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Chapter 121.

Reference of Disputes by Consent of Parties.

Sec. 1. What controversies referred; powers of referees; revocation only by consent.—All controversies which may be the subject of a personal action may be submitted to one or more referees, with the same powers as those appointed by the court; and the parties personally or by attorney may sign and acknowledge an agreement before a justice of the peace, although he is one of the referees, in substance as follows:

"Know all men by these presents, that ...., of ....., in the county of ....., and ...., of ....., in the county of ....., have agreed to submit the demand made by said ....., against said ....., which is hereunto annexed," (and all other demands between the parties, as the case may be,) "to the determination of ...., ... and ....; and judgment rendered on their report, or that of a majority of them, made to the superior court for the said county of ....., within one year from this day, shall be final. And if either party neglects to appear before the referees, after proper notice given to him of the time and place appointed for hearing the parties, they may proceed in his absence.

Dated this ..... day of ....., A. D., 19....."

Such agreement shall not be revoked without mutual consent; but the parties may agree when the report shall be made and vary the form accordingly. (R. S. c. 108, § 1.)

Cross references.—See c. 106, § 20, re interest on amount reported by referees; c. 113, § 93, and note, re reference by court.

Reference is substitute for suit at law.—A submission to referees under the statute is one of the modes which the law has provided for the decision of causes. Their report may be returned to court, and become the basis of a judgment. It is the substitute for a suit at law, and a process for the determination of controversies. Kendall v. Lewiston Water Power Co., 36 Me. 19.

And proceedings are adversary. — Submissions arise from consent, but after the parties have entered into them, they may both become actors, and the proceedings are adversary, and are conducted in the manner prescribed by law. Kendall v. Lewiston Water Power Co., 36 Me. 19.

And a trial of the rights of the parties.—By the consent of those interested, several controversies are investigated in one process. It is a trial of the rights of the parties, but not the less so because they have agreed upon the manner of commencing it, and have selected one of the ways which the law permits them to follow. Kendall v. Lewiston Water Power Co., 36 Me. 19.

By a tribunal selected by them.—A reference under this section is the hearing and determination of a cause between the parties in controversy by a tribunal selected by the parties. Duren v. Getchell, 55 Me. 241.

The provisions of the statute do not authorize such a course of proceeding as will make the referee or referees instruments to hear the testimony of witnesses, and to report that testimony to the court, that it may assume the duty entrusted by the statute to the referees, and make them the channel of communication, by which the court is to be called upon to decide on all existing claims between parties, presented by voluminous and contradictory testimony without the assistance of a jury. The agreement of the parties can neither convert the referees into such instruments, nor authorize the court thus to act. Barnard v. Spofford, 31 Me. 39.

Submission is independent proceeding.—A submission under this section during the pendency of a suit is an independent proceeding, having no relation to, or connection with, the original action. It requires another entry, and is the subject matter of an independent judgment and execution. Crooker v. Buck, 41 Me. 355.

Over which court has no power until report made. — All proceedings under an agreement for submission, entered into during the pendency of a suit, are wholly disconnected from the original suit. Referees are substituted for the court and jury, with full authority to decide the law and the facts, and if the court has any supervisory power, it can be exercised only

when the report is returned to a term of the court agreed upon in the submission, and after being entered upon the docket as an original entry. Crooker v. Buck, 41 Me. 355.

Agreement has effect according to intention of parties. — An agreement to submit a controversy to arbitration, must have effect according to the intention of the parties, exhibited in the submission, like any other contract. Knowlton v. Homer, 30 Me. 552.

But consent alone cannot confer jurisdiction on referees.—The reference of disputes is governed by the provisions of our statutes, and consent alone cannot confer jurisdiction on referees. Faxon v. Barney, 132 Me. 42, 165 A. 165.

Submission limited to controversies which may be subject of personal action. —Parties personally, or by attorney, may submit controversies to referees. But this section limits such submissions to disputes or disagreements which may be the subject of a personal action. Chaplin, Appellant, 131 Me. 187, 160 A. 27.

And this section does not authorize the submission of a bill in equity. Faxon v. Barney, 132 Me. 42, 165 A. 165.

For jurisdiction of equity judge cannot be delegated. — The jurisdiction of an equity judge, who may enter orders requiring the performance of certain acts and who may impose restraints, who is called upon to exercise discretion, cannot be delegated to others. Faxon v. Barney, 132 Me. 42, 165 A. 165.

Reference in equity to master is different procedure. — The reference in equity to a master, as provided by c. 107, § 8, and rule of court, is an entirely different procedure from that prescribed by this section. The master assists the court in some proceeding incidental to the progress of the cause. The statutory reference in effect transfers the cause to another tribunal. Faxon v. Barney, 132 Me. 42, 165 A. 165.

Submission cannot authorize decision on title to realty. — It has been the settled construction of the statute that submissions under it cannot authorize a decision upon the title to real estate. McNear v. Bailey, 18 Me. 251.

And referees cannot adjudicate matter involving such title. — If the subject matter in dispute between the parties necessarily involves the title to real estate, it cannot be adjudicated upon by referees, appointed under a submission under this section. Fryeburg Canal v. Frye, 5 Me. 38.

Thus specific performance of contract for purchase of realty is not within jurisdiction of referees. — A demand for the specific performance of a contract for the purchase of real estate is not within the jurisdiction of referees acting under the provisions of this section. Butler v. Mace, 47 Me. 423.

But, if the dispute between the parties is a mere question of damages, and not of title, reference is proper. Fryeburg Canal v. Frye, 5 Me. 38.

If no question which could properly be determined in a real action only is necessarily involved in a reference under this section and the question presented is one of damage to realty and not of title, the reference is proper. Quinn v. Besse, 64 Me. 366.

Thus, action for damages for flowage may be submitted. — An action for damages for flowage of land by means of a milldam, under c. 180, § 5 et seq., is a personal action within the meaning of this section and a proper subject of reference unless matters which cannot be the subject of a personal action are necessarily involved. Quinn v. Besse, 64 Me. 366.

Claim for damages for breach of contract may be submitted.—A claim for damages for breach of contract is unquestionably the subject of a personal action, or of a submission to arbitration. Gerry v. Eppes, 62 Me. 49.

As may claim for share of partnership profits earned, apportioned and paid over. —Where the plaintiff seeks to recover his proportional share of the profits which have been earned, apportioned, and paid over to all the members of a partnership, it cannot be argued that the submission involves the settlement of a partnership account; that partnership matters can only be settled by bill in equity; that the plaintiff's claim is not "the subject of a personal action," and, therefore, not a matter which can be referred under this section. The claim in such case is not by one partner against the other members of the firm. It does not involve the liquidation or adjustment of partnership affairs. The other members are not parties to the controversy. Stanwood v. Mitchell, 59 Me. 121.

And referees may make award for transfer of goods and chattels.—Referees under this section may make a valid award for the transfer of the title and possession of any goods and chattels which are the subject of the contract in dispute when the mutual claims and rights of the parties under that contract are submitted to them, provided they make the thing to be done

sufficiently certain to prevent further contest as to what it really is which is to be transferred. Gerry v. Eppes, 62 Me. 49.

Administrators can submit doubtful claims to arbitration. — Administrators may discharge claims against the deceased and, having power to decide upon their existence and validity, they can transfer it to another, when disputes arise concerning such claims. Hence, it has been held that they can submit doubtful claims to arbitration. Kendall v. Bates, 35 Me. 357.

And a married woman can make a valid submission to referees of claims growing out of her own separate property, by virtue of c. 166, § 35, which gives her power to hold, manage and dispose of her property, without being subject to the control or interference of her husband. Duren v. Getchell, 55 Me. 241.

Report of referees is final. — The parties in reference cases expressly agree that the report of the referees, being duly accepted by the court to which by law it is returnable, shall be final. Walker v. Sanborn, 8 Me. 288.

Unless parties agree to the contrary.— Ordinarily, the report of the referees or a majority of them shall be final. It is, however, competent for parties to insert in their rule other and different provisions. Whatever provisions are thus inserted, unless they are in violation of law, are binding upon the parties. Anderson v. Farnham, 34 Me. 161, check statute (1853).

And award bars action on original claim.—A valid submission and award in writing, duly published, is sufficient to bar an action upon the original claim, which was submitted. Thenceforward the remedy of the party is not upon the original cause of action, but upon the covenant to perform the award. It is unnecessary to aver a tender of performance, unless the award is made conditional upon the performance of certain acts by the party claiming the benefit of it. Duren v. Getchell, 55 Me. 241.

The parties have authority to agree upon the time when the report shall be made. Kendall v. Bates, 35 Me. 357.

The parties are at liberty to enter into an agreement as to the time, within which the report shall be made, without being confined to a year; it might be more or less than a year, and the form of the agreement can be varied to meet this change. Sargent v. Hampden, 29 Me. 70.

But if statutory form is not varied, agreement is not binding after a year.— Where the agreement is in the form of that prescribed by this section, if the referee's report is never made to the superior court, after the lapse of one year from the date of the agreement, it ceases to be binding upon the parties, and the proceedings under it, not having been matured, or conformable to the statute, become inoperative and void. Sargent v. Hampden, 32 Me. 78.

Report must be made to court when held for ordinary business of session.— The court referred to in the submission cannot, on any proper construction, be the clerk of the court, or a judge thereof in vacation. The report must be made to the court when holden for the ordinary business of a session of the same, within one year from the time of the submission, in order to meet the requirement. Field v. Bissell, 36 Me. 593.

Award as to matters not submitted is invalid.—The award must follow the agreement of submission. It must determine the question submitted. The arbitrator cannot assume to determine points not fairly included, expressly or by necessary implication, in the submission. If he does, his award, as to such points, is invalid and not binding on the parties. Wyman v. Hammond, 55 Me. 534.

If, in the award, matters not referred are embraced, it is not to that extent binding upon the parties, for it is familiar law that an award may be good in part and bad in part. Stanwood v. Mitchell, 59 Me. 121.

Applied in Pierce v. Pierce, 30 Me. 113; Berry v. Sands, 60 Me. 99; Blanchard v. Hodgkins, 62 Me. 119.

Sec. 2. Submission of all demands and of a specific demand.—If all demands between the parties are so submitted, no specific demand need be annexed to the agreement; but if a specific demand only is submitted, it shall be annexed to the agreement and signed by the party making it and be so stated as to be readily understood. (R. S. c. 108, § 2.)

The object of this section must have been to apprise the referees and the adverse party specifically of the subject matter of the controversy, and in such manner that the demandant should be concluded by his specification. No particular form is, or, with propriety, could be prescribed. Harmon v. Jennings, 22 Me. 240.

Specific demand must be annexed. — This section refers to two classes of

demands; those which comprise all the mutual claims between the parties, and those which do not purport to be so; and having provided for the submission of those of both classes, and having dispensed with the specification of those of the first class only, the legislature intended that the other class should be subject to the provision which requires them to be annexed. Pierce v. Pierce, 30 Me. 113. See Kendall v. Bates, 35 Me. 357, wherein it was held that, to a submission "of all demands except heirship," entered into by parties between whom there existed no controversy respecting inherited estates, no specific demand need to be annexed inasmuch as the words "except heirship" are, in such case, of no import or effect.

And this applies when all demands after specified day are submitted. — If a submission is made of all demands arising between the parties after a specified day, a specification of the claims must be annexed to the submission. Such specification is dispensed with only when all demands are submitted. Pierce v. Pierce, 30 Me. 113.

But party requesting delay in annexation cannot complain of such delay.—If one of the parties to a reference of a specific demand makes out and signs his demand, and by agreement between them, at the request of the other party, it is omitted to be annexed until the close of the investigation before the referees, and it is then annexed, it is not competent for the opposing party to avail himself of this error, to prevent the acceptance of the report of the referees against him. Harmon v. Jennings, 22 Me. 240.

Nor can failure to annex be raised for first time on appeal.—If no specific demand signed by the plaintiff was annexed to the submission, if the question was not raised before the referees, it cannot be entertained by the court on appeal. Deering v. Saco, 68 Me. 322.

Demand must be signed by party making it.—In order to give jurisdiction to referees, it is necessary that the demand made by the claimant be signed by him. The want of his signature will be error. Woodsum v. Sawyer, 9 Me. 15.

Signing of submission specifying demand is sufficient.—If the demand submitted is specified in the submission and the submission is signed by the plaintiff, the demand is signed within the meaning of this section. Deering v. Saco, 68 Me. 322.

As is signature on writ annexed to submission.—When one party to a reference has made out a writ against the other, specifically setting forth his claim therein, and has indorsed his name on the back thereof, and such writ is annexed to the submission, it is a sufficient signing of the demand within the purview of this section. Harmon v. Jennings, 22 Me. 240.

Where the parties agree "to submit the demand with the cause of action set forth in the writ, hereto annexed," etc., if the name of the plaintiff's attorney appears on the back of the writ, it will be considered a sufficient signing of the claim required by this section although the words "from the office of" precede the attorney's name. Wood v. Holden, 45 Me. 374.

And declaration in such writ is sufficient specification.—Where the parties to a suit entered into a statute submission of the cause of action set forth in the writ, which was annexed to the submission, the declaration in the writ will be deemed a sufficient specification of the claim submitted, to answer the requirement of the statute. Wood v. Holden, 45 Me. 374.

Sec. 3. Authority of referees.—All the referees must meet and hear the parties; but a majority may make the report, which shall be as valid as if signed by all, if it appears by the report or certificate of the dissenting referee that all attended and heard the parties. They may allow costs or not to either party, unless special provision is made therefor in the submission, but the court may reduce their compensation. Any referee may swear witnesses. (R. S. c. 108, § 3.)

All the referees must hear the parties; and if they do not all agree, the greater part may proceed. Peterson v. Loring, 1 Me. 64.

And this must appear from the report.—If it does not appear from the report that all of the referees were in fact present and participated at the hearing, this is an irregularity. Brann v. Vassalboro', 50 Me. 64.

That all referees were present is sufficiently evidenced by a statement of that fact contained in the award. Thompson v. Mitchell, 35 Me. 281.

Majority can make new award on recommitment.—If a report made by three referees is recommitted, and one of them neglects or refuses to sit again, the other two are competent to make a new award similar to the former, with additional costs. Peterson v. Loring, 1 Me. 64.

And they can amend report to show dis-

senting referee acted in trial of case.—Where a report of the majority of referees is recommitted, for the specific purpose of having them certify that the disagreeing referee acted with them in the trial of the case, but refused to sign the report, they may thus amend their report, without the knowledge or presence of their dissenting associate. Brann v. Vassalboro', 50 Me. 64.

Party testifying falsely liable if oath administered in court.—If the trial is before referees, duly authorized in pursuance of this chapter to determine the controversy between the parties, and a party there testifies falsely as to such matters as might legally be drawn from him at common law, he will be liable to the same punishment, as if the oath had been administered in a court of common-law jurisdiction. State v. Keene, 26 Me. 33.

Prior to the enactment of the provision of this section concerning costs, it was held that, if the parties made no agreement touching the costs of reference, the referees in that respect exceeded their authority in awarding costs to the plaintiff. See Thurston v. Lowder, 40 Me. 197; Hickey v. Veazie, 59 Me. 282.

Applied in Knowlton v. Homer, 30 Me. 552; Smith v. Smith, 32 Me. 23.

Sec. 4. Report returned.—The report shall be made to the court within the time specified in the submission. One of the referees shall deliver it into court, or it shall be sealed up and sent sealed to the court, and shall be opened by the clerk. (R. S. c. 108, § 4.)

Cross reference.—See note to § 1, re finality of report.

The statute does not provide for a report of evidence to be certified by referees to the court. Brann v. Vassalboro', 50 Me. 64.

Section refers to superior court.—The superior court, having been previously mentioned in the agreement in § 1, as the one to which the report should be returned, must be understood to be the court, to which reference is made, in this section. Sargent v. Hampden, 29 Me. 70, wherein is considered a former statute which provided that "the report may be made to any court, held within the time limited in the submission, provided that the parties or their attorneys shall sign an agreement to that effect, naming the court, which agreement shall be annexed by the referees to their report."

Referee can file alternative report.—The right of a referee deriving his power from the statute to present legal questions for the consideration of the court, by an alternative report, is not denied. Barnard v. Spofford, 31 Me. 39.

An award not returned to court within the time limited in the submission cannot legally be accepted at a term subsequent thereto. Berry v. Sands, 60 Me. 99.

Applied in Small v. Thurlow, 37 Me. 504; Hickey v. Veazie, 59 Me. 282.

Sec. 5. Action on report; exceptions; writ of error.—The court may accept, reject or recommit the report and either party may file exceptions thereto. If recommitted, the referees shall notify the parties of the time and place for a new hearing. When the report is accepted, judgment shall be entered thereon as in case of submissions by rule of court and either party may bring a writ of error to reverse such judgment. (R. S. c. 108, § 5.)

The superior court is authorized to accept, reject or recommit a report of referees. Harris v. Seal, 23 Me. 435.

The court has by this section a discretionary power to reject, accept or recommit the report. Hewett v. Bowley, 27 Me. 125; Long v. Rhodes, 36 Me. 108.

Although the submission gives no power to the court to reject the report. In this respect, the statute, and not the agreement of the parties, controls. Hickey v. Veazie, 59 Me. 282.

And, when the report is before the court on exceptions, it has the discretionary power to accept, reject or recommit. Kempton v. Stewart, 31 Me. 566.

Award liberally construed.—Awards are not to be scanned with critical nicety, as they are made by judges of the parties own choosing. They are to be construed liberally and favorably, so that they may take their effect, rather than be defeated. North Yarmouth v. Cumberland, 6 Me. 21; Hanson v. Webber, 40 Me. 194.

And it need not specify each particular.—Where a submission is of divers subjects, distinctly enumerated, if it appears from the whole award, that all the matters submitted have been adjudicated upon by the arbitrators, it is sufficient, though each particular is not specified in the award. Hanson v. Webber, 40 Me. 194.

A motion to recommit a report of ref-

erees, is addressed to the discretion of the court. Harris v. Seal, 23 Me. 435.

A motion to recommit is similar to a motion for a new trial at common law, in granting which a court will exercise a sound discretion. Harris v. Seal, 23 Me. 435.

And decision on such motion not subject to exceptions.—The grant or refusal of a recommitment, is a matter of judicial discretion, and can never be the subject of exception under the statute. Walker v. Sanborn, 8 Me. 288.

The question of recommitment is one of discretion and not of law, and, of course, not subject to the revision of the appellate court on exceptions. Walker v. Sanborn, 8 Me. 288.

But discretion of court must be exercised judicially.—The discretion given the court by this section must be exercised judicially, and upon consideration of the facts and circumstances of the case. Long v. Rhodes, 36 Me. 108.

Newly discovered evidence may be a good reason for a recommitment. North Yarmouth v. Cumberland, 6 Me. 21.

And this is only remedy available in such case or in case of oversights.—A motion to recommit is the only remedy which a party has in case of important oversights on the part of the referees, operating to produce injustice; or in the case of newly discovered evidence, which would essentially alter the state of the case. Harris v. Seal, 23 Me. 435.

And party has right to move for recommitment in such cases.—A party, if he has important newly discovered evidence, or can substantiate the existence of material oversights on the part of referees, must have a right to move for a recommitment. Harris v. Seal, 23 Me. 435.

But errors in judgment afford no ground for recommitment.—If alleged errors by the referee were errors in judgment, they would ordinarily afford no ground for a recommitment. The parties having agreed upon a referee as their judge, must be content with his adjudication. Harris v. Seal, 23 Me. 435.

Report after recommitment not limited by time specified in submission.—It is undoubtedly the duty of referees to make a report within the time specified in the submission; but it is equally certain that it is competent for the court to recommit the report, and the power to recommit necessarily implies a power on the part of the referees to make a new report, and a power on the part of the court to accept it; and as the statute authorizing the court to recommit does not limit the time within which it may be done, we have no doubt it may properly be done after the time specified in the submission. The agreement of the parties does not wholly and exclusively control the proceedings in such cases. Hickey v. Veazie, 59 Me. 282.

While it is undoubtedly true that it is the duty of referees to report in the first instance within the time specified in the submission, this does not deprive them of the power to give the parties a new hearing and to make a new report, after that time, when authorized so to do by a recommitment of the report first made. Hickey v. Veazie, 59 Me. 282.

The statute authorizes the parties to agree within what time the report shall be made; but this was not intended to deprive the court of the power to recommit the report and to authorize a new hearing after that time. Hickey v. Veazie, 59 Me. 282.

The report of the referees is prima facie correct, as the decision of the tribunal selected by the parties, and must be accepted, unless some satisfactory reason be shown for disposing of it in a different manner. Long v. Rhodes, 36 Me. 108.

And wishes of party or referees furnish no ground for rejection or recommitment.—The wishes of a party dissatisfied with the award, or the willingness of the referees to have the case again opened, and more fully and maturely considered, furnishes no ground for rejecting, or recommitting the report. Long v. Rhodes, 36 Me. 108.

Aggrieved party must be allowed time in which to present exceptions.—No valid judgment can be rendered on the report of referees in a statute submission, except by consent, without allowing to the aggrieved party the time prescribed by c. 106, § 14, in which to present exceptions. Crooker v. Buck, 41 Me. 355.

Awards are open to objections.—Awards of referees, appointed under the statute, are open to objections, such as mistakes of law, or fact, and the like, for which the court to which the award is returned will either reject or recommit it, at discretion. North Yarmouth v. Cumberland, 6 Me. 21.

But the burden is upon the party objecting to a report of referees to establish the facts upon which he relies. Rawson v. Hall, 56 Me. 142.

If the errors complained of originated

from oversight or accident, they should be so alleged by the party objecting, and distinctly pointed out; and unless this is done, the court may well refuse to go into evidence concerning them. Harris v. Seal, 23 Me. 435.

Report rejected for fraud of referees.—As to cases of fraud or partiality on the part of referees, it is very clear that, on proof of it to the satisfaction of the court, the report would at once be rejected. North Yarmouth v. Cumberland, 6 Me. 21.

Or of party in whose favor report made.—Fraud on the part of him in whose favor a report is made, as well as partiality and corruption in the referees or any of them, may always be legally proved to impeach the report. Walker v. Sanborn, 8 Me. 288.

Or on ground of excess of jurisdiction.—In those cases where the acceptance of the report is opposed on the ground of excess of jurisdiction, the court will so far examine into the merits of the case as to ascertain whether such is the fact; and if so found to be, the court will reject or recommit the report. North Yarmouth v. Cumberland, 6 Me. 21.

An award of referees may be good in part and bad in part, and if separable the good will be affirmed. Stanwood v. Mitchell, 59 Me. 121.

An award may be good in part and bad in part. An award will be sustained so far as the same is good, if it can be so disconnected from the remainder that no injustice will be done. Rawson v. Hall, 56 Me. 142.

But if good is so connected with bad that justice cannot be done whole award will be void.—When the part of an award, which would be otherwise good, is so connected with that which is void, as to show that justice might not be done by permitting it to have effect, the whole will be void. Philbrick v. Preble, 18 Me. 255.

Applied in Lothrop v. Arnold, 25 Me. 136; Sargent v. Hampden, 29 Me. 70.

Cited in Sargent v. Hampden, 32 Me. 78.