*Charles W Karthaus, Plaintiff in error, *v.* Francisco Yllas y Ferrer and others, Defendants in error.

Arbitration.—Power of partners.

There is a class of cases upon awards, to be found in the books, in which arbitrators have been held to more than ordinary strictness, in pursuing the terms of the submission, and in awarding upon the several distinct matters submitted, upon the ground of this submission being conditional, *ita quod;* but the rule is to be understood, with this qualification—that in order to impeach an award made in pursurance of a conditional submission, on the ground of part only of the matters in controversy having been decided, the party must distinctly show, that there were other points in difference, of which express notice was given to the arbitrators; and that they neglected to determine them. p. 227.

One partner, during the continuance of the partnership, cannot bind the other partner to a submission of the interests of both to arbitration; but he may bind himself, so as to submit his own interests to such decision.[1] p. 228.

It is a settled rule in the construction of awards, that no intendment shall be indulged to overturn an award, but every intendment shall be allowed to uphold it. p. 228.

If a submission be of all actions, real and personal, and the awards be only of actions personal, the award is good; for it shall be presumed, no actions real were depending between the parties. p. 228.

Where, upon a submission by one partner of all matters in controversy between the partnership and the person entering into the agreement of reference, an award was made, directing the payment of money; in an action on the bond to abide by the award, the breach assigned was, that the partner who agreed to the reference did not pay, &c.; this is a sufficient assignment of a breach, as he only who agreed to the reference was bound to pay. p. 231.

Error to the Circuit Court of Maryland. On the 16th of January 1823, the plaintiff in error gave an arbitration bond, in the usual form, with sureties, to the defendants in error, in which it was set forth, that—

"Whereas, certain disputes, differences and controversies have arisen, and are still depending, between the above-bounden Charles W. Karthaus, acting for the late house of Charles W. Karthaus & Co., and himself, and the above-named Francisco Yllas y Ferrer and Josef Antonio Yllas, for the ending and determining the disputes, differences and controversies aforesaid, and all actions, suits and claims and demands whatsoever, concerning the same, the said parties have agreed to refer the same to the award, judgment and determination of Lewis Brantz and Henry Child, both of Baltimore, merchants, arbitrators indifferently chosen and named, by and on behalf of the said parties, to award, order, arbitrate, judge and determine concerning the same. And if the said arbitrators cannot determine the same, that then the same shall be fully ended and determined by a third person, to be by them chosen as an umpire, in such *manner as hereinafter is, in that behalf, mentioned and expressed. Now, the condition of this obligation is such, that if the above-bound Charles W. Karthaus, his heirs, [*223

[1] The general rule in England, and in many of the states of the Union, is, that one partner cannot bind his copartner by submission to arbitration; but in Pennsylvania, it is held, that he may so bind his copartner, by agreement not under seal, in any partnership matter. Taylor *v.* Coryell, 12 S. & R. 243; Gay *v.* Waltman, 89 Penn. St. 453. In the latter case, the chief justice says, "when the submission is confined to cases for settling and determining claims arising in the partnership business, it is difficult to assign any substantial reason for denying the power of one partner, in good faith, to bind his copartner, by a parol submission." And see Southard *v.* Steele, 3 T. B. Monr. 485; Hallock *v.* March, 25 Ill. 48. The English rule is followed in Jones *v.* Bayley, 5 Cal. 345; Wood *v.* Sheperd, 2 Pat. & H. (Va.) 442; Buchoz *v.* Grandjean, 1 Mich. 367; Martin *v.* Thrasher, 20 Vt. 460.

executors, administrators, and every of them, shall and do, for and on his and their parts, in and by all things, stand to, obey, abide, perform, fulfil and keep the award, arbitrament, order, determination, final end and judgment, which shall be by them, the aforesaid arbitrators, made, of and concerning the premises, and of all disputes, differences, actions, suits, claims, and demands whatsoever, touching and concerning the same, so as such award, arbitrament, determination, final end and judgment of the said arbitrators, of and in the premises, be by them made and given up in writing, under both their hands and seals, ready to be delivered to each of the said parties in controversy, in fifty days from the day of the date hereof. And if they, the said arbitrators, of and in the said premises, cannot agree, end and determine the same, in fifty days from the day of the date hereof, that then, if the said Charles W. Karthaus, his heirs, executors, administrators, and every of them, shall and do, for and on his and their parts, in and by all things, stand to, obey, abide, perform, fulfil and keep the award, arbitrament and umpirage of the above-named arbitrators, and such third person and umpire, as they the said arbitrators shall indifferently name, elect and choose, for the ending and determining the same premises, or a majority of them, so as such award, umpirage and judgment of the said arbitrators and umpire, or a majority of them, of and concerning the same, be by them so made and given up in writing, under their hands and seals, ready to be delivered to each of the said parties in controversy, in sixty days from the day of the date hereof ; this obligation to be void and of no effect, otherwise the same shall remain in full force and virtue."

Upon this reference, the following award was made, under the hands and seals of the arbitrators and the umpire :

"We, the undersigned, Henry Child and Lewis Brantz, as arbitrators, and Michael McBlair, as umpire, acting in virtue of the annexed bond or instrument of writing, do hereby award and adjudge, that the late firm of Charles W. Karthaus & Co. pay, or cause to be paid, unto Francisco Yllas y Ferrer and Josef Antonio Yllas, or their representatives, the sum of $1475, for a balance of the general account-current between the parties ; and also the sum of $1398, for a balance arising out of the moneys recovered for the brig Arrogante Barcelones and cargo ; in which award, a parcel of cutlasses, *224] or their *proceeds, are considered as becoming the property of said Yllas y Ferrer. Given under our hands and seals, in Baltimore, this 8th of March 1828."

To an action on the bond, against the plaintiff in error, he pleaded the condition, and that no award had been made. The defendants in error replied and answered, and set it out as stated ; and there was a demurrer to the replication, which the court overruled, and a judgment was entered for the plaintiff below. In this judgment, error was alleged ; and before this court, the plaintiff in error sought to maintain : 1. That the award is not agreeable to the submission. 2. It is not certain, final and mutual. 3. It directs an act to be done by strangers. 4. It is defective in other respects.

The case was argued by *Hoffman* and *Mayer*, for the plaintiff in error ; and by *Wirt*, Attorney-General, for the defendants.

For the *plaintiff* in error.—The object of the submission was, to have all

the matters in controversy adjusted by the arbitrators, and the words "certain disputes," so meant and intended. 2 Caines 320; 15 Johns. 197; Com. Dig. Arbitration, 4, D.

1. This was a submission between all the parties, the plaintiff in error, and the firm of which he was a member, there being partnership and individual disputes; and the award does not apply to all, but only to the plaintiff in error. It should profess to decide everything in the premises. The submission being conditional, *ita quod*, the referees were bound to pursue strictly the submission, in all its terms, and to award on all matters submitted to them. 2 Gallis. 77–8; *Baspole's Case*, 8 Co. 98; 1 Salk. 70; Kyd on Awards 176.

2. An award must be so certain, that it may be pleaded in bar to an action against the parties to it; which is not the fact in this case. 1st. It does not comprehend all the parties, nor decide upon all the subjects in dispute; it is uncertain and contradictory, and there are no averments in the replication which will supply these deficiencies; there should have been an averment as to the members of the firm, as to the accounts, and the transactions out of which the accounts grew. By no form of pleading, could the plaintiff in error show he had, in this case, satisfied the claims of the defendant in error. The award should have designated the claims on the plaintiff, individually, and on the firm; nor does it appear by it, that Charles W. Karthaus, and C. W. Karthaus & Co., were the same persons. [*225 *1 Bac. Abr., Arb. and Award, pl. E, 1, 216; 1 Com. Dig. 666, tit. Award, pl. E, 4; 7 East 81; 5 Wheat. 394. In an action on an award, the plaintiff is not bound to set out the particulars; but if he proceed on the bond, he must set out the breaches with particularity. The defendant may do it, but it is the duty of the plaintiff; Kyd on Awards 195. That part of the award, by which "a parcel of cutlasses, or their proceeds, are considered as becoming the property of the said Yllas y Ferrer," is altogether uncertain. It does not state what cutlasses, or what the amount of the proceeds, considered as the property of Yllas y Ferrer, were included or referred to.

Wirt, for the defendants in error.—The court are always disposed to maintain awards, Caldwell on Arbitrations 123. The pleadings do not exhibit anything from which error can be imputed; the defendant should have rejoined, and shown that there were other parties, and other matters, than those stated in the award; having failed to do this, there is nothing before the court but the submission and the award; and there is noting to show, that there were other persons interested, and other matter to be acted on, but those stated in the award. This form of pleading is only waived, when the submission sets out every matter at large. Kyd on Awards 171; 7 East 81. The firm is not a party to the submission; and the partner who submitted to the arbitration, will alone be bound by it, and to pay the amount awarded. Kyd 40. As to the set-off, in such a case of individual and partnership accounts: 5 T. R. 493; 6 Ibid. 582–3. Certainty to a common interest only, is required in awards. This award is sufficiently certain. Kyd 132; 1 Caines 314–5; 14 Johns. 108–9. If the award be certain in part, it may be executed for so much as is certain; although another part is uncertain; unless the part which is uncertain is the consideration for that which the uncertain part was given. 5 Wheat. 409. The award here is

entirely for the defendants in error, and if any part of it is uncertain, which is denied, the plaintiff in error cannot complain. 11 Wheat. 448. The cutlasses and the proceeds are sufficiently designated, and if they were not, it was for the plaintiff below only to complain.

Trimble, Justice, delivered the opinion of the court:—This was an action of debt, brought by Francisco Yllas and Josef Antonio Yllas, against Charles W. Karthaus, on an arbitration bond, in the circuit court of the district of Maryland. The defendant, after *oyer* of the condition of the
*226] bond, pleaded, no award, &c. The plaintiff replied, setting *forth the award *in hæc verba*, and assigning a breach; the defendants demurred generally, and the plaintiff joined in demurrer. The circuit court having given judgment upon the demurrer, in favor of the plaintiffs; the defendant has brought the case up, by writ of error, for the consideration of this court.

The first and principal ground relied on by the plaintiff in error, for the reversal of the judgment, is, that the award is not agreeable to the submission, in this: that two several distinct controversies, the first between the plaintiffs and the late house of Charles W. Karthaus & Co., and the second between the plaintiffs and Charles W. Karthaus, individually, were submitted to the referees, and that they left the latter undetermined. The condition of the bond, after reciting, that certain disputes, differences and controversies have arisen, and are still depending, between the above-bound Charles W. Karthaus, acting for his late house of Charles W. Karthaus & Co., and for himself and the above-named Francisco Yllas y Ferrer, and Josef Antonio Yllas, &c., "refers the same to the referees named, and their umpire, and binds the said Charles W. Karthaus, &c., to abide by and perform their award; so as such award, &c., "of the arbitrators, of and in the premises, be by them made and given up in writing, under their hands and seals, ready to be delivered to each of the said parties in controversy, in fifty days."

The arbitrators, and their umpire, within the time limited by the submission, made and delivered their award in writing, under their hands and seals, in the following words, to wit: "We, the undersigned, Henry Child and Lewis Brantz, as arbitrators, and Michael McBlair, as umpire, acting in virtue of the annexed bond or instrument of writing, do hereby award and adjudge, that the late firm of C. W. Karthaus & Co. pay to Francisco Yllas y Ferrer and Josef Antonio Yllas, or their representatives, the sum of $1475, for the balance of the general account-current between the parties, and also the sum of $1398, for a balance arising out of moneys received for the brig Arrogante Barcelones and cargo; in which award, a parcel of cutlasses, or their proceeds, are considered as becoming the property of the said Yllas y Ferrer."

It is plainly seen, from the face of the award, that the arbitrators have not contradistinguished between Charles W. Karthaus, as a member of the late house of Charles W. Karthaus & Co., and Charles W. Karthaus, as an individual, unconnected with his late house. The argument is, that this omission of the referees vitiates the award. It is said, that this, being a
*227] conditional submission, *ita quod*, the arbitrators were bound to pursue the submission strictly, and to award of and *concerning every

matter referred to them. In support of this argument, the counsel referred to *Randall* v. *Randall*, 7 East 80, and several other cases less apposite.

That there is a class of cases in the books, in which arbitrators have been held to a more than ordinary strictness in pursuing the terms of the submission, and awarding upon the several distinct matters submitted, upon the ground of the submission being conditional, *ita quod*, is conceded. The case of *Randall* v. *Randall* is a leading case of that class. Lord ELLENBOROUGH, C. J., in delivering the opinion of the court, says: "The arbitrators had three things submitted to them; one was, to determine all actions, &c., between the parties; another was, to settle what was to be paid by the defendant for hops, poles and potatoes in certain lands; the third was, to ascertain what rent was paid by the plaintiff, to the defendant, for certain other lands. The authority given to the arbitrators, was conditional, *ita quod*, they should arbitrate upon these matters, by a certain day. The arbitrators have stopped short, and have omitted to settle one of the subjects of difference stipulated for." This case was adjudged, according to the rule laid down in the books; that if the submission be conditional, so as the arbitrator decide of and concerning the premises, he must adjudicate upon each distinct matter in dispute, which he has noticed. Kyd 177.

But the rule is to be understood with this qualification; that in order to impeach an award, made in pursuance of a conditional submission, on the ground of only part of the matters in controversy having been decided, the party must distinctly show, that there were other points in difference, of which express notice was given to the arbitrator, and that he neglected to determine them. Caldwell 105; Kyd 177; Cro. Car. 216; *Baspole's Case*, 8 Co. 98; *Ingraham* v. *Milnes*, 8 East 445. That Lord ELLENBOROUGH understood and intended to apply the rule, as thus qualified, in *Randall* v. *Randall*, is manifest, For Mr. Espinasse, in commenting upon *Baspole's Case*, having observed, that it is said in that case, that though there be many matters in controversy, yet if only one be signified to the arbitrators, he may make an award for that, for he is to determine according to the *allegata et probata;* and it is in every day's practice, that an award may be good in part, and bad in part. Lord ELLENBOROUGH, in an answer to that argument, replies, "That is, where it does not appear the is any notice to the arbitrator, on the face of the submission, that there is any other matter referred to him, than those that are mentioned to him at the time of the reference; but here it does expressly appear, that there was another matter referred, on which there is no arbitrament."

*In this case, it is not pretended, that any notice was given to the arbitrators of any other matter, unless that notice was given on the face of the submission. The question then is, does it distinctly appear, from the face of the submission, that any other point of difference between parties, was submitted, and of which the submission itself gave the arbitrators notice, but which they have neglected to determine? If, as the argument supposes, there was any point of difference, which concerned Charles W, Karthaus, individually, as contradistinguished from the points in difference which concerned him as Charles W. Karthaus, of the late firm of Charles W. Karthaus & Co., what was that point of difference? [*228

No satisfactory answer has been given, and it is believed, none can be given, to this inquiry. How then can it be maintained, that a distinct point

in difference between the parties was referred, and by the reference itself notified to the referees, which they have neglected to determine? The case of *Ingham* v. *Milnes* is a strong authority to show, that although the submission be conditional, *ita quod*, there must be a distinct specification, as in *Randall* v. *Randall*, to sustain the objection, that part has been omitted by the arbitrators. Here, the submission is in very general, and, we think, in very vague and ambiguous terms. It speaks of disputes, differences and controversies between Charles W. Karthaus, acting for the late house of Charles W. Karthaus & Co., and for himself and the plaintiffs. But how, or in what he acted, for one or the other, is not specified. The terms "late house," imply the former existence, but present non-existence, of the late house of Charles W. Karthaus & Co. He may be the only surviving partner, the firm having ceased, by the death of the other members. But if the firm was continuing, Charles W. Karthaus, while he must be admitted to be perfectly competent to submit to reference his own interests in the firm, could not, by his submission, bind his partners. He might bind himself to perform whatever the award directed the firm of which he was a member, to do; so that, either way, it was a submission of his own interest only. In order to overturn the award, it is not enough, that he may have had different and distinct interests in his individual and in his partnership character. It is a settled rule, in the construction of awards, that no intendment shall be indulged to overturn an award, but every reasonable intendment shall be allowed to uphold it. Thus, if a submission be of all actions, real and personal, and the award be only of actions personal, the award is good; for it shall be presumed no actions real were depending between the parties. Kyd 72; and *Baspole's Case*, before cited.

*229] *So, in this case, although the submission speaks, in general terms, of disputes, differences and controversies, with Charles W. Karthaus, acting for his late house of C. W. Karthaus & Co., and for himself; it shall not be intended, there were any controversies with C. W. Karthaus, individually, other than those decided by the arbitrators. If any such did exist, inasmuch as they are not specifically and distinctly set forth in the submission, so as to give notice to the arbitrators, it was the duty of the party to show, by averment and proof *aliunde*, they were brought before the referees.

There is no analogy between this case and *Lyle* v. *Rodgers*, 5 Wheat. 394, cited at the argument. In that case, it was decided, that where claims against a party, both in her own right, and in her character of administratrix, were submitted to arbitrators, it was a valid objection to the award, that it awarded a gross sum to be paid by her, without distinguishing between what was to be paid by her in her own right, and what in her representative character. The Chief Justice, in delivering the opinion of the court, explained the reason and ground of the decision, by observing, "If this award was made against Mrs. Dennison, as administratrix, she would not only be deprived, by its form, of the right to plead a full administration (a defence which might have been made before the arbitrators, and on which their award does not show, certainly, that they have decided), but also of the right to use it in the settlement of her accounts, as conclusive evidence, that the money was paid in her representative character. If this objection to the award is to be overruled, it must be, on the supposition that it is

made against her personally; yet the statement of fact shows the claim against her to be in her representative character." This reasoning cannot apply to the case before the court. It is of no sort of consequence to C. W. Karthaus, whether he is directed to pay as Charles W. Karthaus, individually, or as Charles W. Karthaus, of his late house of C. W. Karthaus & Co. In each case, he is bound, personally, to pay, having bound himself so to do, by the submission; and the award, if in any case it would be evidence for him against the firm, would not be conclusive, as he had no power to bind his partners, if any existed, by his submission.

It is objected, that the award is not certain, final and mutual. It was said, in argument, that as the first sum awarded, is expressed to be for a "balance of the general account-current between the parties; the general account-current must be understood to include all accounts between them; and hence, that the second sum awarded, for a balance arising out of moneys received for the brig Arrogante Barcelones, is included in the first, and the party thus charged; or, at least, that it does not certainly appear otherwise." *We think there is no foundation for this argument. To indulge such a supposition, would impute either manifest injustice, or [*230 gross negligence, to the referees.

Great stress was laid, in the argument, on the uncertainty of the closing clause of the award, in these words, "in which award, a parcel of cutlasses are considered as becoming the property of said Yllas y Ferrer." There is considerable doubt and uncertainty, as to the meaning of the arbitrators, in these terms. And had this uncertainty appeared in any part of the award, intended for the benefit of the defendant, it would, perhaps, be fatal to the whole award. Had that been the case, it would be hard and unjust, to compel him to perform that part of the award which is onerous to him, when he could not have, on account of its uncertainty, that which would be beneficial to him. But however doubtful the precise intent and meaning of this part of the award may be, it is certain, it was intended as a benefit in some way, to Yllas y Ferrer, over and above the two sums of money directed to be paid to the plaintiffs. The defendant can have no reason to complain, that the plaintiffs, or either of them, may not, on account of this uncertainty, be able to obtain all the benefits intended by the award; nor can it furnish any reason for withholding from them, that to which they are certainly entitled.

It is deemed a sufficient answer, to the objection of want of mutuality in the award, to remark, that great stress was laid, in the early cases, upon the mutuality of an award; but at present, it is by no means considered necessary that each party should be directed to do, or not to do, any particular thing. Caldw. 113. Two had submitted to an award; nothing was awarded as to one party, but that all actions should cease. The court held it a good award. *Harris* v. *Knipe*, 1 Lev. 58. In *Palmer's Case* (12 Mod. 234), one party was directed to pay money to the other, without any directions being given to the latter in any way; and again, it was awarded that A. should pay B. 40 shillings for a trespass. Freem. 204. The respective awards were considered unimpeachable. These cases fully establish the principle above laid down. An award is regarded as final, when it is an absolute conclusive adjudication of the matters in dispute; and there is no reason to doubt the conclusiveness of the adjudication in this case, as to the two sums of money directed to be paid; and that the award will operate as

a bar to any future litigation, upon the accounts for which they are given.

Again, it is objected, that the award directs an act to be done by strangers. This objection grows out of the direction in the award, that "the late firm of C. W. Karthaus & Co. pay, &c." Whatever might be the force of this objection, if it were true in point of fact, we cannot so regard
*231] it. So far as *appears upon the record, the late firm or house of C. W. Karthaus & Co., and C. W. Karthaus, are one and the same person; or more properly speaking, it does not appear that there is any other person *in esse*, belonging to that firm, than C. W. Karthaus himself. If there be any other person *in esse*, of the late house of C. W. Karthaus & Co., it cannot be truly affirmed, that he, and the house of which he was a partner, are strangers to each other. But we cannot, consistently with the rules of law, presume or intend there is any other; indeed, in support of the award, it may reasonably be intended there is not, as the party objecting was cognisant of the fact, and might have shown it, if true, but has not. The direction that the late firm of C. W. Karthaus & Co. shall pay, unquestionably includes C. W. Karthaus; and no other person appearing to exist, it is equivalent to a direction that he shall pay. This reason is applicable to the last ground assumed by the counsel for the plaintiff in error, for a reversal of judgment; namely, that the replication is insufficient, because, in assigning a breach, it only alleges C. W. Karthaus had not paid. As no other was, or could be, bound by the submission and award, to pay, and he was bound; it was a sufficient assignment of a breach of the condition of his bond, to allege that he had not paid the money awarded in favor of the plaintiffs. Upon the whole, it is the opinion of this court, that there is no error in the judgment of the circuit court, and the same is affirmed, with costs and damages.

Judgment affirmed.

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*232] *Junius K. Horsburg, devisee of James Henderson, Appellant, *v.* Martin Baker and Hannah his wife, Francis Clark, Robert Boyce and Peter Mason, for himself, and as guardian to Susannah R. Hamlett.

Equity.—Forfeiture.—Discovery.

A court of chancery is not the proper tribunal to enforce a forfeiture; the remedy for the same being at law.[1] p. 236.

After an answer and discovery, the rule is, that a suit brought merely for discovery, cannot be revived; the object is obtained, and the plaintiff has no motive for reviving it. p. 236.

A bill had been filed originally for discovery, and afterwards became a bill for relief; the relief prayed for, was a forfeiture; which might be enforced at law; under such circumstances, it was proper to dismiss the bill, so far as it sought for relief against the forfeiture; but the dismissal should have been without prejudice to the legal rights of the parties, as absolute dismissal might be considered as a decree against the title the plaintiff claimed, and which, by the bill and the evidence obtained under it, he sought to establish. p. 236.

Appeal, from the Circuit Court for the District of Kentucky. The facts and the pleadings in the case, are fully stated in the opinion of the court.

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[1] Steedman *v.* Cooke, 13 S. & R. 172; Funk *v.* Haldeman, 53 Penn. St. 229; Railroad Co. *v.* Railroad Co., 57 Id. 65