

THE LAW OF ARBITRATIONS.

of the Court that without the magic words "this submission to be made a rule of Court" in the agreement to refer, either party may retire from the agreement at any moment up to the making of the award. In other words, each party agrees to refer the dispute to arbitration, so long as he and his opponent remain of the same mind—an arrangement which is very far from being businesslike.

The history of the law on the subject may be very briefly sketched. At common law an arbitrator was merely the agent of both parties, and either might withdraw his authority to the agent to make an award until the award was actually made. The remedy on the award, if made, was at common law, by action, as upon an ordinary agreement; but as actions were often by rule of Court referred to arbitration by consent, a fictitious process grew up by which it was assumed that an action had been brought upon the claim in dispute, and the action was referred to arbitration by consent by rule of Court *per saltum*. This was called making the submission or the agreement to refer the dispute a rule of Court. It was regulated by 9 Wm. III. c. 15, which Act allowed submissions agreed to be made a rule of Court to be so made on proof of the submission by affidavit, and provided for setting aside awards improperly obtained, but it did not abrogate the common law right to revoke the submission, except that such a revocation would be a contempt of Court. The 3 & 4 Wm. IV. c. 42, s. 39, provided that where the submission was agreed to be made a rule of Court it could not be revoked except by leave of the Court or a judge, which was an important step in advance. The Common Law Procedure Act, 1854, s. 17, went further still, and provided that an agreement or submission in writing might be made a rule of Court, unless there were words shewing a contrary intention. Probably the draftsman thought that by this section he had altogether got rid of the necessity of inserting the words already referred to, and that agreements which did not exclude the making a rule of Court of the submission would have all the privileges of submissions agreed to be made rules of Court, including irrevocability. If so, he was mistaken, because in the case of *Re Meier and Rouse*, 40 Law J. Rep. C.

P. 145, it was decided by the majority of the Court of Common Pleas, consisting of Mr. Justice Willes, Mr. Justice Montague Smith, and Mr. Justice Brett, with the dissent of Chief Justice Bovill, that the right to revoke survived unless there was an agreement that the submission should be made a rule of Court. It was pointed out that the Common Law Procedure Act, 1854, although it enabled a submission to be made a rule of Court without an express agreement for the purpose, contained no provision like that in the Act of Wm. IV. that the submission should not be revocable if there was an agreement that it should be made a rule of Court. Chief Justice Bovill dissented, on the ground that section 7 of the Common Law Procedure Act, 1854, put all arbitrations on the footing of actions referred by rule of Court. This section provides that "the proceedings . . . shall be conducted in like manner as to the power of the arbitrator and the Court, etc., as upon a reference made by consent under a rule of Court or judge's order." By the Act of William IV., references of actions by rule of Court or judge's order could not be revoked; and, therefore, it appeared to Chief Justice Bovill that references by agreement followed the same rule. It not unnaturally seemed to the other judges that the words "conduct of the proceedings" were hardly strong enough to carry this meaning.

The case of *Fraser v. Ehrensperger* happened to come before Lord Justice Brett, who, as a Judge of the Common Pleas, had decided the same point in the case of *Re Meier and Rouse*. No distinction could be drawn between the two cases. A contract for the sale of a cargo of rice contained a clause by which all disputes were to be referred to the arbitration of two London brokers or their umpire; but nothing was said about making the submission a rule of Court. The cargo was not delivered, and the purchasers called on the vendors to appoint an arbitrator. This they declined; whereupon the purchasers proceeded, under section 13 of the Common Law Procedure Act, 1854, to appoint one arbitrator, as they had a right to do. This right, however, was held to be subject to the common law right to revoke, and the vendors having duly revoked, it was held that the award of the arbitrator, made *ex*