This rule is fully recognised by this court in the case of the *United States* v. *Macdaniel*, 7 Pet. 16. That was, like this, an action brought to recover a balance, certified at the treasury, against the defendant, and he set up, by way of defence, a claim which had been rejected at the treasury, for services as agent for the payment of the navy pension fund; and to which claim this *court thought him equitably entitled. It is there [*164
said by the court, that this action is for a sum of money which happens to be in the hands of the defendant, and the question is, whether he shall be required to surrender it to the government, and then petition congress on the subject. The government seeks to recover money from the defendant, to which he is equitably entitled for services rendered. This court cannot see any right, either legal or equitable, in the government, to the money, for the recovery of which this action is brought.

If anything more could be wanted to show how entirely unsupported the present suit is, it will be found in the discharge given by the president of the United States, of Gates, who was held in custody by the marshal, under the execution upon which the poundage is now claimed. This discharge, directed to the marshal, after reciting that Gates had complied with the requisites of the act of the 3d of March 1817, authorized him to discharge the said Gates from his custody, and out of the prison. This law (3 U. S. Stat. 399) gives to the president full power to order such discharge, upon such terms and conditions as he may think proper, and the party shall not be imprisoned again for the same debt. The discharge in this case is absolute and unconditional, and the marshal had no authority to hold him in custody afterwards. So that, admitting Gates to have been liable for these poundage fees, the marshal's power or right to compel payment from him, was taken away by authority of the United States, the plaintiff in the suit. And the right of the marshal to claim his poundage fees from them, is thereby clearly established. The judgment of the circuit court is accordingly affirmed.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel: On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby affirmed.

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*John Lutz, Plaintiff in error, *v.* Otho M. Linthicum. [*165

Award.—Responsibility of agent.—Presumption.

In the circuit court of the county of Washington, Linthicum instituted an action of covenant, on articles of agreement, by which Lutz covenanted that Linthicum should have peaceable possession of a certain house in Georgetown, and retain and keep the same for five years; Linthicum was evicted by Lutz, before the time expired. The articles were spread upon record, by which it appeared, that they were made "by and between John Lutz, of, &c., and agent for John McPherson, of Fredericktown, in the state of Maryland, of the one part, and Otho M. Linthicum, of Georgetown, &c., of the other part;" and it is witnessed, "that the said John Lutz, agent as aforesaid, has rented and leased," &c., the premises to Linthicum; and on the other hand, Linthicum covenants to pay the rent, &c., as stated in the declaration; there was no covenant in the lease, by Lutz, for quiet enjoyment, as stated in the declaration; but the latter was founded upon the covenant implied by law, in case of demises. The articles concluded with

these words: "In witness whereof, we, the said John Lutz and O. M. Linthicum, have hereunto interchangeably set our hands and seals, day and date above. John Lutz, agent for John McPherson [L. S.], O. M. Linthicum. [L. S.]" The defendant Lutz pleaded performance, without praying *oyer*, and issue was joined. Afterwards, the parties, by consent, agreed to refer the cause: and accordingly, by a rule of court, it was ordered, "that William S. Nicholls and Francis Dodge be appointed referees between the parties aforesaid, with liberty to choose a third person; and that they, or any two of them, when the whole matter concerning the premises, between the parties aforesaid in variance, being fairly adjusted, have their award in writing under their hands, and return the same to the court here; and judgment of the court to be rendered according to such award, and be final between the said parties." The referees so named, on the 28th of January 1833, chose John Kurtz the third referee; and afterwards, on the same day, made their award in the following words: "We, the subscribers, appointed arbitrators to settle a dispute between Otho M. Linthicum and John Lutz, in which the executors of the late John McPherson of Frederick are interested, do award the sum of $1129.93, to be paid to the said Linthicum, in full for all expenses and damages sustained by him, in consequence of not leaving him in quiet possession of the house, at the corner of Bridge and High streets, in Georgetown; (the demised premises), for the full term of the lease for five years; any arrear of rent due from Linthicum, to be paid by him:" signed by all the referees. Judgment was given by the circuit court, for the full amount of the award so made, and costs.

The articles purport to be made by Lutz, and to be sealed by him; and not to be made and sealed by his principal; the description of himself, as agent, does not, under such circumstances, exclude his personal responsibility.[1] But this very liability was necessarily submitted to the referees, and came within the scope of their award.

*166] *It was objected to the award, that it was uncertain, not mutual and final; that it did not state whether the money is to be paid by Lutz, or the executors of McPherson; that it did not find the arrears of rent due, and to whom due; that it did not appear to be an award in the cause; that the award and the proceedings thereon where not according to the laws of Maryland; that the appointment of the third referee ought not to have been made, until after the other two referees had met and heard the cause, and disagreed thereon.[2] The court held all these objections invalid.

Without question, due notice should be given to the parties, of the time and place for hearing the cause, by the referees; and if the award was made, without such notice, it ought, upon the plainest principles of justice, to be set aside; but it is by no means necessary, that it should appear upon the face of the award, such notice was given; there is no statute of Maryland, whose laws govern in this part of the district, which requires such facts to be set forth in the award. If no notice is in fact given, and no due hearing had, the proper mode is to bring such facts, not appearing on the face of the award, before the court, upon affidavit and motion to set aside the award; but *primâ facie*, the award is to be taken to having been regularly made where there is nothing on its face to impeach it.

The statute of Maryland requires that notice of an award shall be given to the party against whom it is made, by service of a copy, three days before judgment is moved; and judgment is not to be entered, but on motion, and direction of the court; it was alleged, that a copy of the award was not delivered. How that may have been, we have no means of knowing, for nothing appears upon the record respecting it, and there is no ground to say, that it ought to constitute any part of the record, or that it is properly assignable as error; it is a matter purely collateral, and *in pais*. If no such copy had been delivered, the proper remedy would have been, to take the objection in the court below, upon the motion for judgment, or to set aside the judgment for irregularity, if there had been no waiver, or no opportunity to make the objections before judgment. But in the present case, sufficient does appear upon the record, to show that the party had full opportunity to avail himself of all his legal rights in the court below: the cause was referred at November term 1832; pending the term, to wit, on the 18th of January 1833, the award was filed in court; the cause was then continued until the next term, viz., the fourth Monday in March 1833; at which time, the parties appeared by their attorneys, and upon motion, and after argument of counsel, judgment was entered. We are bound to presume, in the absence of all evidence to the contrary, that all things were rightfully and regularly done by the court, and that the parties were fully heard upon all the matters properly in judgment.

[1] See note to Clarke *v.* Courtney, 5 Pet. 320.

[2] Alexandria Canal Co. *v.* Swann, 5 How. 83, 90. And see Smith *v.* Morse, 7 Wall. 57.

Lutz v. Linthicum.

ERROR to the Circuit Court of the district of Columbia, and county of Washington.

In the circuit court, Otho M. Linthicum, the defendant in error, instituted an action of covenant, on a certain lease, or article of agreement, by which the defendant, John Lutz, demised to him a certain brick house in Georgetown, for a term of five years, at a rent specified in the same. Under this lease, *the plaintiff, Linthicum, held possession of the premises, [*167 according to the covenants in the said lease, and made certain repairs. The declaration averred, that before the end of the term for which the premises were so leased to the said Linthicum, the defendant, John Lutz, evicted and dispossessed him from the premises, whereby he lost the benefit of the repairs done to the same, and claimed damaged for the breach of the covenants in the lease and for eviction, amounting to $2000. The lease, upon which the action was instituted, was in the following terms:

"Articles of agreement, made and concluded this 22d day of October, in the year of our Lord 1828, by and between John Lutz, of Georgetown, in the district of Columbia, and agent for John McPherson, of Fredericktown, in the state of Maryland, of the one part, and Otho M. Linthicum, of Georgetown and district aforesaid, of the other part, witnesseth, that the said John Lutz, agent as aforesaid, has rented or leased to the said O. M. Linthicum, all that brick house, with the appurtenances thereto belonging, situated on the corner of High and Bridge streets, in Georgetown aforesaid, with the alley thereto attached, of thirteen feet six inches, fronting on Bridge street, and running parallel with said house, now in possession and occupied by Jacob Carter, Jun., as a dry-goods store: to have and to hold said house, and receive peaceable possession on the 3d day of May next ensuing, and continue for the space of five years from said time, which will terminate on the 3d day of May 1834. And the said O. M. Linthicum, on his part, doth hereby covenant and agree, for himself, his heirs and assigns, to pay to the said John Lutz, agent as aforesaid, or his successor, the just and full sum of two hundred and fifty dollars, for each and every year, for the aforesaid term of five years, the rent to be paid half yearly, as the same may become due; and all repairs that may be done by the said O. M. Linthicum, for his own convenience, to be at his own expense, and any repairs done by him to be left on the premises, as relates to the house; but in case he should erect a warehouse on the vacant ground, shall have the privilege to remove the same, at his will and pleasure, within said time, and to leave the house in as good condition, at the end of said term, as when he gets possession, the usual wear and tear excepted. *In witness whereof, we, the said John Lutz and O. M. Linthicum, have [*168 hereunto interchangeably set our hands and sale, day and date above.

JOHN LUTZ, Agent for J. MCPHERSON. [L. S.]
O. M. LINTHICUM. [L. S.]

"Signed, sealed and delivered in presence of
JAMES GETTYS, JOHN WHITE."

The defendant, John Lutz, pleaded performance, and afterwards, the following agreement of reference was entered into, by the counsel for the parties in the case. The record contained the following entries, relative to the further proceedings in the case.

"Whereupon, it is ruled by the court here, that the said William S. Nicholls and Francis Dodge, gentlemen, be appointed referees between the parties aforesaid, with liberty to choose a third person; and that they, or any two of them, when the whole matter concerning the premises between the parties aforesaid in variance, being fairly adjusted, have their award in writing, under their hands, and return the same to the court here, and judgment on the court to be rendered according to such award, and be final between the said parties. And afterwards, to wit, on the 28th day of January 1833, the said William S. Nicholls and Francis Dodge file in court here, the following certificate, appointing John Kurtz, with themselves, the referees in the premises, to wit:

"We certify, that, pursuant to the terms of reference, in the case of Otho M. Linthicum *v.* John Lutz, and before proceeding to act therein, or make any award, we, the referees, did nominate and appoint John Kurtz, whose name is subscribed to the within award, the third referee, to act, together with ourselves, in deciding the controversy between the parties, and submitted to us. W. S. Nicholls. Francis Dodge."

"And on the same day, the referees file in court here their award, in manner and form following, to wit: We, the subscribers, appointed arbitrators to settle a dispute between Otho M. Linthicum and John Lutz, in which the executors of the late John McPherson, of Frederick, are interested, do award the sum of eleven hundred and twenty-nine dollars and ninety-three cents to be paid to the said Linthicum, in full for all expenses and damages sustained by him, in *consequence of not leaving him in quiet possession of the house, at the corner of Bridge and High streets, Georgetown, for the full term of the lease for five years—any arrear of rent due from Linthicum to be paid by him. W. S. Nicholls. J. Kurtz. Francis Dodge."

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The circuit court gave judgment for the plaintiff on the award, and the defendant prosecuted this writ of error.

The case was argued by *Key*, for the plaintiff in error; and by *Marbury* and *Coxe*, for the defendant.

For the plaintiff in error, the following points were relied upon. 1. That the award is void for uncertainty, in not stating who is to pay the money awarded, the defendant or the executors of McPherson; and in not finding whether there was any arrear of rent due, or how much, nor to whom. 2. That the award is void, not being mutual nor final, in leaving the rent unascertained, and its payment unenforced. 3. The award is void, not appearing to be made in the cause—there being, in fact, another submission at the same time, to the same referees, of the same matters of controversy, by bond between the appellee, and the executors of McPherson, in reference to which the referees made the award. 4. The judgment of the court is erroneous; the submission, appointment of the third referee, award, and proceedings thereon, not being according to the act of assembly and the order of the court: 1st. The arbitrators ought not to have appointed a third person, until it was seen that they disagreed. 2d. When they appointed a third person, the defendant ought to have had notice of the person so chosen. The appointment and the award were made and filed the same day. 3d. No notice appears to have been given to the defendant, either of the

appointment of the third person, or of the making, or of the return of the award.

Key contended, that the award was defective in form. The reference was under an act of the assembly of Maryland, which directs the mode of proceeding in such cases. The *lease on which the action was [*170 founded, was executed by the plaintiff in error, as an agent of McPherson; and yet the award is given against him, as if he had acted as the principal in the agreement. The award was made against him, imposing upon him a personal liability, when the declaration states, that in the contract he acted as agent, and the claim stated in it is a claim on him as the agent of McPherson. Thus, the award is not in conformity with the submission; for the submission must be considered as having reference to the pleadings; and in the declaration, as well as in the articles of agreement, the plaintiff in error is stated to be the agent of McPherson. Yet the award finds against the plaintiff in error individually; and judgment is entered against him, not as agent, but individually.

The award is void for uncertainty. It does not say, who shall pay the amount found due, whether it shall be paid by John Lutz, or by the executors of McPherson. If it is a debt due by him as agent, he should, by the award, have been directed to pay it as agent, and his claim to repayment by the executors, would thus be clearly established. The award is not declared to be made in the suit in which the agreement to refer was entered. It does not say, that the money is to be paid in that suit, nor is it applicable to it; nor does it appear, that there was not another suit between the parties. The suit was brought for damages under a contract, and for the loss of the use and repairs of a certain house; and the award gives the amount to the plaintiff below for expenses, but nothing is said in the agreement about expenses. There could be no claim for expenses, for not having been allowed to hold the premises under the lease.

The award is also defective, in not finding the exact amount to be deducted for arrearages of rent. "Any arrear of rent due from Linthicum to be paid by him." The referees do not say, what those arrears are; and thus the whole amount found by the referees must be paid by Lutz, and he may afterwards recover the arrears when he can. *Lyle* v. *Rodgers*, 5 Wheat. 395, 405; 2 Gallis. 61; 14 Johns. 308. When a suit such as this is referred to arbitrators, they *must dispose of it—they must say what is to be [*171 done finally with it. This is not done; nothing is said about the costs.

The law of Maryland, ch. 8, § 75, directs that a notice of the award, and a copy of the same, shall be given to the party. Nothing of this is shown by the record to have been done; and the court had, therefore, no authority to give judgment on the award.

Marbury and *Coxe*, for the defendant.—Formerly, it seems to have been the policy of courts, in construing awards, to vacate them, if possible. A more reasonable construction now prevails; courts will intend everything to support awards, and give them effect. Most of the objections in this case must be sustained, if at all, by matter beyond the award.

A very material inquiry is contained in the proposition, to consider, that the submission was limited to the parties in the cause, and the matters in dif-

ference between them in that cause. Other parties, and other matters, different from those connected with the particular action referred to, may be introduced into the order of reference, if it be the pleasure of the parties and the order of reference embrace them. But who are connected with the reference, and what is referred, must depend on the terms of the order of reference. The agreement of the parties, and the order of reference, both show that the submission was limited to the parties in the suit. The record exhibits no evidence of a reference of the same, or any other controversy, between other parties. There is no ground for the introduction of the executors of Mr. McPherson; they certainly were not parties to the reference by order of court; and are strangers to the record and proceedings in this cause.

What was the matter referred? Was it general, of all matters in controversy between the parties; or special, of the matters in difference between them in this suit? There have been some nice discriminations respecting the effect of certain terms of referenee, which have how become familiar to the profession. When the reference is in these terms, "all
*172] matters in *difference between the parties in the cause," it has been held, to constitute a general reference; and then the arbitrators are not confined to the special matter in dispute in the cause referred, but may award on any subject or matter in difference between the parties, whether pleaded or not. But when the reference is, "of all matters in difference in the cause between the parties, the reference is special, and the arbitrators are confined to the matters in dispute in the cause referred. Watson on Arb. 3; 2 T. R. 645. The reference in this cause was special: the language of the agreement and of the order of reference limited it not only to the parties on the record, but to the matter in dispute between them in that cause. The language is, "the arbitrament of a majority in the premises, to be final between the parties," "when the whole matter concerning the premises, between the parties aforesaid in variance, being fairly adjusted," &c. By *premises*, meaning the cause referred. It is, in effect, if not in terms, a reference of "all matters in the cause in variance between the parties." The arbitrators were thus limited, and were not authorized to inquire or award concerning matters not pending in the cause referred to them.

What was then in dispute in the cause? It is shown by the pleadings. The action was brought to recover damages for the breach of a covenant for quiet enjoyment, contained in a lease signed by the plaintiff in error. The defendant pleaded performance. The reference then embraced nothing more than the question of eviction, and the consequent damage; and the referees had no authority to inquire into any other matter. It is insisted, that the award is uncertain in this: "that it does not find whether there was any arrear of rent due, nor how much, nor to whom." This matter concerning the rent was not a matter in controversy in the cause, and was not within the submission. It could not have been introduced into the cause but by a plea of set-off against the damages claimed by the plaintiff. No such plea was filed, in fact; nor would such a plea have been admissible. A plea of set-off can only be when there are mutual debts; not when the demand, on either side, is for unliquidated damages.

*If there be uncertainty in what the arbitrators have said concern-
*173] ing the rent, it will not vitiate the award; for "if an award be good

in part, and bad in part, and that part in which it is bad be not within the submission, it shall not invalidate that which is good within the submission." Watson on Arb. 135, 136 ; Kyd on Awards 244.

Again, on this part of the award. It does not appear by the finding of the arbitrators, in their award, that any rent was in arrear and due: they say, "any arrear of rent due from Linthicum, to be paid by him ;" not that there is rent in arrear, but if there be any. If the plaintiff in error would avail himself of any uncertainty connected with this part of the award, he should have made a motion to set it aside, and made it appear to the court, by affidavits, that there was rent in arrear. In the absence of such proof, it is not to be presumed, that there was rent due, the payment of which the arbitrators should have awarded, with sufficient certainty. For courts will not intend an award to be uncertain ; the uncertainty must appear on the face of the award, or by averment. Watson on Arb. 103–4, 119–20 ; Kyd on Awards 26.

With regard to all that was within the submission, the award is sufficiently certain, final and mutual. The submission embraced nothing more than "whether there had been a breach of the covenant ; and if so, the plaintiff's claim to damages for the eviction." If the arbitrators had done nothing more than award the payment of a sum of money, it would have been sufficient, without finding the act of eviction. But the arbitrators not only award the money to be paid, but they state that it is to be paid in consideration of the breach of covenant, complained of in the plaintiff's declaration. Watson 131, 145.

It is objected, however, to this part of the award, that it is uncertain, "in not stating who is to pay the money awarded." Absolute certainty is not required ; yet nothing short of absolute certainty, could make it more certain than it appears in this case, that Lutz is to pay the money awarded to Linthicum. There are but two parties to this suit, and two only to the reference. *Linthicum is the plaintiff, seeking damages [*174
for breach of a specific covenant. Lutz is the defendant, charged with the breach. The arbitrators award, that Linthicum shall receive $1129.93, for his loss and damage, in consequence of the breach of covenant of which he complained against Lutz. Who then is to pay? Certainly, Lutz, the defendant, and only other party in the suit. The executors of McPherson had nothing to do with it. Are the terms in which the verdict of a jury is rendered more certain ? Not at all ; the usual form is, "we find for the plaintiff, and assess his damages at so much ;" it is never added, to be paid by the defendant.

This award is said to be void, not being mutual. In the case of *Lyle* v. *Rodgers*, 5 Wheat. 400, it is said, "that if that part of the award which is void, be so connected with the rest as to affect the justice of the case between the parties, the whole is void." In that case, the release of certain lands by Bond and Lyle, was the recompense, in consideration of which Mrs. Dennison was to pay a sum of money ; but inasmuch as Mrs. Dennison could not have advantage of what was intended for her, the whole was declared void. The payment of the rent, in this case, forms not part consideration for the payment of the $1129.93 to Linthicum, and is no way connected with it ; the suit was solely for the damages.

It is objected, that the arbitrators ought not to have appointed a third

person, until they had disagreed. To this it is answered, that the third person to be chosen by the arbitrators, was, by the terms of the order of reference, to be a referee, and not an umpire; but if an umpire, it was not improper to make the appointment before a difference.

It is objected, that the appointment and award were made and filed the same day. It is answered, that the record does not show this to be the fact; it shows, that the arbitrators filed the certificate of the appointment of the third referee, and their award, on the same day, to wit, the 28th day of January. If, however, the fact was shown, it is no evidence of misconduct; it is consistent with perfect fairness. If there be unfairness *or mis- *175] conduct in the arbitrators, it should be averred and shown, on affidavit, on a motion to set aside the award.

As to no notice of the appointment of a third referee, or of the making or of the return of the award. This objection is for matter *dehors* the award. That notice was given, need not be stated in the award. 6 Har. & Johns. 407. To impeach the award for want of notice, a motion, supported by affidavit, to set it aside, must be made; it cannot be by exception, which must be for matter on the face of the award. Act of Maryland of 1778, ch. 21, §§ 8–10. The award shall remain seven days in the general, and four in the county court during their sitting, before judgment shall be entered up. Then judgment shall be entered, and execution granted, in the same manner as may be on verdict, confession or nonsuit.

Story, Justice, delivered the opinion of the court.—This is a writ of error to the circuit court of the district of Columbia, for the county of Washington. The original suit was an action of covenant, brought by Linthicum against Lutz, upon certain articles of agreement, made between Lutz on the one part, and Linthicum on the other part, on the 22d of October 1828. The declaration, after reciting that Lutz, by these articles, leased certain premises in Georgetown to Linthicum, for five years, from the 3d day of May then next ensuing, and a covenant on the part of Linthicum to pay therefor an annual rent $250, the rent to be paid half-yearly, averred, that, by the articles of agreement, Lutz bound himself to Linthicum, that the latter should have peaceable possession of the premises and retain and keep the same for the said five years; that Linthicum entered into possession of the premises, and held the same until the 3d day of November 1832, when Lutz evicted and dispossessed him, &c. The articles are spread upon the record, by which it appears, that they were made "by and between John Lutz of, &c., and agent for John McPherson, of Fredericktown, in the state of Maryland, of the one part, and Otho M. Linthicum, of Georgetown, &c., of the other part." And it is witnessed, "that the said *176] John Lutz, agent as aforesaid, *has rented and leased," &c., the premises, to Linthicum; and on the other hand, Linthicum covenants to pay the rent, &c., as stated in the declaration. But there is no covenant in the lease by Lutz for quiet enjoyment, as stated in the declaration; but the latter is founded upon the covenant implied by law, in cases of demises. The articles conclude with these words: "In witness whereof, we, the said John Lutz and O. M. Linthicum, have hereunto interchangeably set our hands and seals, day and date above. John Lutz, agent for John McPherson. [L. S.] O. M. Linthicum. [L. S.]"

The defendant, Lutz, without praying *oyer* of the articles (without which they could not constitute a part of the declaration), pleaded general performance of the covenants; upon which an issue was joined to the country. Afterwards, the parties, by consent, agreed to refer the cause; and accordingly, by a rule of court, it was ordered, "that William S. Nicholls and Francis Dodge he appointed referees between the parties aforesaid, with liberty to choose a third person; and that they, or any two of them, when the whole matter concerning the premises, between the parties aforesaid in variance, being fairly adjusted, have their award in writing, under their hands, and return the same to the court here; and judgment of the court to be rendered according to such award, and be final between the said parties." The referees so named, on the 28th of January 1833, chose John Kurtz the third referee; and afterwards, on the same day, made their award in the following words: "We, the subscribers, appointed arbitrators to settle a dispute between Otho M. Linthicum and John Lutz, in which the executors of the late John McPherson, of Frederick, are interested, do award the sum of eleven hundred and twenty-nine dollars and ninety-three cents, to be paid to the said Linthicum, in full for all expenses and damages sustained by him, in consequence of not leaving him in quiet possession of the house, at the corner of Bridge and High streets, in Georgetown (the demised premises), for the full term of the lease for five years. Any arrear of rent due from Linthicum, to be paid by him." Signed by all the referees. Judgment was given by the circuit court, for the full amount of the award so made, and costs; and the present writ of error is brought to revise that judgment.

*The question, whether the articles of agreement personally bound Lutz, is not presented by the pleadings in such a manner as that there might not be difficulty in deciding it, if it constituted the only point in judgment. But if this difficulty were surmounted, and the articles are to be deemed properly before us, we do not see, how they can well be construed not to import a personal liability on the part of Lutz, for the want of any other obligations contained in them. The articles purport to be made by Lutz, and to be sealed by him; and not to be made and sealed by his principal. The description of himself, as agent, does not, under such circumstances, exclude his personal responsibility. But this very liability was necessarily submitted to the referees, and came within the scope of their award. [*177

Several objections have been taken to the award. In the first place, it is said, that the award is uncertain, and not mutual and final; that it does not state by whom the money awarded is to be paid, whether by Lutz, or by the executors of McPherson; and that it does not find the arrears of the rent due, and to whom due; and that it does not appear to be an award made in this cause. We are of opinion, that these objections are ill founded. The award is sufficiently shown to be an award in this cause; for no other cause directly appears to have been pending, or in dispute between the parties; and the subject-matter of this very suit is directly within the terms of the award. The award being made in this suit, and applicable in its terms to it, it is sufficiently certain, that the money is to be paid by Lutz, for there is no other person on the record by whom it can be judicially awarded to be paid. The award is also mutual and final, as to all the matters referred. It is not a general arbitration, at the common law, of all

matters in dispute between the parties; but a specific reference of the matters in dispute, in the cause pending in court, under a rule of court. Now, those matters were the damages and losses claimed by Linthicum, for the breach of the covenant; and the sum awarded is expressly declared to be "in full for all expenses and damages" so sustained. As to the arrears of the rent due from Linthicum, they constituted no part of the matters submitted; they were not in controversy in the suit. And the statement in the award, as to any arrears of rent, was *merely an exclusion of a *178] conclusion, which might possibly have been drawn, that the referees had deducted such arrears in making their award. It is, therefore, very properly stated, that any arrears of rent due by Linthicum are, notwithstanding the award, to be paid by him.

Another objection is, that the submission, the appointment of the third referee, the award itself, and the proceedings thereon, have not been according to the acts of assembly of Maryland, and to the order of the court. It is said, that the appointment of the third referee ought not to have been made, until after the two other referees had met and heard the cause, and disagreed thereon; but we are of a different opinion. The submission under the rule of court did not contemplate the third referee to be a mere umpire in the case, upon a difference of opinion of the other two; but an original referee, to be chosen by the other two, and when chosen, to constitute a part of the board authorized to hear and decide the cause. How otherwise are we to understand the language of the rule? "They (that is the three), or any two of them, are to have their award in writing," &c., which words plainly contemplate the case of a hearing by all of them; and if the case were one in which an umpire was to be chosen, there is no impropriety, and on the contrary, it has been thought, that there is great propriety, in selecting the umpire, before the other arbitrators have disagreed. This doctrine has been repeatedly held in England, (*a*) and it was affirmed in the court of appeals of Maryland, in *Rigden* v. *Martin*, 6 Har. & Johns. 403. It is so reasonable in itself, that if the point were new, it would be difficult to displace it. Then, again, it is said, that no notice appears to be have been given to Lutz of the appointment of the third referee, or of the making or returning the award, and that these acts appear all to have been done on the same day. There is certainly no objection to these acts being done on the same day, if the parties had due notice and a due hearing before the referees, and the award was made upon due deliberation. Without question, due notice should be given to the parties, of *the time and place for hearing the cause; and if *179] the award was made, without such notice, it ought, upon the plainest principles of justice, to be set aside. But it is by no means necessary, that it should appear upon the face of the award, that such notice was given. There is no statute of Maryland (whose laws govern in this part of the district) which requires such facts to be set forth in the award. The act of 1779, ch. 21, § 8, merely authorizes submissions, by a rule of court, of causes pending in the court; and the act of 1785, ch. 80, § 11, provides only for cases, where either of the parties dies pending the submission, and before the award. If no notice is in fact given, and no due hearing had, the

(*a*) See Watson on Awards, ch. 4, § 2, p. 56–8; Kyd on Awards 82–8, 2d edition; Roe *v.* Doe, 2 T. R. 644; Harding *v.* Watts, 15 East 556.

proper mode is to bring such facts (not appearing on the face of the award) before the court, upon affidavit, and motion to set aside the award. But, *primâ facie*, the award is to be taken to have been regularly made, where there is nothing on its face to impeach it. This very objection was made and overruled in *Rigden* v. *Martin*, 6 Har. & Johns. 403.

Another objection is, that the same act of Maryland of 1785, ch. 80, § 11, requires, that in all cases of awards made under a rule of court, the party in whose favor the award is made shall cause a copy thereof to be delivered to the adverse party or his attorney, at least three days before judgment is moved for upon the award; and the clerk of the court is not to enter judgment upon any award, without a motion to, and direction from, the court; and the court shall always have satisfactory proof that a copy of the award hath been so delivered, before judgment shall be so directed to be entered; and it is said, that there has not been a compliance with this requisite by a delivery of the copy. How that may have been, we have no means of knowing, for nothing appears upon the record respecting it, and there is no ground to say, that it ought to constitute any part of the record, or that it is properly assignable as error. It is matter purely collateral and *in pais*. If no such copy had been delivered, the proper remedy would have been, to take the objection in the court below, upon the motion for judgment, or to set aside the judgment for irregularity, if there had been no waiver, or no opportunity to make the objections, before judgment. But in the present case, sufficient does appear upon the record, to show, that the party had full opportunity *to avail himself of all his legal rights in the court below. [*180
The cause was referred at November term 1832; pending the term, to wit, on the 18th of January 1833, the award was filed in court; the cause was then continued until the next term, viz., the fourth Monday in March 1833; at which time, the parties appeared by their attorneys, and upon motion, and after argument of counsel, judgment was entered. We are bound to presume, in the absence of all evidence to the contrary, that all things were rightfully and regularly done by the court, and that the parties were fully heard upon all the matters properly in judgment.

Upon the whole, our opinion is, that the judgment of the circuit court ought to be affirmed.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel: On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby affirmed, with costs and damages at the rate of six per centum per annum.