of the party who complains of it, before an award is made, and he does not then repudiate the submission, but proceeds under it until an award is made, he cannot afterwards impeach the award on the ground of such mistake or fraud."

Also, in Gardner vs. Newman, supra, it is said:

SYLLABUS. "A party going into the arbitration after the refusal of the arbitrators to be sworn or to admit counsel waives his objection thereto."

OPINION. "And going into the arbitration after the refusal by the arbitrators to be sworn or to admit counsel amounted to a waiver of the objection by the plaintiff."

In Badders vs. Davis, 88 Ala. 367, 6 So. 854, it is said:

"The order of submission to arbitration in this case was to two named persons, 'they to call in a third man, whose award, when made according to law, to be made the judgment of the court'. No third man was called in, but the two named arbitrators had theparties and the witnesses before them, heard the cause and rendered their award. No objection was raised on the trial to the failure to call in the third arbitrator. Proceeding to trial before the two without objection was a waiver of the right to have the third man called in."

The facts pleaded in the second amendment to the bill, viz: that the continuance of the matter beyond April 1st, 1924, was at the request of Respondent, that hearings were held after that date in which Respondent participated without objection, and that no objection was ever raised by him until after the award was made, would, under the rules announced above, seem to present a perfect example of waiver of the right to object to the award because it was not made within the time originally fixed by the parties, and as the demurrer admits these facts it would seem that this ground of demurrer is without merit.

The fourth ground of demurrer is that there is no equity in the bill, but it is believed that this will be met and disposed of by the argument on the other grounds of demurrer.

The fifth ground of demurrer is that Complainant himself repudiates the award by claiming full title to the sprayer when the award decrees him but a one-half interest.

The Complainant has no intention of repudiating this award and,having sued upon it, could not now do so if he would.

However, a proper construction of the prayer of his bill concerning the sprayer, will not justify the assumption that he is claiming full title to the sprayer, but rather will show that he expressly prays that the "Court decree that the said sprayer is

owned by your complainant and the said Mathew Feurst and that said defendant be enjoined from interfering with or denying the rights of your complainant thereto." Mr. Roach mistakes the import of this language which expressly affirms the joint ownership and merely asks that Complainant's right, that of a one-half owner, be not interfered with.

The sixth ground of demurrer is that Complainant has an adequate remedy at law.

This assertion we deny.

It is obvious that inasmuch as the Respondents admit that he has transferred away all of the property he owns in the state of Alabama, and that he is a non-resident, the only remedy that Complainant has aside from this action, is to go to Chicago and sue the Respondent on the account, and such an action is now probably barred by the statute of limitations. Complainants only adequate remedy is to have these fraudulent transfers voided so that he may proceed in Alabama to enforce his Alabama award, and he properly resorts to the Alabama Chancery Court for that purpose, and that Court very properly has assumed jurisdiction of his cause. Having done so it will retain the case for all purposes, although without the element of the fraudulent transfers, the rest of the case might well have been disposed of in a court of law

But, says the Respondent in his eighth ground of demurrer, there is no showing of any indebtedness from Respondent to Complainant to justify the setting aside of his transfers which he admits were without consideration and disposed of all of the property he had in the state of Alabama. Of course, there must be an indebtedness or the transfers cannot be fraudulent, but if the Court holds the award valid against Respondent's demurrers, then there is a valid and subsisting indebtedness, and if, for any reason, the Court should determine that the award is not valid and binding, there is still the indebtedness on the original account pleaded, and admitted by the demurrer.

In his ninth ground of demurrer Respondents raise the proposition that there are no facts alleged in the bill showing an intent to defraud and it must be conceded that such an intent must be pleaded and proved in order to set aside conveyances as fraudulent.

But it is contended that the allegations of this bill are ample in this respect. It alleges in considerable detail, the following facts:

1: The debt from Respondent to Complainant, established by the award.

2: That "for the purpose of hindering, delaying and defrauding your complainant, in or out of the collection of the aforesaid debt" Respondent made the conveyances complained of.

3: That the property conveyed included all of the property owned by Respondent in the State of Alabama.

4: That this property (describing it) was conveyed to the son of Respondent Mathew Feurst, Respondent Mathew C. Feurst.

5: That the property was worth $2,500.00 and was conveyed for a consideration of $1.00 "which said sum is grossly inadequate."

6: That the conveyances were made by the grantor and accepted by the grantee "with the intention of defrauding your complainant out of the debt owing from said Mathew Feurst to Complainant."

7: That said conveyances are void as to this debt.

8: The deeds are set out in full as exhibits "C" and "D".

It is difficult to imagine what other facts could have been set out and certainly no more are needed under the law of this state, which is set out fully as follows:

> "The intent put into action, and which merely hinders or delays the creditor, issufficient. It need not defraud/him, nor deprive him wholly or even partially, of his remedy for finally obtaining satisfaction of his debt or demand. The intent to defraud, however, must exist to render the transaction void; but this intent is sometimes a question of fact and sometimes a question of law. If the necessary consequences of a given act, on the part of a debtor, is to hinder, delay or defraud his creditor, then the law conclusively presumes that it was committed with the intent to defraud, no matter what was the motive that prompted the act. Such would be a voluntary gift by an insolvent debtor of a large part of his property. The motive might be 'sweet charity', but the gift would nevertheless be fraudulent as to the donor's creditors. Such acts carry within themselves evidences of fraud against the creditors. The statutes therefore refer to the legal, and not the moral intent. The fraud meant to be prevented by the statute is a legal fraud. To invoke it is not necessaryly to impute a corrupt or evil motive; on the other hand, an act of hte debtor may be a fraud in morals, and dishonorable, but unless it is a legal fraud upon the creditor, he cannot have it declared void under the statute.
>
> For a bill to be sufficient under this statute, it is not necessary that it should set forth facts showing any formal or premeditated design to accomplish the illegal purpose. It is enough that it allege facts which reasonably

> show an intent to hinder, delay or defraud the creditors. If facts are thus alleged which reasonably show the necessary intent, the transaction cannot be sustained by showing that there is open to the creditors some remedy other than the setting aside of the fraudulent transaction."
>
> Skinner vs. Southern Grocery Co., 174 Ala., 359, 56 So. 916.

When we consider that these conveyances, gifts really, because even if the recited consideration of $1.00 was paid in full, the amount is so small and idsproportionate to the value of the property that it cannot be called a sale, were made just three weeks after the award was announced and for the obvious purpose of putting Respondent's property beyond the reach of Complainant, and that the transaction is fully set out in the bill and the fraudulent intent expressly averred, it is difficult to see wherein the bill lacks to entitle the Complainant to the relief he asks, that these transfers be set aside and the Respondent's property subjected to his debt.

So much disposes of all the demurrers except number Seven, which is based on the theory that the arbitrators did not themselves ascertain the boundary line but left this question to another whose decision the arbitrators accepted and substituted for their own, contrary to the submission.

The award shows that a survey was made by the County Engineer Greenwood, and that the arbitrators "find from the survey" that the row of orange trees, including, of course, the land on which they grow, belongs to Complainant.

These arbitrators sat as a court, heard evidence and from it, as a court does, decided the matters in controversy. They did the logical thing to do in any dispute concerning a boundary line; they heard the testimony of a competent, disinterested surveyor who told them where the dividing line between the properties of these parties ran, and this, if they believed the testimony, as they evidently did, decided the matter in their minds.

To the same extent that a court leaves the decision of its problems to the witnesses who testify before it as to what the facts are, and substitutes their "decisions" for its own, these arbitrators accepted Mr. Greenwood's "decision" and adopted it, but to no greater extent, and in so doing the adopted the only feasible plan for de-

ciding the matter on which the parties could not agree. How else does any court ever decide a question of boundary line, other than by hearing the testimony of witnesses who are conversant with the facts, in the great majority of cases, engineers who have actually gone upon the ground and made an accurate survey? Surely there can be nothing about this contrary to the submission in this case, which presupposes that the arbitrators will hear testimony from witnesses on both sides.

> "Now the Code provides, that an award made in substantial compliance with its provisions, is conclusive between the parties thereto and their priviews, as to the matters submitted, and cannot be inquired into or impeached for want of form or irregularity, if the award determines the matter or controversy submitted; and such award is final, unless the arbitrators were guilty of fraud, partiality or corruption in making it. Code #3232 (6169.) The statutory provision as to the conclusiveness of awards, is but declaratory of the common-law rule on the subject. Chambers vs. Crook, 42 Ala. 171; Elrod vs. Simmons, 40 Ala. 274; Davis vs. Forshee, 34 Ala. 107; Wright vs. Bolton, 8 Ala. 548; Bumpass vs. Webb, 4 Port. (Ala) 65. The award when legally made is the judgment of a court constituted by the parties themselves and cannot be impeached except for reasons such as are specified in the statute; and, like judgments of other courts, all reaonable presumptions are to be made in its favor. The decisions of arbitrators are to be liberally construed and every reasonable intendment is made to support support them."

Edmundson vs. Wilson 108 Ala. 118; 19 So. 367.

Applying the rules of law above stated to this case, it would seem to be obvious that these demurrers should be over-ruled and judgment for complainant entered upon the pleadings.

Respectfully submitted,

Solicitor for Complainant.

I hereby certify that copy of this brief was mailed to Mr. R. P. Roach, solicitor for Respondents, this 24th day of September, 1929.

Solicitor for Complainant.

JOSEPH EICHBERGER COMPLAINANT.	IN THE CIRDUIT COURT OF BALDWIN COUNTY, ALABAMA. IN CHANCERY.
vs MATHEW FEURST and MATHEW C. FEURST, RESPONDENTS.	REPLY BRIEF OF COMPLAINANT ON FINAL SUBMISSION.

This case has been so long delayed, so complicated by amendments and briefs at various stages of the litigation that it seems only fair to the Court to combine, so far as possible, the various briefs for complaint in this (it is to be hoped) final brief, particularly as the last brief filed by Complainant was largely an attempt to anticipate the brief for Respondents, was based on Respondents' oral argument to the Court and was in many respects wide of the mark because of the new and different points raised by Respondents' brief when filed.

The case made by the original bill is that Complainant and Respondent, Mathew Feurst, with their respective wives, entered into an agreement to arbitrate their differences; on this agreement which is Exhibit "A" to the bill an award was made to the Complainant and against Respondent Mathew Feurst, and the wives, while parties to the original agreement, were not mentioned in the award nor affected by it. (As a matter of fact they were neither necessary nor proper parties to the agreement).

After the award, which is set out in full as Exhibit "B" to the bill respondent refused to be bound by it and to avoid the award deeded all of his property in the State of Alabama to his son the Respondent, Mathew C. Feurst, and the bill alleges that this transfer was fraudulent and void as to the Complainant, a creditor, by reason of the award.

The prayer is that the conveyance be set aside and declared void and the land subjected to the debt fixed by the award and that the boundary line fixed by the award be, by the Court

fixed and determined as the true line.

To this bill demurrers were filed and upon submission to Judge Leigh the demurrers were sustained and Complainant amended his bill for the first time by adding to Paragraph Two (2) an allegation that the awardwas not rendered by April 1, 1924, the date fixed in the agreement of submission, because of the desire of the arbitrators to give both sides ample time and because said extension of time was made by the arbitrators at the request of the Respondent and also by inserting as the second paragraph of the bill a claim on the account in the event the award should be held invalid.

At this stage of the proceedings the writer was retained as Counsel for Complainant and upon leave duly obtained filed a second amendment to the bill in which a waiver upon the part of the respondent of his right to have the award made by April 1, 1924 was alleged.

To this bill as twice amended, Respondent re-filed his original demurrers, pleas, and answers and the demurrers were submitted to the Court on briefs and on October 2, 1929 the Court handed down its decree over-ruling the demurrers.

A part of the files in this case have been lost or mislaid and the answer of the Respondents which contains admissions essential to Complaint's case does not appear in the files. For the convenience of the Court a copy of the demurrers, pleas and answers, taken from an office copy furnished by Mr. Roach is here set out in full.

JOSEPH EICHBERGER, Complainant, vs MATHEW FEURST and MATHEW C. FEURST, Respondents	IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA IN EQUITY

Come the Respondents and file this their Demurrer to the Bill of Complaint hereto fore filed against them in this Court by the said Complainant, and for grounds of Demurrer assign the following upon each one of which separately the Respondents insist viz:

(1) Because said Bill of Complaint is multifarious in that it seeks (a) to have set aside certain conveyances (b) to establish and define an uncertain or disputed boundary line (c) for an injunction (d), to settle the title to personal preoperty and the Bill shows that these are inconsistent reliefs not growing out of the same subject matter nor founded on the same contract or transaction or related to the same property between the same parties.

(2) The indebtedness claimed by Complainat against the Respondents, Mathew Feurst, is shown by the Bill to be based on an arbitration which the Bill shows on its face is void and not binding on the said Mathew Feurst in that the written agreement for arbitration made a part of the Bill shows that the parties did not concisely state in writing the matter in dispute between them, and which they desired to leave to the determination of the arbitrators.

(3) Because the agreement for arbitration made a part of the Bill shows that the award was to be made in writing subscribed by the said arbitrators and delivered to the parties on or before the first day of April, 1924, and the Bill shows on its face as does the alleged award itself, that the award was not made within the period of time fixed by the submission, but was made on September 18, 1924, more than five months after the date fixed by the submission. Therefore the alleged award is not binding on the said Mathew Feurst.

(4) Because that there is no Equity in the Bill.

(5) Because the Complainant shows in his Bill of Complaint that he has not complied with the award himself but repudiates same in that he claims the sprayer and asks the Court to decree the ownership thereof to the Complainant when the award only gives him a half interest therein.

(6) The Complainant has an adequate remedy at Law.

(7) The alleged award shows that the arbitrators did not themselves ascertain the boundary between real estate holdings of the respective parties but left this question to another whose decision the arbitrators accepted and substituted for their own contrary to the submission.

(8) The Bill asks to set aside conveyances made by one of the Respondents, namely, Mathew Feurst, to the other Respondent, namely, Mathew C. Feurst, on the theory that Mathew Feurst is indebted to the Complainant and there is nothing in the Bill of Complaint to show any legal and binding indebtedness from Mathew Feurst to the Complainant existed at the time the Bill was filed.

(9) Because that no facts are alleged showing any intention on the part of Mathew Feurst to hinder, delay or defraud the Complainant by any act alleged in the Bill. Willingham & wife vs. Harrell 36/583.

Not waiving the Demurrer hereinabove contained but insisting therein the Respondents filed the following plea to the Bill of Complaint in this cause:-

For plea to this Bill of Complaint these Respondents say that there was no legal submission to arbitration of the matters in contraversy of the said Complainant, and the Respondent, Mathew Feurst, in that the parties did not enter into a written agreement concisely stating the matter in dispute between them but on the contrary, on the agreement that was entered into for the alleged arbitration contained this statement as to the matter in dispute between them and no other, viz: "The parties hereto are unable to agree upon a statement of an account rendering one to the other and upon the ownership of a row of orange trees and the disposition of certain personal property owned by them in common and are desirous of submitting their controversy to arbitration"

And Respondents allege that this is not a concise statement or the matter in dispute between them, but is a statement so general, indefinite and vague, that no issue could be made up thereon, and Respondents further allege that this arbitration based on this written agreement is the foundation of the indebtedness sued on. The said award was not made nor delivered as above specified until Sept. 18, 1924, and that the Respondent, Mathew Feurst, the party to said controversy, repudiated said award and refused to be bound thereby.

Having filed Demurrers and Pleas to the Bill of Complaint clause, now without waiving said Demurrers or Pleas, not expressly insisting on same, these Respondents file the following as their answer to said Bill of Complaint in this cause:-

1: These Respondents answering the first paragraph of the Bill of Complaint admitting all the allegation thereof.

2: These Respondents say that while a so-called agreement to arbitrate was entered into between said Mathew Feurst and the Complainant that this agreement was not in the form as required by Law in that it did not concisely state in writing, signed by the parties thereto, the matter in dispute between them. And further answering said paragraph these Respondents say that the award was to have been made in writing and signed by the arbitrators on or before the first day of Apr. 1924 but was not made until Sept. 18, 1924 and that the said Mathew Feurst repudiated the said and refused to be bound thereby. Respondents deny that Mathew Feurst is indebted to the Complainant in any sum whatsoever, that the said Complainant is indebted to him, this Respondent, in a large sum, to-wit:- five hundred dollars ($500.00) and that these Respondents have found the utmost difficulty in getting the Complainant to do justice by Mathew Fuerst and he has failed and refused to pay his indebtedness to the said Mathew Feurst. Further answer to the second paragraph of the Bill of Complaint says that there has been no correct survey made of the line between the said lands of the said Mathew Feurst and the Complainant but that the line which this Respondent, Mathew Feurst, insisted on is that line which has been agreed on between these parties for years. That the row of orange trees which the Complainant is claiming, was planted out by the Respondent, Mathew Feurst, after the line between the two parties, namely that of the said Mathew Feurst and the Complainant had been distinctly and definitely agreed on between them and the said line is correct and the true dividing line between the two properties.

(3) Answering the 3rd paragraph of the said Bill of Complaint these Respondents admit that the said Mathew Feurst executed to the said Mathew C. Feurst the deed, copies of which are attached as exhibited "C" and "D" to the Bill of Complaint, but Respondents deny that the said Mathew Feurst was indebted to the Complainant in any sum whatever at the time of execution of said deeds and deny that there was any purpose on the part of the said Mathew Feurst or of Mathew C. Feurst to hinder, delay or defraud Complainant. The Respondents admit these deeds cover all the real estate of the said Mathew Feurst in the County of Baldwin and State of Alabama, and admit that the same is worth twenty-five hundred dollars ($2500.00) and perhaprs largely more, but deny that the Complainant has any right or claim to the said property nor has he any claim against either of these Respondents which would justify this Court in annulling and setting aside these conveyances.

Wherefore having answered said Bill of Complaint fully, the Respondents pray to be dismissed with their reasonable costs in this behalf expended.

Solicitor for the Respondents.

Two amendments have been filed to this Answer: The first is made by adding the following: "The alleged agreement for arbitration was not only between the Complainant and Respondent but was also joined in by Josephine Eichberger, the wife of the Respondent and Respondent denies that there ever was any agreement for arbitration between the said Complainant alone and this Respondent. The award referred to in the Bill of Complaint was one purporting to be rendered in a case between Josephine Eichberger and wife on the one part and Mathew Feurst and wife on the other. Respondent denies that the arbitrators referred to in the Bill of Complaint made any award in any case of controversy between this Complainant alone on the one side and the Respondent alone on the other". The second amendment to the answer, "denies all the allegations thereof".

After the decree of the Court of October 2, 1929 over-ruling the Demurrers to the Bill Complainant proceeded to take the testimony in support of the Bill and after the completion of Complainant's testimony the matter was called before the Court for final submission.

At this hearing held at theSeptember 1930 sitting of the Court, Respondent produced two witnesses for oral examination before the Court, the Respondent Mathew Feurst and one Lloyd F. Eichelberger and offered the testimony of these witnesses with respect to some of the items of the account considered between the arbitrators in making the award. This testimony was received by the Court over objection of Complainant and the matter was finally submitted to be considered and decided by the Court upon Briefs to be filed by the parties.

Complainant's Brief was prepared and an effort was made to anticipate the arguments of Respondent and the Brief served and filed butRespondent's Brief did not advance the same arguments as those indicated on the oral argument before the Court but instead raised new and different points, one of which, raised in this final brief for the first time, being that there was no equity in the Bill for the reason that it was not alleged that a copy of the award was made and served on the Respondent as provided by the agreement of submission and inasmuch as this was a valid objection to the equity of the Bill, although in the opinion of the writer not properly raised or presented, it was necessary to withdraw the final submission and again amend the Bill by supplying the necessary allegation that a copy of the award

was served on Respondent, by service on his attorney. At this time the Bill was also amended by striking from it the name of Josephine Eichberger as a party, and by striking the allegation that Respondent was present in person at the hearings before the arbitrators.

Depositions to prove the added allegation of service of the copy of the award upon Respondent's Counsel having been taken and filed the cause is again ready for final submission.

Upon the first submission of the cause Respondent filed his Brief in which he argues six (6) reasons why the Bill should be dismissed. The first four (4) of these he entitles, " On Demurrer". No Demurrers raising these four (4) points have ever been filed by Respondent. In the first Demurrer #4 is, "there is no equity in the Bill" and this has been decided adversly to Respondent by the decree of the Court of October 2, 1929. Without further pleading Respondent in his final Brief advances four (4) further reasons why the Bill is without equity. His first is that the agreement for submission provides, "that said award shall be made in writing, subscribed by the said arbitrators and delivered to the parties hereto", and that the Bill is fatally defective in that it does not allege that a copy of the award was delivered to the Respondent. Assuming that this point is properly raised it is meritorious and was the reason why it was necessary to withdraw the submission and amend the Bill to provide the necessary allegation. This has been done and the Deposition of A. W. Keller taken to prove the additional allegation and this disposes of Respondent's first ground of Demurrer.

The second ground of Demurrer is:

> "The Bill is without equity in that the agreement for submission shows that the arbitrators were themselves to investigate and decide upon the ownership of a row of orange trees. In the Bill it is alleged the arbitrators adjudged and determined that,'complainant was the owner of land and orange trees thereupon in dispute'. Copy of the award made Exhibit "B" and attached to and made a part of the Bill of Complaint shows that the award only said.'row of orange trees belonging to Mr. Eichberger'".

This precise ground of Demurrer has been decided adversly to the Respondent. It was #7 in the original Demurrer upon which the Court ruled in its decree of October 2nd and Respondent is concluded by that ruling.

The third ground of Demurrer is that the Bill is without

equity in that it is a Bill by two (2)mComplainants only one of whom is alleged to have any interest in the property and debts in controversy. There has been some confusion in the record on this point. The Bill as originally filed was by Joseph Eichberger as sole Complainant. It was amended by adding Josephine Eichberger as co-complainant and re-amended by striking her name from the Bill so that it now stands as originally filed, a Bill by Joseph Eichberger alone. The agreement for submission was between Eichberger and Feurst and their respective wives; just why the wives were made parties to this original agreement is not clear but they were parties to it to the extent that both wives signed it. However, after hearing the evidence, the arbitrators handed down their award finding partly in favor of Complainant and partly for Respondent but with a balance due Complainant from Respondent. They made no award either for or against either of the wives and they, of course, have no direct interest in the award; that this was not a mere oversight on the part of the arbitrators is evident from the fact that the award recites:

> "In accordance with the agreement dated February 20, 1924 between Mathew Feurst and wife of Chicago, Illinois and Joseph Eichberger and wife of Foley, Alabama we proceeded" .....etc.

The situation then is that Complainant, who was awarded a sum of money as against Respondent, is the only person who has any interest in the enforcing of the award. The question is, is he obliged to lose the benefit of the award made in his favor because there was a party to the original submission who was not decreed any relief? Merely to state the question is to answer it.

Respondent cites the case of Barrett vs Central Building & Loan Association 130 Ala. 294 30 So 347 as his authority for the proposition that the Bill is withoutequity because it appears that the agreement of submission was signed by persons who are not parties to the Bill. This case holds that when a Bill alleges that no due date was fixed by a mortgage and, as an exhibit to the Bill, sets out a copy of the mortgage which shows that a due date was

fixed, there is a "repugnancy" between the Bill and the Exhibit which will make the Bill subject to a Demurrer raising such point but the case is far from an authority for Respondent's position. There is no repugnancy in this case. True, Exhibit "A" to the Bill shows parties signing it who are not madeparties to the suit, but Exhibit "B", the award, shows that only Complainant and Respondent were affect/ed by the award and hence they are the only proper parties to the Bill.

A large part of Respondent's argument in his Brief and on his third and fourth reasons why the Bill is without equity, is based on the Bill as it was before, by amendment, Josephine Eichberger was stricken as a party Complainant and so is not applicable now that she has been so stricken and to this part of the argument no attention will be paid in this Brief.

Complainant insists there is no merit in Respondent's third and fourth arguments against the equity of the Bill.

In his Brief filed at the former submission, in his arguments on the merits of the case as distinguished from his arguments on Demurrer hereinbefore noted, Respondent's first proposition is that this is a statutory arbitration; that it fails in substantial compliance with the statute in two respects; first by failing to allege a delivery of a copy of the award to Respondent; (whichof course, has been cured by the last amendment) and second, because a copy of the award was not delivered to the Clerk of this Court to be entered up as the judgement of the Court as is provded may be done by Section 6161 of the Code; that, so failing of substantial compliance with the statute, the award is not binding and conclusive and he is entitled to re-litigate the items of dispute considered by the arbitrators and that the testimony offered by him for that purpose should be received and considered by the Court.

Complainant contends first that this is a statutory award and that substantial compliance with the statute is shown by the record even though the award was not delivered to the Clerk to be entered up as a judgement and second, that even if it be held that such

delivery to the Clerk is an essential to the validity of a statutory award and hence that this is not such an award, still it is valid and binding on Respondent as a common law award.

On the first proposition, that this is a valid statutory award, substantial compliance with the statute appearing from the record, it will be observed that all of the provisions of the statute up to and including the making of the award, have been literally complied with by the Complainant or waived by the Respondent. The question then becomes: Given a valid statutory award does it lose its character as such because suit is brought on it instead of delivering to the Clerk to be entered up as a judgement?

Section 6161 of the Code was inserted in the Chapter on arbitration and award to provide a convenient means of enforcing a valid award but that it is not the only way to do so is evidenced by the fact that many cases appear in the reports in which suits of one kind or another arebrought on an award without first having it entered up by the Clerk as a judgement. The following is a list of a few cases in which this has been done with the approval of the Supreme Court of Alabama. There are many others.

Odum vs Rutledge and J. R. Company 94 Ala 488 10 So 222--an action at law on an award.

Graham vs Woodal 86 Ala. 313 5 So 687-- an action at law on an award.

Payne vs Crawford 97 Ala. 604 11 So 725-- an action at law on an award.

Anderson vs Miller 108 Ala. 171 17 So 302-- an action at law on an award.

Edmundson vs Wilson 108 Ala. 118 19 So 367-- an action in equity for specific performance of an award.

Black vs Woodruff 193 Ala. 327 69 So 97-- an action in equity for the specific performance of an award.

Indeed, it is not reasonable to suppose that the way provided by the statute was intended to be the only way a valid award could be enforced as in many cases it would amount to a substantial denial of all relief. The present case is a perfect example. Respondent admits that he has deeded away all of his property in

Alabama and to enter up the award to have the effect of a judgement on which execution might issue would not help Complainant a bit. These fraudulent transfers must be set aside and Complainant properly sues to have that doneand his award enforced all in one action.

It is not what is done with an award in an effort to enforce it after it is made that determines whether nor not the award is a valid statutory award. Such an award may be entered up as a judgement by the Clerk as provided in Section 6161 or it may be enforced in any other way that may be expedient under the circumstances of the case and that this is true must be apparent from a reading of Section 6169 of the Code which reads:

> "An award made substan/tially in compliance with the provisions of this chapter is conclusive between the parties thereto and their privies, as to the matter submitted, and cannot be inquired into, or impeached for want of form or for irregularity, if the award determines the matter or controversy submitted; and such an award is final, unless the arbitrators are guilty of fraud, partiality or corruption in making it".

An award <u>made</u> is the language of this statute. This award was made in compliance with the provisions of the chapter on arbitrationand award and it is only on the ground of what has been done since the making of the award that Respondent complains of a failure to substantially comply with the statute but if the award was properly made then Section 6169 applies and the award is final and conclusive whether it be entered up by the Clerk to have the force and effect of a judgement or whether action be brought to enforce it as was done in this case. But assuming for the sake of argument that it be held that this cannot be considered an award made substantially in compliance with the statute because not delivered to the Clerk to be entered up as a judgement, and that therefore Section 6169 does not apply to make it final and conclusive, even so, it must be held conclusive of the controversy and binding on Respondent though denied the aid of Section 6169.

Certainly it cannot be denied that there was an attempt to arbitrate made by these parties which, even if not/in substantial

compliance with the statute, is in all respects ample as a common law arbitration and award and it can make no difference in Complainant's rights if it be considered merely as a common law arbitration and award and so not entitled to the benefits of Section 6169.

> "Nothing in this chapter contained shall prevent any person or persons from settling any matters of controversy by a reference to arbitration at common law". Section 6171 Code 1923.

> "The statutory provisions are necessary to be observed when the award is to be given the effect of a judgement. Those provisions do not supersede arbitration according to the common law mode. Shaw vs State 125 Ala 80 28 So 390.

Any agreement to submit an existing difference or controversy to mutually chosen arbitrators, without formality or even written agreement of submission, followed by an award which disposes of the matters submitted, is all that is required to constitute a valid common law award.

See 5 C.J. Page 16 and cases cited.

This Court has jurisdiction to enforce such an award in an equitable action such as this is:

> "Now the ground upon which the jurisdiction to enforce the specific performance of an award is entertained is said by Judge Story to be that 'it is but the execution of the agreement of the parties ascertained and fixed by the arbitrators'. McNeil vs. Magee, 5 Mason, 244, 256, Fed. Cas. No. 8,915. So Chief Justice Parker of the Massachusetts court says that the subject, on its 'true footing' is the specific performance of a contract in writing; for the submission is the agreement. It is virtually a contract to do what is awarded'. Jones v. Boston Mill Corp. 4 Pick. (Mass.) 515, 16 Am. Dec. 358. This status and character of the proceedings to enforce an award in equity has been fully recognized by this court."
> Black v. Woodruff, 193 Ala. 327, 69 So. 97

Whether this be considered a statutory or a common law award then in either event it is binding on Respondent andconclusive of this controversy for, in the one case, if it be held a award made in substantial compliance with the statute Section 6169 expressly provides that it is "conclusive" and "cannot be inquired into or "impeached" while if it be held to be no more than a common law award then the Suprement Court has this to say of it:

MCCLELLAN, C. J. "The law favors, and by express statute it is made the duty of courts to encourage, the settlement of controversies by reference thereof to arbitrators chosen by the parties. Code, 1896, #508. The theory upon which the law and courts encourage such settlements is that they facilitate and expedite the adjustment of disagreements between citizens, they save the time of the courts and the costs of regular judgcial proceedings, and being made pursuant to the agreement of the parties, and by persons of their own selection, they are likely to be more satisfactory to all concerned and to assuage and heal animosities, thereby conserving the general good. To conserve these ends, and to justify their favor and encouragement of the law and the courts, it is necessary that such settlements should settle the controversies involved, close them up, and conclude them out of court. If any party dissatisfied with the asettlement made by arbitrators may bring the controversy into court, and there have it reinvestigated, and litigated and determined over again, the whole scheme and theory and purpose of arbitration would be thwarted and defeated; there would be no basis for the favor and encouragement of the law and the courts; and instead of time and costs being saved, and animosities being allayed, litigation would be repeated and drawn out, costs would be increased and ill-feeling engendered, intensified and prolonged beyond what would be incident in any of these respects to suits in the courts in the first instance. In other words, the submission to arbitration might well in every case, and certainly would in many, operate to the creation or aggravation of the very evils which it is the purpose of the law to avoid or to lessen by recognizing, providing for and encouraging this mode of settling controversies among the parties. But apart from the foregoing considerations it is altogether illogical that a party to an arbitration should be allowed to take the controversy into the courts after it has been submitted to arbitrators and decided by them. His submission of it is entirely voluntary. There is no coercion or compulsion about it. The consideration for his agreement of submission is a like agreement on the part of his adversary. Their minds come together to the conclusion that this is the best way to adjust their differences. They select the person or persons who shall determine the issues between them, and they contract one with the other that the arbitrators thus selected shall determine and declare their rights and duties in the premises, and they bind themselves to abide by and perform whatever award may be made. It is not their contemplation nor their contract that the award shall be tentative merely, or evidential merely, or merely preliminary to litigation in the courts; but it is their contemplation and undoubtedly their binding contract, that the award shall finally settle and forever determine the controversy. Each of them is as much bound by the award as if each, without controversy or arbitration, had agreed, contracted and promised in writing to pay the money or do the thing each is required by the award to pay or do. It is as much an agreed settlement of their dispute in the one case as in the other, and neither can any more avoid or escape the duty imposed by the award than he can avoid or escape the obligation imposed by his contract. If he made the contract and has not performed it, and is sued upon it,

> he has no defense to such suit. He may show if he can, that he did not sign it or that he has performed it, but, failing in this, he is absolutely bound by it. So with an award. If he has submitted a matter to arbitrators, and they have jointly considered the matter and determined it, and made their award accordingly, and he is sued upon that award, he has no defense, to such suit. He may show, if he can, that they have not considered the matter submitted, or that their award is corrupt; but, failing this, he cannot have a reinvestigation of the controversy and a retrial of its issues in any court, because he has foreclosed all that by a valid and binding contract that those issues shall once for all be investigated by judges of his own selection, and that their conclusion upon them shall determine and forever settle the controversy. He has no right to have his controversy tried by a court, because he has contracted away this right in consideration of having it settled by judges of his own selection, and the law recognizes and the courts will hold him to this contract, whether the award be a common-law or a statutory award. The controversy has been settled as he voluntarily and upon valuable consideration agreed that it should be settled, and there it must and does end. It is therefore subversive not only of the whole theory of arbitration, the emasculation of the whole system, altogether illogical and even absurd, to allow a retrial of the controversy in the courts, by appeal or otherwise, but it involves the participation by the courts in a flagrant violation of the express, valid and binding contract of the parties.
>
> We have been discussing awards generally, without special reference to our statutory provisions on the subject of arbitration....."
>
> Silbourn v. Hurt, 139 Ala. 557, 36 So. 768.

Certainly, then Respondent is not entitled to again go into the items of the account which the arbitrators considered and settled and his testimony (that of Respondent and his witness Eichelberger) offered for that purpose is subject to the objections made to it and is not admissible and should not be considered by the Court.

So much disposes of all the arguments and objections of the Respondent save only his claim that in various respects, which he points out in his last Brief, there is a failure of proof.

First, he says,

> "There is no admission that the submission shown by the Bill 'Exhibit A' is true."

but in this contention the record is against him. To quote from the plea filed by Respondent:

> "For plea to this Bill of Complaint these Respondents say that there was no legal submission to arbitration of the matters in controversy of the said Complainant, and the Respondent Mathew Feurst, in that the parties

> did not enter into a written agreement concisely stating the matters in dispute between them but on the contrary, the agreement that was entered into for the alleged arbitration contained this statement as to the matter in dispute between them and no other, vis: 'the parties hereto are unable to agree upon a statement of an account rendered one to the other and upon the ownership of a row of orange trees and the disposition of certain personal property owned by them in common and are desirous of submitting their controversy to arbitration.' "

A plain admission that the agreement from which Respondent's quotation is taken, "Exhibit A" to the Bill, was entered into by the parties hereto.

To quote from the Answer filed by Respondent:

> "These Respondents say that while a so-called agreement to arbitrate was entered into by the said Mathew Feurst and the Compplainant that this agreement was not in the form as required by law....."

Another admission that the parties did enter into the agreement of submission.

To quote from the first admendment to Respondent's Answer:

> "The alleged agreement for arbitration was not only between the Complainant and Respondent but was also joined in by Josephine Eichberger the wife of the Respondent..."

A further admission that "Exhibit A" to the Bill was executed by the parties.

In the face of these admissions proof of the signing of the agreement of submission would be superfluous.

Secondly, Respondent says:

> "There is no admission by the Answer that the award "Exhibit B" is true and correct and no proof of this allegation. The proof of this sought to be made by A. W. Keller falls to the ground because Keller is asked if 'the paper marked Plaintiff's "Exhibit A" now handed to you is the award which you and Mr. Cooney made as arbitrators in this matter', and answers 'Exhibit A' is the award which Mr. Cooney and I signed as Arbitrators', and it will readily be seen on examination of the Bill that 'Exhibit A' is not the award. As this is the only proof offered on this point, the award goes unproved."

It is true that "Exhibit A" to the Bill is the agreement of submission and not the award but Mr. Keller's reference to "Exhibit

A" is not to "Exhibit A" of the Bill but to the "Exhibit A" attached to and made a part of his deposition and that "Exhibit A", being endorsed by the Commissioner "P's Ex. A. E. F. S." it will be seen is the original award signed by both of the arbitrators. There is no evidence to the contrary and the award is fully proved.

Respondent also contends that there is an allegation in the Bill to this effect,

> "And Complainant further alleges that hearings were held by the arbitrators after April 1, 1924 in which Respondent Mathew Feurst participated and at which he was present in person."

and he says that there is a failure of proof on this point but Respondent over-looks the amendment to the Bill which struck out the allegation that Mr. Feurst was present in person and confines the allegation to that Mr. Feurst was represented by Counsel and this, of course, does away with the necessicty of proving that Mr. Feurst was present in person.

Respondent repeats his argument that the Bill is repugnant to the "Exhibit A" which has been considered heretofore.

The remainder of his Brief is devoted to an argument on the

> "Equities of the case in the light of the evidence advanced on the final hearing in the presenceand hearing of the Court."

but as has been pointed out heretofore this evidence is not admissible and will not be considered by the Court.

The evidence for Complainant, considering the admissions of the Respondent, fully sustains all of the allegations of the Bill and, of course, there is no conflict of testimony as Respondent has offered none except that which seeks to re-open the items of account concluded by the award.

The award must be considered in the light of the established rule in this State.

> "Now the Code provides, that an award made in substantial compliance with its provisions, is conclusive between the parties thereto and their privies, as to the matters submitted, and cannot be inquired into or impeached for want of form or irregulariitty, if the award determines the matter or controversy submitted; and such award is final, unless the arbitrators were guilty of fraud, partiality or corruption in making it. Code #3232 (6169(. The statutory provision as to the conclusiveness of awards, is but declaratory of the common-law rule on the subject.

Chambers v. Crook, 42 Ala. 171; Elrod vs Simmons, 40 Ala. 274; Davis vs. Forshee, 34 Ala. 107; Wright v. Bolton, 8 Ala. 548; Bumpass vs Webb, 4 Port. (Ala.) 65. The award when legally made is the judgement of a court constituted by the parties themselves and cannot be impeached except for reasons such as are specified in the statute; and, like judgements of other courts, all reasonable presumptions are to be made in its favor. The decisions of arbitrators are to be liberally construed and every reasonable intendment is made to support them."

Edmundson vs. Wilson, 108 Ala. 118; 19 So. 367.

Applying this rule to this case it is obvious that this award must be enforced by the decree to be entered herein.

Respectfully submitted,

Solicitor for Complainant.

I hereby certify that a copy of the above Brief was mailed to Hon. R. P. Roach, Solicitor for Respondent this 4 day of May, 1931.

Solicitor for Complainant.

COPY

T. W. RICHERSON
REGISTER AND CLERK OF THE CIRCUIT COURT
BALDWIN COUNTY
BAY MINETTE, ALA.

January 12th,1932.

Mr.H.C.Steiner,
119 S.Water St
Mobile Alabama.

Dear Sir:-

I have investigated the record in the Probate Office here and find that Matthew Feurst or Matthew C.Feurst, do not own any land in this County,except the 20 acres you have the mortgage on,therfore if I issue/execution the it will only add costs of Sheriff's Commission on judgment also issuing execution &c which ill run the bill up considerably,and which you will have to pay as there is no way collecting anything from them on execution , so if you will send ck $559.75 covering the judgment and costs also cost of transcript in appeal in the Circuit Court here,you will save several dollars additional costs, hoping you take advantage of this by Jan 15th,1932 I beg to remain yours truly.

T. W. Richerson

Clerk Circuit Court and Register in Chancery
Baldwin County Alabama.

R.PERCY ROACH
LAWYER
MOBILE ALA.

December 22, 1931

Mr. T. W. Richerson,
Clerk Baldwin County Circuit Court,
Bay Minette, Ala.

Dear Mr. Richerson:

Will you please send me the cost bill in the case of Joseph Eichberger vs. Mathew Fuerst? And the next time your son is going from Mobile to Bay Minette, I wish you would ask him to stop by the office and take the file in this case back to you. I will be obliged to him.

With best wishes for a good Christmas, I am,

Yours very sincerely,

R. P. Roach

RPR h

R.PERCY ROACH
LAWYER
MOBILE ALA.

January 12, 1932

Mr. T. W. Richerson,
Clerk Circuit Court Baldwin County,
Bay Minette, Ala.

Dear Mr. Richerson, In re: Eichberger v. Fuerst

Is there any way to get the bondsman more time to collect the judgement out of Fuerst? You are fully acquainted with the circumstances of the bond in this case, I know, and you understand why this office regrets any trouble that would come to the bondsman, if it could be saved by a little time to prevail upon Fuerst, who is out of the state.

Sincerely yours,

C. R Hall

Secretary to Mr. Roach

crh

JOSEPH EICHBERGER,
Complainant.

vs.

MATHEW FEURST AND
MATHEW C. FEURST.
Defendants.

IN CIRCUIT COURT,

BALDWIN COUNTY, ALABAMA,

IN EQUITY.

Notice is hereby given that on October 9th, 1924, Mathew Feurst, the owner of the East half of the Southeast Quarter of the Southeast Quarter and the East half of the Northeast quarter of the Southeast quarter of Section four, Township eight South of Range four East, Baldwin County, Alabama, was indebted to the said complainant in the sum of two hundred twenty nine dollars and seventy three cents ($229.73), under an award made September 18, 1924, to your complainant against said defendant, by P. J. Cooney and A. W. Keller, arbitrators agreed upon by complainant and said Mathew Feurst and to whom the matters in dispute by them were submitted and that those two certain deeds by Mathew Feurst and Mary Feurst to Mathew C. Feurst, the one for the East half of the Southeast quarter of the Southeast quarter of Section four, Township eight South of Range four East, Baldwin County, Alabama, and the other conveying the East half of the Northeast quarter of the Southeast quarter of Section four, Township eight South of Range four East, Baldwin County, Alabama, each filed in the office of the Judge of Probate, Baldwin County, Alabama, October 13, 1924, and recorded in Deed book 35 N. S., page 160, were made for the purpose of hindering, delaying and defrauding your complainant out of his debt aforesaid; that the same was made without adequate consideration and that they are void as against the complainants debt and the complainant has this day filed his complaint in the said court praying that said conveyances be declared void, annulled and set aside; and that said lands be subjected to payment of complainants said debt.

Richardson, Reeher & Hall
Attorneys for Compaainant, Joseph Eichberger

Eichberger
vs
Frenst

(1127)

(127)

OK

THE STATE OF ALABAMA } Office of the Judge of
BALDWIN COUNTY } the Probate Court

I, W. D. STAPLETON, Judge of said Court in and for said County, do hereby certify that the within instrument was filed in this office for record on the 30th day of December 1924 at 2:30 o'clock P.M. and I further certify that the same is duly recorded in Record Book No. 2 Judgments Page 127 and duly examined.

Witness my hand this 3rd day of January 1925

[signature] Judge of Probate Court.

By ....

W. C. Beebe
Rec'd ...

12/30/24 2:30 P.M.

Second Amendment to Bill.

JOSEPH EICHBERGER,

Complainant,

-vs-

MATHEW FEURST, et al.,

Respondents.

IN EQUITY.
IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA.

SECOND AMENDMENT TO BILL.

Comes now the Complainant, and by stipulation of counsel, leave of Court being therein expressly waived, amends the amended bill of complainant as follows:

By adding to Paragraph Two of said Bill as heretofore amended, the following:

"And Complainant further alleges that hearings were held by the arbitrators after said April 1st, 1924, in which the Respondent Mathew Feurst participated and at which he was present in person and represetned by counsel, and that said Respondent made no objection to the action of the arbitrators in assuming to act and continue in authority as arbitrators after said April 1st, 1924, but on the contrary, said Respondent continued to participate in said arbitration after said date and made no objection that the award was not made on April 1st, 1924, as agreed, until long after said award was finally rendered by the arbitrators on September 18, 1924, and Complainant alleges that by reason thereof, said Respondent waived his right to object that the award was not rendered within the time limited in the agreement to submit to arbitration."

Lloyd Mahaffey.
Solicitor for Complainant.

BAY MINETTE, ALA., July 3 1931

I M Parkinson

Our Ck

IN ACCOUNT WITH

G. W. HUMPHRIES

JUDGE OF PROBATE

BALDWIN COUNTY

Please Return Bill With Remittance

			Privilege Tax	Rec. Fee	Total
30	Deed Rec. Mort. from	to		80	

Paid
7/6/31
G W Humphries Judge
by Thelma Cox

IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA IN CHANCERY.

JOSEPH EICHBERGER)
)
Complainant.)
)
-vs-)
)
MATHEW C. FEURST, et al)
)
)
)
Respondents.)

THIRD AMENDMENT TO BILL.

Comes now the respondent and by leave of court heretofore granted amends his Bill of Complaint in the following particulars.

1. By adding to Paragraph Second of said Bill as last amended the following: that a true copy of said award was made and signed by the said arbitrators, P. J. Cooney and A. W. Keller and on September 18, 1924 the same was delivered by the arbitrators to Mr. John Stelk, the attorney for the respondent, Mathew Feurst, as required by said agreement to arbitrate herein before mentioned.

2. By striking from said Bill the name of Josephine Eichberger as a party complainant.

3. By striking from the Seciond Amendment to the Bill heretofore filed the words "present in person and" so as to make said amendment read as follows:

"And complainant further alleges that hearings were held by the arbitrators after said April 1, 1924, in which the respondent, Mathew Feurst, participated and at which he was represented by council, and that said respondent made no objection to the action of the arbitrators in assuming to act and continue in authority as arbitrators after said April 1, 1924, but on the contrary, said respondent contined to participate in said arbitration after said date and made no objection that the award was finally rendered by the arbitrators on September 18, 1924, and complainant alleges that by reason thereof, said respondent waived his right to object that the award was not rendered within the time limited in the agreement to submit the arbitration."

Solicitor for Complainant.

Copy
of
3rd Amendment

First Amendment to Bill -

JOSEPH EICHBERGER, Complainant, -vs- MATTHEW FEURST, et al, Respondents.	)	IN EQUITY IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA.

Comes the Complainant and by leave of Court amends the bill of complaint as follows:

FIRST: By adding to paragraph two of said bill the following:

"Said award was not rendered by April 1, 1924, the date fixed in the agreement of submission because of the desire of the arbitrators to give both sides ample time to present their cause and because said extension of time was made by the arbitrators at the request of respondent Matthew Feurst."

SECOND: By inserting after the second paragraph of the bill the following:

Second-A: "Complainant avers that even were said award invalid for any reason, that nevertheless the respondent Matthew Feurst was and is justly indebted to Complainant in the sum of Two Hundred Twenty-nine and 73/100 Dollars, together with interest, after the allowance of all proper credits, which amount is still due and unpaid, and which sum he will be unable to collect if Respondent Matthew Feurst is enabled to dispose of his entire holdings in Alabama as he seeks to do by the aforesaid deed to his son."

Solicitors for Complainant.

LLOYD A. MAGNEY
ATTORNEY AND COUNSELLOR AT LAW
FOLEY, ALABAMA

July 15, 1931.

Hon. F. W. Hare,
Judge of the Circuit Court,
Monroeville, Alabama.

RE: EICHBERGER VS FEURST.

Dear Judge:-

I have your letter of the 13th and enclose herewith copies of the first amendment to the bill of complaint and the answer of the respondents.

I am sending duplicates of these papers to Mr. Roach and asking him to write you authorising the substitution of these copies for the original papers which are missing from the files.

Very truly yours,

Lloyd Magney

lam/lff
2 encl.

Answer to Amended Bill.

JOSEPH EICHBERGER and JOSEPHINE EICHBERGER, Complainants,	)	IN THE CIRCUIT COURT OF
VS	)	BALDWIN COUNTY, ALABAMA
MATHEW FEURST and MATHEW C. FEURST, Respondents	)	IN CHANCERY.

Come the defendants and for answer to the Bill as amended say as follows: -

The alleged agreement for arbitration was not only between the Complainant and Respondent but was also joined in by Josephine Eichberger, the wife of the Respondent, and the Respondent denies that there ever was any agreement for arbitration between the said Complainant alone and this Respondent. The award referred to in the Bill of Complaint was one purporting to be rendered in a case between Joseph Eichberger and wife on the one part and Mathew Feurst and wife on the other. Respondent denies that the arbitrators referred to in the Bill of Complaint made any award in any case of Controversy between this Complainant alone on the one side and the Respondent alone on the other.

R. C. Reed

Solicitor for the Respondent

Copy

Answer to Original Bill

Joseph Eichberger Compalinant. vs Mathew Feurst and Mathew C. Feurst Respondents.	IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA IN EQUITY.

Come the Respondents and file this their Demurrer to the Bill of Complaint heretofore filed against them in this Court by the said Complainant, and for grounds of Demurrer assign the following upon each one of which separately the Respondents insist, viz:

1. Because said Bill of Complaint is multifarious in that it seeks (a), to have set aside certain conveyances (b) to establish and define an uncertain or disputed boundary line (c) for an injunction (d), to settle the title to personal property and the Bill shows that these are inconsistent reliefs not growing out of the same subject matter nor founded on the same contract or transaction or related to the same property between the same parties.

2. The indebtednedd claimed by Complainant against the Respondents , Mathew Feurst, is shown by the Bill to be based on an arbitration which the Bill shows on its fact is void and not binding on the said Mathew Feurst in that the written agreement for arbitration made a part of the Bill shows that the parties did not concisely state in writing the matter in dispute between them and which they desired to leave to the determination of the arbitrators.

3. Because the agreement for arbitration made a part of the Bill shows that the award was to be made in writing suscribed by the said arbitrators and delivered to the parties on or before the first day of April, 1924, and the Bill shows on its fact as does the alleged award itself that the award was not made within the period of time fixed by the submission, but was made on September 18, 1924, more than five months after the date fixed by the submission. Therefore the alleged award is not binding on the said Mathew Feurst.

4. Because that there is no Equity in the Bill.

5. Because the Complainant shows in his Bill of Complaint that he has not complied with the award himself but repudiates same in that he claims the sprayer and asks the Court to decree the ownership thereof to the Complainant when the award only gives him a half interest therein.

6. The Complainant has an adequate remedy at Law.

7. The alleged award shows that the arbitrators did not themselves ascertain the boundary line between real estate holding of the respective parties but left this to another whose decision the arbitrators accepted and substituted for their own , contrary to the submission.

8. The Bill asks to set aside conveyances made by one of the Respondents namely, Mathew Feurst, to the other Respondent, namely, Mathew C. Feurst, on the theory that Mathew Feurst is indebted to the Complainant and there is nothing in the Bill of Complaint to show any legal and binding indebtedness from Mathew Feurst to the Complainant existed at the time the Bill was filed.

9. Because that no facts are alleged showing any intention on the part of Mathew Feurst to hinder, delay, or defraud the Complainant by any act alleged in the Bill.

Not waiving the Demurrer hereinabove contained, but insisting therein the Respondents filed the following plea to the Bill of Complaint in this clause:-

For plea to this Bill of Complaint these Respondents say that there was no legal submission to arbitration of the matters in controversy of the said Complaintant and the Respondent, Mathew Feurst, in that the parties did not enter into a written agreement concisely stateing the matter in dispute between them , but on the contrary, on the agreement that was entered into for the alleged arbitration contained this statement as to the matter in dispute between them and no other, viz:- " The parties hereto are unable to agree upon a statement of an account rendering from one to the other, and upon the ownership of a row of orange trees and the disposition of certain personal property owned by them in common and are desirous of submitting their controversy to arbitration. "

And Respondents allege that this is not a concise statement of the matter in dispute between them, but is a statement so general, indefinite and vague, that no issue could be made up thereon, and Respondents further allege that this arbitration based on this written agreement is the foundation of the indebtedness sued on. The said award was not made nor delivered as above specified until September 18, 1924, and that the Respondent, Mathew Feurst, the party to said controversy, repudiated said award and refused to be bound thereby.

Having filed Demurrers and Pleas to the Bill of Complaint,

this clause, now without waiving said Demurrers or Pleas but expressly insisting on same, these Respondents filed the following as their answer to said Bill of Complaint in this cause:-

1. These Respondents answering the first paragraph of the Bill of Complaint admitting all the allegation thereof.

2. These Respondents say that while a so-called agreement to arbitrate was entered into between said Mathew Feurst and the Complainant that this agreement was not in the form as required by Law in that it did not concisely state in writing, signed by the parties thereto, the matter in dispute between them. And further answering said paragraph these Respondents say that the award was to have been made in writing and sibned by the aribtrators on or before the first day of April, 1924, but was not made until Sept. 18, 1924, and that the said Mathew Feurst repudiated the said award and refused to be bound thereby. Respondents deny that Mathew Feurst is indebted to the Complainant in any sum whatsoever; that the said Complainant is indebted to him, this Respondent, in a large sum, to wit; Five Hundred Dollars ($500.00), and that these Respondents have found the utmost difficulty in getting the Complainant to do justice by Mathew Feurst and he has failed and refused to pay his indebtedness to the said Mathew Feurst. Further answer to the second paragraph of the Bill of Compalint says that there has been no correct survey made of the line between the lands of the said Mathew Feurst and the Complainant, but that the line which this Respondent, Mathew Feurst, insisted on is that line which has been agreed on between these parties for years. That the row of orange trees which the Complainant is claiming , was planted out by the Respondent, Mathew Feurst, after the line between the two properties, namely that of the said Mathew Feurst and the Complainant had been distinctly and definitely agreed on between them and the said line is correct and the true dividing line between the two properties.

3. Answering the third paragraph, of the said Bill of Complaint, these Respondents admit that the said Mathew Feurst executed to the said Mathew C. Feurst the deed, copies of which are attached as Exhibited "C" and "D" to the Bill of Complaint, but Respondents deny that the said Mathew Feurst was indebted to the Complainant in any sum whatever at the time of execution of said deeds and deny that there was any purpose on the part of the said Mathew Feurst or of Mathew C. Feurst to hinder, delay or defraud Complainant. The Respondents admit these deeds cover all the real estate of the said Mathew Feurst in the County of Baldwin, and State of Alabama, and admit that the same it worth

Twenty-five hundred Dollars ($2500.00) and perhaps largely more, but deny that the Complainant has any right or claim to the said property not has he any claim against either of these Respondents which would justify this Court in annulling and setting aside these conveyances.

Wherefore having answered said Bill of Complain fully, the Respondents pray to be dismissed with their reasonable costs in this behalf expended.

R.R. Roach.
Solicitor for the Respondent

Answer to Bill

JOSEPH BICHERGER and
JOSEPHINE BICHERGER,

Complainants,

-vs-

MATHEW PUROST and
MATHEW C. PEURST,

Respondents.

IN THE CIRCUIT COURT OF

BALDWIN COUNTY, ALABAMA.

IN CHANCERY.

Comes the defendants and for answer to the bill as amended by the third amendment filed on the ___ day of December, 1930, and denies all the allegations of. The defendants refile to the bill as amended, the answers heretofore filed in this cause.

R. R. Reed

SOLICITOR FOR RESPONDENTS.

In addition to these three Amendments to the Bill, the Complainant made one other amendment, Viz:- That by which Josephine Eichberber was added as a party complainant. She was later stricken out as such party by the third amendment shown herein.

MONROEVILLE, ALA. 192_

M Joseph Eichberger Vs Mathew Stewart, et al
Baldwin Co. Circuit Court
In Equity

IN ACCOUNT WITH

M. R. FARISH
COURT REPORTER

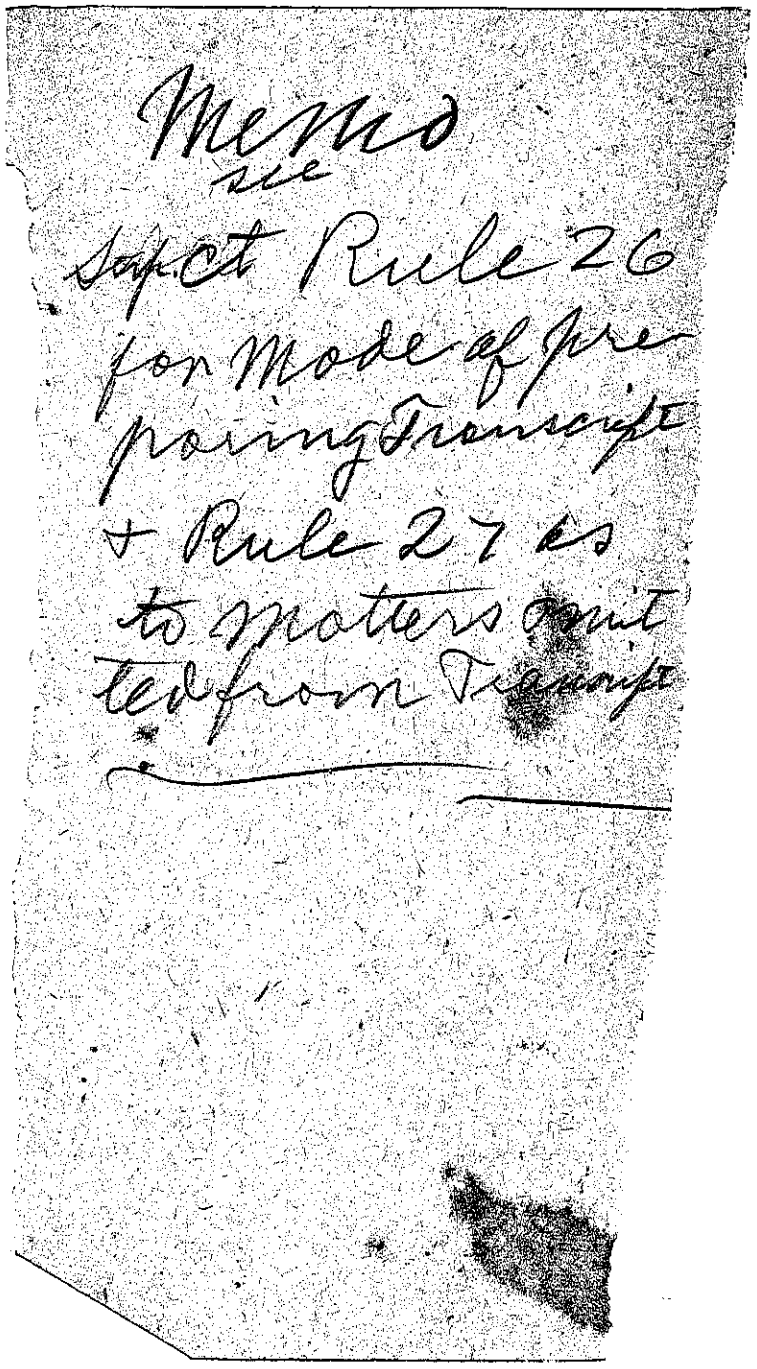
Transcript of testimony taken in Open Court
Paid 3/25/32
M R Farish 20.00

Bills for transcripts due and payable on receipt of same

Eschbeyer
vs
Forest

Bradwin Co

Bill of
M. C. Friel


Memo
re
Supt Rule 26
for Mode of pro
posing Transcripts
& Rule 27 as
to matters omit
ted from Transcripts

THE STATE OF ALABAMA - - - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1931-32.

1 Div. 698.

Mather Burnt, et al

v.

Joseph Richberger,

Appeal from Baldwin Circuit Court,
In Equity.

THOMAS, J.

The suit was to set aside a conveyance alleged to be fraudulent, and to defeat a creditor who had judgment under the written award of arbitrators.

The subject of arbitration and awards under the statute and the common-law are considered in §6156, et seq., Code; Rhodes v. Palmer, 208 Ala. 595; Gardner v. Newman, 150 Ala. 429; Hoffman v. Milner, 142 Ala. 678; Kilgoure v. Hurt, 139 Ala. 557.

The concrete question for decision is thus stated by appellants' counsel:

> "Both parties admit that all the proceedings in this arbitration up to and including the award itself were in accordance with the Statutes of Alabama on this subject, except the complainant claims that he was not required to cause the submission and award to be returned to the Clerk of the Circuit Court of the county in which the award was made, as required by Section 6161 of Code (1923) of Alabama so that it might be entered up as the judgment of that court, as required by Section 6167 of that Code. The respondents claim that this requirement of the statutory arbitration and award law of Alabama, not having been substantially complied with, the award was not final and conclusive, but could be inquired into, as any other question of indebtedness vel non, between the parties thereto. And this is the only question in this case."

The authorities establish:

(1) That "Arbitration as a means of settling disputes and controversies in this jurisdiction is recognized to exist at common law (Walden v. McKinnon, 167 Ala. 291, 47 So. 874, 22 L. R. A. (N. S.) 716), and provided for by the terms of this chapter, and in which the procedure to be followed in arbitration is prescribed. The statutory arbitration extended advantages unknown to the common law as giving the award the effect of the verdict of a jury, and permitting a judgment to be entered in it, dispensing with the common-law necessity of the suit. When the reference to arbitrators is made under the statute, the terms of the statute will be read into the agreement, and it will be interpreted in the light thereof. Tennessee, Coal, etc., Co. v. Roussell, 168 Ala. 436, 436, 46 So. 866, 130 Am. St. Rep. 56; Rhodes v. Folmar, 208 Ala. 595, 597, 94 So. 745; Rayne v. Crawford, 97 Ala. 604, 11 So. 726. For other cases, see 1 Mac. Dig. 697. See also section 6171. * * Statutory provisions in relation to arbitration are to be liberally construed. Tuscaloosa Bridge Co. v. Jemison, 33 Ala. 476." - §6156, Code 1928.

(2) That a valid award of arbitrators, in substantial compliance with the statutory provisions governing arbitration and award, does not become a nullity because suit is brought thereon instead of delivery or filing of the award within the time prescribed, with the clerk of the circuit court as provided by statute, §6161, Code.

(3) That an award of arbitrators which fails of statutory requirements and amounts to a valid common-law award, is final and conclusive between the parties thereto and privies thereof. - Gardner v. Newman, 136 Ala. 522; Shaw v. State, 126 Ala. 80, 84; Sherman v. Stanfield, 60 Ala. 110, 122; Dudley v. Ferris & McCurdy, 79 Ala. 187, 190.

(4) That a court has no authority, merely on motion, to enter up on its judgment, a common-law award, unless by the consent of the parties litigant solemnly given in judicio. - Dudley v. Ferris & McCurdy, supra; Byrd v. Odem, 9 Ala. 755, 766; Martin v. Chapman, 1 Ala. 278.

(5) That a common-law award may be made the basis of an appropriate action thereon. - Lamar v. Nicholson, et al, 7 Porter (Ala.) 108; 5 C. J. 236, §648, note 64.

The several statutes touching the question of arbitration and award are to be considered as one system. And when so regarded, the use of the word "must" in §6157, Code, and the words "may" and "either party may" in §§6161, 6170, Code, respectively, and the express declaration in §6171, Code, that "arbitrations at common law not prevented," demonstrate the legislative intent to confer a privilege only, that was permissive by these terms employed, as in §6161, Code, which declares that such award has the immediate effect of a judgment, under this and

other statutes indicated or to be stated further. - Kilbourn v. Hart, 139 Ala. 667.

Common awards have been enforced by suits thereon: Okun v. Rutledge & Julian K. Co., 94 Ala. 486, 495; Graham v. Woodall, 86 Ala. 313, 314; Payne v. Crawford, 97 Ala. 604, and Anderson v. Miller, 108 Ala. 171, were actions at law on awards; and in Edmundson v. Wilson, 108 Ala. 110, and Black v. Woodruff, 193 Ala. 327, specific performance of an award was had or sought in equity: in Lamar v. Nicholson, 7 Porter (Ala.) 158, 166, there was the rendition of a judgment in the county court upon the return of an award of arbitrators; and Davis v. McConnell, 3 Stewart, 492, a suit in the circuit court to judgment on an award of arbitrators.

And §6169 of the Code is but declaratory of the common-law rule on the subject, -- that awards in substantial compliance with the statute are conclusive and final between the parties and privies as to the "matter submitted," unless the arbitrators are guilty of fraud, partiality, or corruption in making it, and may be enforced by statutory method if complied with, or by the common-law method, as we have indicated. And in Rhodes v. Palmer, 208 Ala. 595, was the declaration, that the foregoing statute was applicable whether the award was made under Chapter 258 of the Code, §§6156, 6169, or at the common-law.

It is only on the ground of failure of statutory provisions as to filing in the circuit court, etc., and the method sought as to its enforcement, that objection is made to the decree

of enforcement. This did not change the binding effect of the award, as to the matter submitted and its conclusion upon the parties and privies under the statute and under the common-law. - Edmundson v. Wilson, 108 Ala. 113; Milhouse v. Hurt, 139 Ala. 557; Collier v. Watley, 130 Ala. 38; Brewer v. Main, 60 Ala. 156; 2 Am. & Eng. Enc. of L. (2nd Ed.) 790.

The relief sought is of the same subject-matter and parties in interest, under the rules for complete relief in a court of equity. The bill was properly filed for setting aside the fraudulent conveyances and for the enforcement of the award. The judgment is, therefore, affirmed.

Affirmed.

Anderson, C.J., Brown and Knight, JJ., concur.

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

1 Div., No. 698,

Mathew Fuerst et al, Appellant,

vs.

Joseph Eichbergen, Appellee,

From Baldwin Circuit Court.

The State of Alabama,
City and County of Montgomery.

I, Robert F. Ligon, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing pages, numbered from one to 5 *inclusive, contain a full, true and correct copy of the opinion of said Supreme Court in the above stated cause, as the same appears and remains of record and on file in this office.*

Witness, Robert F. Ligon, Clerk of the Supreme Court of Alabama, at the Capitol, this the

18 day of Dec., 1931

Robt. F. Ligon

Clerk of the Supreme Court of Alabama.

The Supreme Court of Alabama

October Term, 19 31-2

1st Div., No. 698,

Mathew Fuerst,

et al

Appellant,

VS.

Joseph Eichberger

Appellee.

From Baldwin Circuit Court.
In Eq

COPY OF OPINION

BROWN PRINTING CO., MONTGOMERY, 1929

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

October Term, 1931-2

To the Register *of the* Circuit *Court of* Baldwin *County—Greeting:*

Whereas, the Record and Proceedings of the Circuit *Court of said county, in a certain cause lately pending in said Court between* Matthew Ehrest, *Appellant*, *and* Joseph Eichberger, *Appellee*, *wherein by said Court, at the* —— *Term, 19*—, *it was considered adversely to said appellant*, *were brought before our Supreme Court, by appeal taken, pursuant to law, on behalf of said appellant*:

NOW, IT IS HEREBY CERTIFIED, *That it was thereupon considered by our Supreme Couri, on the* 17th *day of* December *1931, that said* decree *of said* Circuit *Court be in all things affirmed, and that it was further considered that the appellant*, *and* H W French and W. C Stevens *sureties on the appeal* [illegible] pay

the costs accruing on said appeal in this Court and in the Court below

Witness, Robert F. Ligon, Clerk of the Supreme Court of Alabama, at the Capitol, this the 18th *day of* December, *1931*

Robt F Ligon

Clerk of the Supreme Court of Alabama.

The Supreme Court of Alabama.

October Term, 1921-2

1st *Div., No.* 698

Matthew Fuerst

Appellant,

vs.

Joseph Eichberger

Appellee.

From Baldwin Circuit *Court.*
(In Equity)

CERTIFICATE OF AFFIRMANCE.

The State of Alabama,
County. } *Filed*

this 2 *day of* [illegible] *192*[illegible]

[illegible]

BROWN PRINTING CO. MONTGOMERY. 8807

JOSEPH EICHBERGER,

Complainant,

-vs-

MATHEW FEURST, et al,

Respondents.

BRIEF OF RESPONDENTS ON BILL AS AMENDED:-

(1) The bill is multifarious, in that it is the joinder of distinct and independent matters, namely - (1) to enforce an arbitration (2) to establish a boundary line (3) to settle the title to personal property (4) to set aside deeds alleged to be fraudulent.

This cannot be done in one and the same bill.

FORD v. BORDERS, 200 Ala. 70, S.C. 75, So. 398.

(2) The Statute 6158 requires that the parties concisely state in writing, signed by them, the matter in dispute between them. This statement by the parties says:

> "The parties hereto are unable to agree upon a statement of an account rendered from one to the other and upon the ownership of a row of orange trees and the disposition of certain personal property owned by them in common and are desirous of submitting their controversy to arbitration."

What account is referred to?...

What date - what amount?.....

Was it to be an account of Feurst against Joseph Eich-

berger, or one of Feurst against Josephine Eichberger, or one of Joseph Eichberger and Josephine Eichberger against Feurst?

Where was the row of Orange trees?

What row of orange trees was it?

What personal property was it that was to be disposed of?

These questions and others remain unanswered by the submission.

The arbitrators are bound by the terms of the submission.

ANDERSON v. MILLER, 108 Ala. 171.

TENN. C.J. & RY.CO. v. ROUSELL, 155 Ala. 436.

TABOR v. CRAFT, 116 So, Rep. 132.

(3) The submission required the award to be made by April 1st, 1924. This the bill shows was not done. This makes void the award.

ANDERSON v. MILLER, 108 Ala. 178.

T. C. I. & RY. CO. v. ROUSELL, 155, Ala. 446.

TABOR v. CRAFT, 116 So. 134.

(4) AS TO THE EQUITY OF THE BILL OF COMPLAINT - the report of the arbitrabors show they did not proceed in persuance of the submission. This report shows the award was made under a submission between Mathew Feurst and wife and Joseph Eichberger and wife. This is not the submission

alleged in the bill. This submission says the "differences submitted to us for determination", were what they decided. But these do not show what was submitted. Some items were mentioned by the award, but no statement of account was made up or rendered by either the parties or the arbitrators.

The award or report of the arbitrators does not show that they fixed the line so as to see to whom the row of orange trees belonged, but simply that they adopted a survey made by Greenwood, a county surveyor. The arbitrators show they took the surveyors word for it and made that their award.

This was not in accordance with the terms of the submission. It was just about the same thing that was done in the Tabor v. Craft case, cited above.

The award itself shows it was made September 18th, 1924, some five or six months after it was required under the terms of the submission to have been made.

Then the submission required "that said award shall be made in writing, subscribed by said arbitrators, and delivered to the parties hereto." It is not alleged that the award was ever delivered to any of the parties.

The submission required that the arbitrators tax the costs and expenses of the reference, which the award fails to show was done.

Now, as to the allegations of fraud to support the prayer to set aside the deeds; on this point the bill sets

forth no facts, but seems to ask the court to set the deeds aside because the complainants wants it done.

Facts constituting fraud and not simply conclusions of the pleader, are required to import equity to a bill seeking to set a deed aside.

The bill is based on an indebtedness shown by an arbitration. The arbitration being abortive, no indebtedness is shown and for this reason as well as the others, the bill is without equity.

(5)

The bill of complaint is based on an arbitration and award to sustain the alleged indebtedness of respondent Mathew Feurst to complainant, Joseph Eichberger.

As heretofore demonstrated, the arbitration and award are invalid, so no indebtedness is shown. The court, therefore, has before it a bill seeking to set aside Mathew Feurst's deeds because made with an alledged intent to hinder, delay and defraud complainant, a creditor. There being no debt, there could be no creditor to defraud and so the bill falls to the ground.

It is respectfully submitted that the demurrers to the bill of complaint are well taken and should be sustained.

R. P. Coach.
SOLICITOR FOR RESPONDENTS.

I hereby certify that I have this day mailed to LLOYD A. MAGNEY, Esq., Solicitor of Record, a copy of this brief, SEPTEMBER 19th, 1929.

R. P. Roach.
SOLICITOR FOR RESPONDENTS

I hereby certify that I have this day mailed
to LLOYD A. MAGNEY, Esq., Solicitor of Record, a
copy of this brief, SEPTEMBER 19th, 1929.

SOLICITOR FOR RESPONDENTS

)seph Eichberger,
Complainant,)
)
vs)
) In the Circuit Court of Bald-
win County,Alabama,In Equity.
Mathew Fuerst,)
Mathew C.Fuerst,)
Respondents)

Respondent's Brief in reply to Brief of Complainant,mailed to the Court July 1st,1931.

While this case has been long drawn out and has doubtless become tire-some to the Court,it is hoped that some compensation for its length is found in the fact that now at last indeed one simple and direct issue has been reached and both parties concur that it is the issue,one taking one side of it and the other the other side.

Taking the language of the Complainant,in his last brief,

> "Given a valid statutory award does it lose its character as such because suit is brought on it instead of delivering it to the clerk to be entered up as a judgment?"

We understand this to mean "valid" in all respects,except that the successful party failed to deliver the submission and award to the Clerk of the Circuit Court for record as required by Sections 6157 and 6161 of the Code of 1923 of Alabama,

Respondents state now that this is the issue. They so stated in their last Brief filed June 27th,see Page 2 of that Brief. And in the Breif now being answered the Complainant says not a word about enforcing the award sought to be sued on,as a common law award. He has evidently seen the inconsistency of seeking to enforce the award both as a statutory award and as

a common law award,and is now standing squarely on a submission under the statute of Alabama.

With this issue clearly before the Court,let us see where it places the Complainant. He quoted rather copiously from the opinion of Mr Justice McClellan,in the case of T.C.I.& Ry Co. vs Roussell 155 Ala.445,but it is significant that the quotation stopped just where it did. It will be noted that the quotation from that decision was to show that the court was pointing out the fact that in that case/had the parties used in the agreement to arbitrate, the language "by arbitration in accordance with the statutes of Alabama",and thus to argue that in the absence of this language in the submission in the case at bar,the parties were not in this case bound to a statutory arbitration.

But it will be noted that the Complainant has already admitted that this proceeding is under an agreement for an arbitration under the statute of Alabama. He kept amending his bill until he brought himself and the Respondents down to that issue and that alone. But what does the Supreme Court say,speaking through Mr Justice McClellan,in addition to the part of that decision quoted on Page 5 and ended at top of page 6 of his brief? He Says "and hence,if conditions of substance were not complied with,essential to be averred in the pleas to render them immune from attack,the award was abortive,whether as a ground of action thereon or defense as is here attempted".

The submission in that case was under the statute,and it is admitted and insisted by both parties in this case that the same is true,so how can Complainant escape the conclusion reached by the Supreme Court in that case that the Award is abortive?

Complainant admits that in the case at bar,he,the successful party did not return the award to the Clerk for record. In the case quoted from, the lower court had sustained a demurrer to pleas 4 and 5 on the ground that the pleader had alleged that"the arbitrators were sworn according to the laws" and it was contended that the submission being under the statute,this allegation did not mean statute law. But the Supreme Court held that the word"law" embraced Statute law,and held the pleas good,remarking that,"Of

> "Of course,to support,in proof,these pleas in this respect,it is essential to adduce testimony tending to show that the arbitrators were sworn as required by the statute."

So the conclusion is that the"Condition of substance" referred to in the Court's Opinion,that might or would make the"award abortive",was a failure on the part of the defendant in that case to prove the arbitrators were sworn as required by the statute. Complainant seems to argue that,although the failure to prove that the arbitrators were sworn in that case,would be a failure on a condition of substance,yet in this case,to admit that the submission and award were not returned to the clerk of the court, is an admission of something not of substance.

By this Complainant takes the position that an unrecorded award,is a judgment of higher sacredness than a judgment rendered in the regular course of proceedings of a duly constututed lawful court like the Curcuit Court of Baldwin County. It is almost too well known to require any assertion on the part of these Respondents,that"The judgments of Courts of record can only exist in the records of the Court.They can not exist in parol,or be proved by parol evidence".Stewarts Adm'r vs Stewart's Heirs.31 Ala.214.It is remarkable that anyone should contend that a paper,never returned to the Circuit Court for record and

never recorded in that Court,could have the force and effect in evidence,and in all other substantial particulars,except the issuance of execution thereon,that a regular judgment duly recorded on the records of that court has in law. It is submitted that the mere statement of such a proposition is to refute it.

A solemn judgment of a duly constituted court,until entered on the records of that Court is abortive and of no effect.

Hall's Adm'r vs Hudsons Adm'r 20 Ala.285.
Perkins Vs Perkins 27th Ala.479
Campbell vs Byers et al 189 Ala.307-313.
Lewis vs Martin 210 Ala.401-409-10.

The Complainant's insistance that an award made under a statutory submission,though not returned to the Circuit Clerk for record and not recorded,is of higher sacredness than the judgment of the same Circuit Court in other cases regularly before it,is refuted by the decision of the Supreme Court in a case cited and relied on by the Complainant,viz: Black vs Woodruff 193 Ala.335. The Court says in that Case,"But evidently an award is not as sacred against inquiry as the judgment or decree of a court," The attention of this Court is directed to that case as showing the utter inconsistency of trying to hold an award not entered of record,as of higher validity and probative force than the judgment of a Circuit Court or any other Court of Record. No matter how regular the proceedings in a case in this Honorable Court,if these proceedings do not culminate in a judgment or decree duly made and entered on the minutes of this Court,this court itself will never consider any action taken in such case as evidence of a debt or for any other probative purpose.

The Complainant goes further, and asks the Court to interpret the word "May" in Section 6161 of the Code to be permissive in its

force and meaning and not manditory.We cheerfully accept the guage on this point.

This word("May") is construed to mean shall whenever the right of the public or third personsdepends upon the exercise of the power or performance of the duty to which it refers.

Montgomery vs Henry 144 Ala.629-634.
Ex parte Cincinnati etc Ry Co.,78 Ala.258.
Supervisors vs United States 4 Wall.446.
Smalley vs Paine lo2 Tex.304,305,116 SW 38
Lapsley vs Merchants Bank 105 MO A.98,78 SW lo95,1096.

It is submitted that in this case at bar,if Eichberger,the Complainant is to have a judgment"conclusive between the parties"and such award judgment is to be"final"as said in section 6169 of the Code,then Fuerst has rights in the premises. He has the right to stand on the whole statute which Eichberger has invoked in part. For Eichberger to secure a contract judgment under the statutory laws of Alabama that would be conclusive and final against Fuerst a condition precedent to such judgment,is made by that same statute that Eichberger shall return the submission and award to the Clerk of the Circuit Court for the recording of these papers therein. If Eichberger wanted to waive all rights he had under the award,then he would be permitted to refrain from returning these papers as required by this statute.But Eichberger was no more required to return the award to the Clerk for record that it might become a binding judgment,than was Eichberger required to submit the matter between him and Fuerst to arbitration under the statute,but having done the one,he has no option but to do the other,and this because the right of Fuerst comes in just here under the statute,to the effect that as a condition precedent to a conclusive and final judgment,as evidence of indebtedness or for any other purpose,the submission and award must be so returned,and if Eichberger fails to do this,he

has no award that will in any proceeding or suit bind Fuerst in any way shape or form.

If the Statute says A may do a certain thing to get a judgment against B,then A maytrefrain from doing that thing,but if he does, refrain,he fails to get the ~~thing~~ judgment.The word"May"in the statute means must,so far as B's rights are concerned.

This is on the familiar principle that parties may make a certain thing a condition precedent to the going into effect any contract into which they may propose to enter. Although the contract after the condition precedent is made,may be signed in due and legal form,if the condition precedent fails the contract falls and is of no force.For a case fought to the very finish,on this point and in which the principle invoked is fully sustained,see the case of Dees & McNeil vs Fairbanks,Morse & Co 126 So 621,622, 624,625.The facts were in that case,which was decided in favor of plaintiff in the Mobile Circuit Court,appealed by Defendant to the Court of Appeals,reversed in that Court,and on Certiorari to Supreme Court,the judgment of the Court of Appeals was reversed, then decided in favor,by the Court of Appeals,on mandate of supreme Court,of plaintff Appellee,then taken back to Supreme Court by Appellant,and there again decided adversely to Appellant and then Appellant made a motion for rehearing in Supreme Court which was overruled,that Fairbanks,Morse & Co.,had sold to Dees & McNeil a crude oil burning engine. In order to induce the signing of the contact,the agent of the seller,represented to the buyer that the engine was in good running condition. This induced the signing of the contract. It turned out that the engine had a latent defect caused by faulty construction,which caused it to be not in good running condition. Neither party knew of this defect at the time

the contract was made,but the Court held that since it was a condition precedent to the making thereof,the buyer had one of three rights,either to rescind the contract,or,affirming it,to recover damages for the injury,or insist on it as a matter of defense to an action founded on the contract.

The Complainant seems not to be much impressed with decisions in other jurisdictions to the effect that the faiure to return to the Clerk of the Circuit Court the submission and award for record is fatal to the award for any purpose,and concludes his dissertation on these decisions by by the remark that he"finds himself strangely content to be defending a position in accordance with the weight of authority and which the Supreme Court of Alabama approves".Then he cites Lamar vs Nicholson 7 Port.158. Strange to say,that when you read that case,you find it an authority for the insistance of the Respondents in this case. That was decided to be a common law award,and that as such it might be the basis for an action.But it is further on said by the Court,"An award,where the submission has been made pursuant to the statute,is a warrant for the judgmant of the Coubt,quite as much so,as the verdict of a jury would be; and like the latter,must be followed by the judgment,both as it regards the amount and the parties charged." It is readily seen that the only thing that the Supreme Court of Alabama,approved in this case is that an award,under the common law proceeding,might be made the basis of an action,but this is not such a proceeding; it is one admitted by both parties,and sustained by the facts,to be a submission for arbitration under the statute of Alabama,and that was the kind of award the parties contracted for and bound themselves to. The Complainant has not cited one single decision,to the effect that where the facts such as are in this case presented,the Supreme

Court has held the award,good for any purpose.An examination of every case cited by him on this point,has demonstrated that the point was not raised,if the award indeed was not returned to the Clerk as required,or that there is nothing to show whether it wa so returned or not.Neither does the Complainant show in what particulars the statutes of other states from which the decisions cited by Respondents,differ from the statutes of Alabama.It seems to be admitted by him that these other states require the award in order to become conclusive on the party against whom rendered, must be returned to the Clerk and recorded. This is exactly what the law of this state requires, and this being true,the decisions of the other states are in point and while,of course,not claimed to be binding on the Courts of this State,are persuasive to the effect,that on like facts,the Courts of this State would doubtless see fit to follow the decisions of these other states. That decisions of other states are of value in Alabama,is attested by the large expense the lawyers of this State go to in order to get before them thse outstate decisions. And further,should one go to our Supreme Court library,he would see the books containing the decisions of all the States of the Union and some foreign countries,and the decisions of our own Supreme Court and Court of Appeals are teeming with citations to sustain the rulings in those Courts on like questions.

The aim of the whole Statutory proceeding on arbitration and award is that an award may be made for the one purpose of having it, in case it is not performed in ten days,become conclusive as a judgment of a court by returning it to the Circuit Clerk for record. The Complainant cites the Court to a number of cases where the award though returned to the Court,is refused record and is stricken from the files because it departs from the Statutory plan in one small

particular,perhaps some preliminay,such as arbitrator substituted but not in exact accordance with Sec.6160,or that no copy is delivered to one of the parties as agreed in the contract. These one would think,might,under the rule that courts favor arbitration and encourage settlements of controversies by this means,be over looked,but not so.If departures from the statute even in these preliminary ways,the Courts refuse sanction.But now we come to a departure from the main and primary purpose,that of having a conclusive and final judgment by having the award returned to the Clerk for record,and,Complainant in utter disregard of the authorities cited by him on these other points of departure,insists that this Court hold this departure on the part of the Complainant as of no consequence,asks the Court to just please overlook it,and say that,although the statutory submission was had,and all the proceeding up to the return of the submission and award to the Clerk were in accord with the requirements of the statute,and the contract for arbitration was under the statute,the failure of Complainant to comply wi with the statute in its most important and vital particular,is a matter of no moment,and asks the Court to treat the award,as just as conclusive against the Respondents as if the Complainant had carried out his contract in this most vital particular. We submit that the Complainant is submitting a paradoxical request,one in which he asks the Court to enforce the statute when it runs in his favor and to disregard it when it runs contrary to his interests.

The Complainant rather seems to discredit the argument of the Respondents made in their brief of the 27th of June,by saying the Respondent Mathew Fuerst could have filed the award himself if he wanted to Appeal. The word "may" in that statute,6170 clearly is per-

missive,because it involves the rights of no one other than the Respondent,Mathew Fuerst. And for him to exercise the power to appeal by first returning the submission and award to the Clerk of the Circuit Court,would be for him to impart conclusiveness and finality to Complainant's award,which but for this act in so returning it,the award would not have. So while the appeal statute does permit the unsuccessful party to return the awards to Circuit Clerk for record,this in no way militates against the insistance,that the susuccessful party practically cuts off the right of appeal on the part of the unsuccessful,by refraining from filing the submission and award with the Clerk as required. It would be lkie the defendant being compelled to sue himself in a Circuit Court,in favor of a plaintiff who unwilling to sue,is given a judgment,so that the defendant,who has brought the judgment on himself may,have the privilege of appeal to Supreme Court from that Judgment.There might arise of Course,an award where under it the unsuccessful party might conceive himself to be benefitted by an appeal and in order to get that benefit might return the award to the Clerk,but that is not this case. Fuerst alleged and proved that he from the start, would not abide by the award. That it was unf fair and unjust. This was notice to Eichberger that if he would bind Fuerst by a statutory award judgment,he must comply with the statute and return the papers to the Clerk of the Circuit Court. But he chose not to do this.He comes into this court,and says do for me what I had a right to do for myself,but did not do,namely treat this award as binding and conclusive on Mathew Fuerst,and cut him off from the right to be heard in his defense,by showing the truth of the case.

It is submitted that the Court will not aid him in this injustice. It is clear under the evidence of A.W.Keller,a witness twice ex-

amined by Complainant,that the arbitrators did not go to the orange orchard,to see anything about its condition.Keller says this they did not do because it was a year after the work was to have been done,and to have gone would have furnished the arbitrators no evidance of its condition at the time in question.Not so,the submission to arbitrate shows it was made in February 1924,and the proof shows the contract for the work was to have been performed by Eichberger in 1923. The condition of the ground and the trees would have spoken volumes to the arbitrators,and they could have seen then,in the winter,when no change in the trees and no subsequent plowing of the ground,that the contention of Eichberger was true or false. They chose not to do this. In fact the only thing we have to show Fuerst had anything to do with the case is he had a lawyer,who was so busy he had to let the matter drag along from February to September before he could find time to give it any attention. Fuerst was never present.We have nothing to show that he ever had a witness in his behalf. All of which goes to show that it would be as we submit,very unjust, to permit Eichberger to close the mouth of Fuerst,by an award not in compliance with the statutory requirements,under which by the contract of the parties,the award was to be made.

It is therefore,respectfully submitted that the prayer of the Bill of Complaint should be refused and the Bill dismissed.

Respectfully Submitted,

July 4th,1931 R. T. Roach

Copy mailed this day to Lloyd A.Magney,Esq'r,Solicitor of record for Complainant.

R. T. Roach.
Solicitor for Respts.

JOSEPH EICHBERGER,

COMPLAINANT,

VS

MATHEW FEURST and
MATHEW C. FEURST,

RESPONDENTS.

NO._____

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA

IN EQUITY.

BRIEF FOR RESPONDENTS ON FINAL SUBMISSION

Since the last amendments to the bill and answer, there is only one question left in this case, that is; Was the award in this case made substantially in compliance with the provisions of the Code Chapter on arbitration and award, that is, Chapter 258 of the Code? The complainant contends that it was so made, and the respondents contend that it was not so made.

In support of respondents' contention, it is submitted as follows:-

Said chapter in the Code on arbitration and award makes a complete Statutory System. Section 6157 of that Chapter says:

> "When no suit is pending, the parties to any controversy may refer the determination thereof to the decision of arbitrators, to be chosen by themselves; and the award made pursuant to the provisions of this chapter must be entered up as the judgment of the proper court, if the award is not performed."

Section 6161 of that Chapter is as follows:-

> If the award is not performed in ten days after notice and delivery of a copy thereof, the successful party may, if a suit be pending, cause the award and the file of papers in the cause to be returned to the court in which the suit is pending, or, if no suit is pending, cause the sub-

> mission and award to be returned to the clerk of the circuit court of the county in which the award is made, if for the payment of more than fifty dollars, for the delivery of specific property, or to do or omit to do any particular act; if for fifty dollars, or less, then to a justice of the peace of the county; and, in either case, such award has the force and effect of a judgment at law, upon which execution may issue as in other cases."

The particular in which the respondents contend that the proceedings in this case depart from the Statute is one, namely:-

That the successful party did not cause the submission and award to be returned to the clerk of the Circuit Court of the county in which the award was made, therefore, the said award was not entered up as the judgment of that court.

The submission, that is, the contract for arbitration, signed by the parties in this case, contemplated a Statutory award.

To demonstrate this, examine the submission as shown by Exhibit "A", made a part of the bill of complaint. Section 6158 of the Code says:

> "The parties must state concisely, in writing, signed by them, the matter in dispute between them."

This the court has held that the parties did. See the ruling by the court on the respondents demurrer raising this point. Rulihg on demurrer filed October 2nd, 1929.

Then, we find the Statute, Section 6158 of the Code, says the parties must state that they desire to leave the de-
~~tails~~ Circuit of the matters in dispute between them to certain per-

sons, naming them as arbitrators; all this was done almost in the language of the Statute. The proceedings throughout before the arbitrators followed the requirements of the Statute, Section 6155.

In case of doubt as to whether an award is under the Statute or the Common Law, it is held in 5 C. J. page 41, that:-

> "When on its face, the contract may be regarded as providing for either a statutory arbitartion or an arbitration at common law, it should be referred to the statute."

But this is not a case in which there is any doubt. The whole proceeding up to the rendering of the award was manifestly statutory, but right here it falls down. It appears by the submission and the award itself that the parties intended to be bound by the award only in case the said arbitration conformed to the statute.

5 C. J., page 237, Section 645.

A common law award differs from a statutory award in a great number of particulars.

It is said in Dudley v. Faris & McCurdy, 79 Ala., 189-190, "There are two kinds of arbitrations and awards recognised of force in this state - the one authorized and regulated by the statute and the other governed by the rules of the common law. In many respects they are essentially different; in others, closely analogous. These points we will not stop to discuss, except in one particular. It is only an award which is made in substantial compliance with the provisions of the statute, or a statutory award, which the law makes it compulsory on a judge or

chancellor to enter up as the judgment of the proper court, if the award is not performed within a specified time, - Code, Section, 3537.

A court has no authority to enter up as its judgment a common law award."

In a case in which a bill was filed seeking the specific performance of an award, the court says, "the submission was of matters in dispute, not involved in any pending litigation, settlement of which is provided for by arbitration under Section 3222, of the Code; and, the submission was entered into in writing, duly signed by the parties in interest, fully in accordance with said Section of the Code".

Edmondson v. Wilson, 108, Ala. 120.

In the same case, the court said further, "The award, when legally made, is the judgment of a court constituted by the parties themselves, and cannot be impeached except for reasons such as are specified in the statute; and, like judgments of other courts, all reasonable presumptions are to be made in its favor". S.C. page 121-122.

We submit, therefore, that the submission to the award, and the proceedings looking to the award and up to the award itself, were for a statutory and not a common law award. In other words, the contract of the parties provided for a complete statutory award, amd this the complainant concedes and insists on as true. See page 9, of his brief of May 4th, 1931.

But the failure to comply with the statute by the successful party, returning the award to the clerk of the circuit court of Baldwin County, Alabama, the county in which the arbitration was held, is fatal to the award and it looses its character as such and cannot be declared on as a common law award.

The authorities cited by the complainant, insisting that suits of one kind or another are brought on an award without first having it entered up by the clerk as a judgment, are not in point.

We will now consider these decisions:-

He first cites Odom v. Rutledge, J. R., Co., 94, Ala., 488. This was not a suit on an award at all. It was a probate case to condemn a railroad right-of-way, the railroad thereby repudiating the award, and joined with this probate case was a suit by the railroad company to recover a penalty provided by the submission to be made by the party who failed to carry out the award. Neither party was repudiating the award in a direct sense, but both parties were in a sense standing on it. There is nothing in the case to show whether the award had been returned to the circuit clerk for record.

The next case complainant cites is Graham v. Woodhall, 86 Ala., 313. We find in this case nothing to indicate whether the award had ever been returned to the circuit clerk for record, but we do find that a plea impeaching the award was held good.

Complainant next cites Payne v. Crawford, 97, Ala, 604. There is nothing in this case to indicate whether this award was or was not returned to the circuit clerk for record. It was, strictly speaking, a common law award, and the case was an action of ejectment, and therefore nothing to indicate that the court ruled on the point insisted on by complainant in the case at bar.

The next case cited by complainant is Anderson v. Miller, 108 Ala., 171. In this case, it was an action on the award, but it is not shown whether the award was returned to the circuit

clerk for record as required by the statute, but it does appear that the award was held insufficient because a copy thereof was not delivered to the parties, as provided in the submission, and the defendant was allowed to show the facts.

The next case cited by complainant is Edmondson v. Wilson, 108, Ala., 118. This, like his other citations of authorities does not show whether the award had been returned to the circuit clerk for record as required by the statute, but from a portion of the opinion already quoted, which will bear repetition because so much in point, namely, "The award, when legally made, is a judgment of a court, constituted by the parties themselves, and cannot be impeached except for reasons such as are specified in the statute; and like judgments of other courts, all reasonable presumptions are to be made in its favor", we conclude that the award had been duly recorded and had become such a judgment as the court approved in the above language. In the last case cited by complainant, that of Black v. Woodruff, 103 Ala, 327, we find a case not in point at all because it is declared by the court that it was a common law award. It is nowhere stated that the parties had agreed to a statutory award, and it was further declared in the course of proceedings that the award was void and could not be specifically enforced. We find also that the correctness of an award may be attacked in a proceeding for its specific enforcement, and such defence need not be brought forward by a cross bill. This authority is more of an authority in favor of the respondents than it is in favor of the complainant.

It is respectfully submitted therefore, that none of the authorities cited by the complainant to sustain his insistance that a statutory award not returned to the circuit clerk

E.M.reco

for record as required by the statute can be made the basis of a suit of any kind for its enforcement.

Complainant goes on to say, "Indeed, it is not reasonable to suppose that the way provided by the statute was intended to be the only way a valid award could be enforced, as in many cases it would amount to a substantial denial/relief. The present case is a perfect example. Respondent admits that he had deeded away all his property in Alabama, and to enter up the award to have the effect of a judgment on which execution might issue would not help complainant a bit. These fraudulent transfers must be set aside and complainant properly sues to have that done, and have his award enforced, all in one action."

In thus arguing the complainant overlooks the whole chapter on"Creditors Bills". This is chapter 278 of the Code. This chapter provides for creditors bills to enforce collection of judgments and also to set aside conveyances by a creditor without a lien, and for bill of discovery by creditors, and provides for orders and decrees (Section 7345) as may be necessary and proper to reach and subject the property fraudulently conveyed.

The trouble with the complainant throughout is, that he does not seem to grasp the idea that in order for his award to be any evidence of an indebtedness when the contract for submission to arbitration provided for and contemplated a statutory award, is that it was necessary for the complainant, in order for his contract judgment to have any force or effect, it must have been completed by returning the submission and award to the circuit clerk as required by the statute, and if he has not done that, he has no evidence of an indebtedness of any sort on which to file a creditor's bill to set aside a conveyance, even though, had there been a debt, the conveyance might be said to be fraudu-

lent. No conveyance can be set aside by a party who has no debt against the grantor in the conveyance. In the case at bar, there are two parties respondent, one the grantor in the conveyance, and the other the grantee. Certainly no one would contend that the grantee in the conveyance could be bound by an award arrived at under a contract of submission for a statutory award, when the statute had not been complied with by having the submission and award returned to the circuit clerk for record. It is held in the case, Deposit Bank of Frankfort, v. Caffee, et al, 135 Ala. 208, as follows:

> "In order for a creditor to maintain a suit in equity to set aside a conveyance as fraudulent, whether it be constructively or actually fraudulent, there must be shown the existence of a debt due the complainant for the payment of which, except for the conveyance, the property transferred could be made liable to creditors; and in such suit, the grantee in the conveyance must have an opportunity to dispute the debt, and may plead any defense, not merely personal, which the grantor or debtor could have made against it."

The respondents have never contended that the complainant, if he had have returned the award to the clerk for record, would have only one remedy for its enforcement; he would have all the remedies for its enforcement that any judgment creditor would have, and he, like any other litigant who might bring a suit on a claim, and pursue his litigation to the point where he might get a judgment, but if he stopped there without getting a judgment, or if after getting the judgment announced by the court, he failed to have it duly spread upon the minutes of the court, he certainly could not have any such proceedings leading up to the point where a judgment might have been rendered used as evidence of either a judgment indebtedness or any sort of indebtedness. The statute requires judgments to be entered of record to have any force, "A judgment is admissable between any parties to show the fact of the

rendition thereof; between parties and privies thereto, it is conclusive as to the matter directly in issue, until reversed or set aside." Section 7700, of Code 1923.

The complainant lays stress on the word "made", as found in Section 6169 of the Code. This section is preceeded by the entire statutory structure creating arbitration and award under the statute. It is followed in that chapter by only two other sections, namely, 6170, providing for appeals to the Appellate Court, and 6171, arbitrations at common law not prevented. So the word "made" as found in section 6169 has reference to all that goes before in this chapter on arbitration and award, and to say that it doesn't embrace sections 6157 and 6161, is to take a position absolutely untenable when applied to the construction of statutory law. "Made" either embraces all of the requirements of the chapter, or it does not have any meaning whatever. If any particular portion of the law might have been said not to be included in the meaning of that word, it certainly would not be held to exclude the most important provisions of the whole chapter. So long as the submission and award are not returned for record to the circuit clerk, the award is a mere scrap of paper, having no dignity and representing nothing except an abortive attempt at a statutory arbitration and award.

But, complainant goes on to show that he is not so sure that his statutory proceedings for arbitration are all right without complying with that part of the statute providing for the submission and award to be returned to the circuit clerk; but goes on to insist that even though it is not in substantial compliance with the statute, because not returned to the circuit clerk, it thereby becomes a common law arbitration and award, and

it can make no difference in complainant's rights, if it is merely a common law award.

In taking this position, the complainant simply disregards the contract charagter of the proceeding on which he is basing his bill of complaint. All through the citations of authority that complainant seems to stand on, runs the thread that the award is a contract judgment. Numbers of authorities in the books are to the effect that the award must be within the terms of the submission, and over and over again, it is held that the submission is a contract, and unless the contract is carried out in accordance with the statutes, that the award is of no force and effect. It is held in many, and it is submitted, the best jurisdictions, that it is the law, "That where it clearly appears, either by express stipulation or otherwise, that the parties intended to be bound by the award, only in case it should conform to the statute, then, if it fails to comply with the statute, it cannot be enforced at common law, because to do so would change the contract of the parties". 5 C.J. 236, Section 645.

In the case of Erie Telegraph & Telephone Co. v. Bent, 39 Fed., 409, a case decided by the circuit court of the United States, for the District of Massachusetts, it is held, "No action at common law can be maintained on an award of arbitrators, rendered under a statutory submission, which does not comply with the statute". The particular in which the award in that case failed to comply with the statute is stated to be as follows: "The supreme court of the state (Mass.) rejected the award on the ground that it was not returned to the Superior court within the time specified in the submission."

It is held in a Massachusetts case, Deerfield v. Arms, 20 Pickering, 480, 32 American Decisions, 228, as follows: "Sub-

mission attempted to be made under the provisions of the statute, and providing thereon be entered in the court of common pleas, if, inoperative as a statutory, is not valid as a common law submission to arbitration".

In the case of Holdridge v. Stowell, 40 N.W., 259-261 (Minn.) it is held as follows - after pointing out the distinction and many differences between a common law award and a statutory award, the court says:-

> "From the time of filing the award, the proceeding is pending in and under the supervision and control of the court, which may vacate the award in certain cases, and in others modify or correct it, and as the statute seems to comtemplate, may re-commit it to the arbitrators, and the court enters judgment on the award, and the judgment will then stand as though entered in an ordinary action. The right secured to the parties to have these requirements of the statute complied with, and to have the results which it attaches to the submission, is important. It may have been the sole inducement which led to the submission, rather than have the controversy left to an ordinary action. Where it is clear that the parties intended and supppsed they were making a submission securing it, to hold them to a mode of submission which does not secure it, would surely be to annul the contract they have intended to make, and substitute in its place a new and different one. The decision that the award cannot stand for any purpose was correct".

Then, in a California case, Williams v. Walton, 9 Cal. 143-147, the court said:

> "When parties expressly stipulate to submit their matters in controversy in a special statutory mode, we have no right to infer that they intended to be bound at all, unless the mode stated was sutstantially pursued. A common law submission is a very different matter from a submission under our statute. In the later case the proceeding is in court, the arbitrators are under its control, and the remedies of the parties much more simple, direct, and efficient. * * * * They evidently intended a proceeding in court, where each party could avail himself of all the remedies allowed by the statute."

See also the following cases:

Colo. Hepburn v. Jones, 4 Colo. 98.
Bash v. Van Osdol, 75 Ind. 186, Healy v. Isaacs, 73 Ind. 226, Anderson v. Anderson, 65 Ind. 196, Boots v. Canine,

58 Ind. 450, Shroyer v. Bash, 57 Ind., 347, Estep v. Larsh, 16 Ind., 82, Francis v. Ames, 14 Ind., 251, Coates v. Kaiger, 14 Ind., 179.

Semmes v. Banter, 9 Ky. L., 286.

Sargent v. Hempden, 32 Me., 78.

Deerfield v. Ames, 20 Pick. 480, 32 Am. D., 228.

Holdridge v. Stowell, 39 Minn., 360, 40 N. W., 259.

Benjamin v. Benjamin, 5 Watts & S., 562, 64, (Penn.) Tacoma R. etc., Co., v. Cummings, 5 Wash., 206, 31 P. 447, 33 P. 507.

Morse Arb. & A., page 48.

All these citations are in harmony with the Alabama law on this subject, and there is no case more directly in point in Alabama, than the case of Wilbourn v. Hurt, 139 Ala., 557, cited by complainant, and with the page long quotation from the opinion. This case is too long to be made the subject of a discussion in extenso. The facts were in that case, that an arbitration in an amount not exceeding fifty dollars ($50.00), and the award was filed and entered up by the Justice of the Peace, as the judgment of his court. The losing party attempted to take an appeal to the circuit court, and Mr. Chief Justice McClelland, in an eight page decision, held that no appeal could be taken in such a case to the circuit court because none was provided for. And, he uses this significant language, in binding the parties to the statutory methods including the return of the award to the court.

> "When the award is upon a submission of a controversy which is not the subject of a binding suit, appeals are limited to such only as are returnable to the circuit court. In such a case, returnable to a justice court, no appeal is allowed at all".

Now, to apply this to the case at bar. The parties had entered into a statutory submission to arbitration. The amount

involved was such as to require the submission and award to be returned to the clerk of the circuit court. In such case, it became the duty of the successful party to so return the submission and award. Section 6170 of the Code gives the parties a right of appeal to the court of appeals/or to the Supreme Court. By the failure of the successful party to comply with the statute and return the submission and award to the circuit court for record, the right of the respondent to take an appeal is destroyed. This was one of the vital and important rights which the respondent in entering into the contract for submission to a statutory award reserved to himself. And, no sort of argument that the court may disregard that contract, and enforce this award as a common award can be listened to for a moment. He, the complainant, has been standing all along on the terms of his contract of submission, and now he proceeds to kick that out and try to bind the respondents, one of whom had no part whatever in the submission and award, to something done which was not according to the contract, and was therefore wholly without the purview of a binding and conclusive statutory award. And that it was a statutory award, we have complainant's word for it, on page nine of his brief of May 4th, 1931, as follows:

> "On the first proposition, that this is a valid statutory award, substantial compliance with the statute appearing from the record, it will be observed that all of the provisions of the statute up to and including the making of the award, have been literally complied with by the Complainant or waived by the Respondent. The question then becomes; Given a valid statutory award does it lose its character as such because suit is brought on it instead of delivering to the Clerk to be entered up as a judgment?"

The respondents' answer is that it does lose such character, and the reasons, if not clearly set forth above, are reiterated in the authorities cited by complainant himself. In An-

derson v. Miller, 108 Ala., 178, it is said:-

> "The right of the parties and the duty and authrity of the arbitrators are to be measured by the terms of the submission".

As stated above, it is admitted that the submission was one under the statute. The statute clearly required that the submission and award be returned by the successful party, to the clerk of the circuit court of the county where the award is rendered, and that the award be recorded in the circuit court.

The supreme court has repeatedly held that where it is clearly evident that the arbitration is under the statute, (and here this is admitted) that this is an adoption by the parties of the statutes as elements of the agreement. T.C.I. & R.Y. Co. v. Roussell, 155 Ala., 445.

It is further said:

> "The statute does not require any judgment to be rendered by the court, but provides that the submission and award shall be entered up as the judgment of the court. - Code 1896, Sections 509,513. Consequently nothing is required save the clerical act of filing said submission and award, and entering the same up as the judgment of the court ..... "The arbitrators, in their award, followed the submission, finding that Gandy was not entitled to redeem, and fixing the price that he should pay for the other land. No exceptions were reserved, and it has not been shown that the award (which became a judgment by being filed and entered up) is void. Consequently it must stand as the judgment of the court."

Not to tire the court with further argument and citation of authority, we submit that it has been established that the award was not made in substantial compliance with the statute, in that it was not returned with the submission to the clerk of the circuit court of Baldwin County, Alabama, by the successful party so that it might be recorded and entered up as the judgment of the court. And, therefore, the award is void and furnishes no evidence of any indebtedness by respon-

pondent, Mathew Fuerst, to the complainant, Joseph Eichberger.

The learned solicitor for the complainant admitted in his argument in open court that the complainant had no case if the award was not to be treated as conclusive between the parties. As under the law, the complainant has no award, which is final and conclusive between the parties, then the complainant has no case.

Under the oral testimony given in open court by Mathew Fuerst, the respondent, and Lloyd Eichelberger, it is shown conclusively that the respondent, Mathew Fuerst, was not indebted to the complainant in any sum whatsoever. Fuerst states this clearly and distinctly in his testimony as taken down in open court by the court stenographer. Further the testimony of Mr. Lloyd Eichelberger shows that he was there the very year that the complainant claims to have done the work on the orchard for respondent, Mathew Fuerst, and that the work had not been done and he exhibits photographs and shows a schedule of his examination of the orange trees, all going conclusively to show that this was a trumped-up claim, and Mr. Eichelberger tells us that the complainant said that if Mr. Fuerst did not know what happened there, (at Foley) he would never know the difference, thus clearly showing that the complainant had in mind to collect a big bill from respondent for work he, the complainant, did not do.

Direct testimony was introduced by Mr. Fuerst that he had paid the complainant all that he owed him. This is uncontradicted. No citation of authority is necessary to sustain the position that the complainant has no case in view of this testimony. But, if authority is needed, it will be found in the case of Birmingham News Co. v. Crane, 130 So. 681,-683.

In conclusion, it is respectfully submitted, (1) that the demurrer, pointing out the want of equity in the bill, should be sustained, and this on the ground that the bill fails to show that the submission and award was returned to the circuit clerk for record, as required by the statute, (2) the bill is not only not proved, but, the answer is proved to the effect that the submission and award were not returned to the circuit clerk for record, and that no debt existed from the respondent, Mathew Fuerst, to the complainant, (3) the law and all the equities of the case are on the side of the respondents.

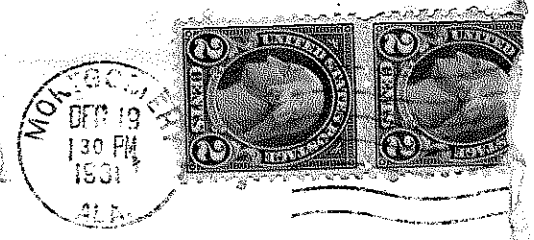
It is, therefore, respectfully submitted that the prayer of the bill of complaint should be denied and the bill dismissed.

R. O. Roach
Solicitor for Respondents.

I hereby certify that I have this day mailed to Lloydd A. Magney, a copy of this brief. This June 27th, 1931.

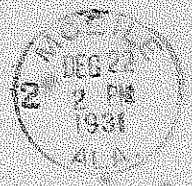
R. O. Roach
Solicitor for Respondents.

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY



Register, Baldwin Circuit Court,
Bay Minette, Alabama.

R. PERCY ROACH
LAWYER
MOBILE ALA.



Mr. T. W. Richerson,
Clerk Baldwin County Circuit Court,
Bay Minette, Ala.