only have an action for the real damage ſuſtained; and not even that, if tender of amends is made before any action is brought (8).

VI. THE ſeiſing of heriots, when due on the death of a tenant, is alſo another ſpecies of ſelf-remedy; not much unlike that of taking cattle or goods in diſtreſs. As for that diviſion of heriots, which is called heriot-ſervice, and is only a ſpecies of rent, the lord may diſtrein for this, as well as ſeiſe: but for heriot-cuſtom (which ſir Edward Coke ſays [t], lies only in *prender*, and not in *render*) the lord may ſeiſe the identical thing itſelf, but cannot diſtrein any other chattel for it [u]. The like ſpeedy and effectual remedy, of ſeiſing, is given with regard to many things that are ſaid to lie in franchiſe; as waifs, wrecks, eſtrays, deodands, and the like; all which the perſon entitled thereto may ſeiſe, without the formal proceſs of a ſuit or action. Not that they are debarred of this remedy by action; but have alſo the other and more ſpeedy one, for the better aſſerting their property; the thing to be claimed being frequently of ſuch a nature, as might be out of the reach of the law before any action could be brought.

THESE are the ſeveral ſpecies of remedies, which may be had by the mere act of the party injured. I ſhall, next, briefly mention ſuch as ariſe from the joint act of all the parties together. And theſe are only two, *accord*, and *arbitration*.

[t] Cop. § 25. [u] Cro. Eliz. 590. Cro. Car. 260.

(8) The ſtatute directs that the action ſhall be an action of treſpaſs or upon the caſe, and therefore an action of trover cannot be brought to recover goods taken under an irregular diſtreſs. 1 *H. Bl.* 13. To an action under this ſtatute, the defendant may plead the general iſſue. But if a party pay money to redeem his goods from a wrongful diſtreſs for rent, he may afterwards maintain an action of trover againſt the perſon who diſtrained them.

I. ACCORD is a ſatisfaction agreed upon between the party injuring and the party injured; which, when performed, is a bar of all actions upon this account. As if a man contract to build a houſe or deliver a horſe, and fail in it; this is an [16] injury for which the ſufferer may have his remedy by action; but if the party injured accepts a ſum of money, or other thing, as a ſatisfaction, this is a redreſs of that injury, and entirely takes away the action [w]. By ſeveral late ſtatutes, (particularly 11 Geo. II. c. 19. in caſe of irregularity in the method of diſtreining; and 24 Geo. II. c. 24. in caſe of miſtakes committed by juſtices of the peace,) even *tender* of ſufficient amends to the party injured is a bar of all actions, whether he thinks proper to accept ſuch amends or no.

II. ARBITRATION is where the parties, injuring and injured, ſubmit all matters in diſpute, concerning any perſonal chattels or perſonal wrong, to the judgment of two or more *arbitrators;* who are to decide the controverſy: and if they do not agree, it is uſual to add, that another perſon be called in as *umpire*, (*imperator* or *impar* [x],) to whoſe ſole judgment it is then referred: or frequently there is only one arbitrator originally appointed. This deciſion, in any of theſe caſes, is called an *award*. And thereby the queſtion is as fully determined, and the right transferred or ſettled, as it could have been by the agreement of the parties or the judgment of a court of juſtice [y]. But the right of real property cannot thus paſs by a mere award [z]: which ſubtilty in point of form (for it is now reduced to nothing elſe) had it's riſe from feodal principles; for, if this had been permitted, the land might have been aliened colluſively without the conſent of the ſuperior. Yet doubtleſs an arbitrator may now award a conveyance or a releaſe of land; and it will be a breach of the arbitration-bond to refuſe compliance. For, though originally the ſubmiſſion to arbitration uſed to be by word, or by deed, yet both of theſe being revocable in their nature, it

[w] 9 Rep. 79.
[x] Whart. *Angl. ſacr.* i. 772. Nicols. Scot. hiſt. libr. ch. 1. *prope finem.* 115.
[y] Brownl. 55. 1 Freem. 410.
[z] 1 Roll. Abr. 242. 1 Lord Raym.

is now become the practice to enter into mutual bonds, with condition to ſtand to the award or arbitration of the arbitrators
[17] or umpire therein named [a]. And experience having ſhewn the great uſe of theſe peaceable and domeſtic tribunals, eſpecially in ſettling matters of account, and other mercantile tranſactions, which are difficult and almoſt impoſſible to be adjuſted on a trial at law; the legiſlature has now eſtabliſhed the uſe of them, as well in controverſies where cauſes are depending, as in thoſe where no action is brought: enacting, by ſtatute 9 & 10 W. III. c. 15. that all merchants and others, who deſire to end any controverſy, ſuit, or quarrel, (for which there is no other remedy but by perſonal action or ſuit in equity,) may agree, that their ſubmiſſion of the ſuit to arbitration or umpirage ſhall be made a rule of any of the king's courts of record, and may inſert ſuch agreement in their ſubmiſſion, or promiſe, or condition of the arbitration-bond: which agreement being proved upon oath by one of the witneſſes thereto, the court ſhall make a rule that ſuch ſubmiſſion and award ſhall be concluſive: and, after ſuch rule made, the parties diſobeying the award ſhall be liable to be puniſhed, as for a contempt of the court; unleſs ſuch award ſhall be ſet aſide, for corruption or other miſbehaviour in the arbitrators or umpire, proved on oath to the court, within one term after the award is made (9). And, in conſequence of this ſtatute, it

[a] Append. No. III. § 6.

(9) A motion to ſet aſide an award under a ſubmiſſion by an obligation, muſt be made before the laſt day of the next term after the award is made. 9 & 10 *W. III. c.* 15. *ſ.* 2. 2 *T. R.* 781. But this does not extend to an award made in purſuance of an order of *niſi prius*. *Str.* 301. If a motion be made to ſet aſide an award under the ſtatute, becauſe it has been procured by corruption or undue means, or for any matter extrinſic the award, it muſt be made before the end of the next term; but an application for an attachment for not performing an award, may be reſiſted at any time for defects appearing on the face of the award itſelf; for ſuch an award, after that time, might be pleaded in bar to any action

is now become a conſiderable part of the buſineſs of the ſuperior courts, to ſet aſide ſuch awards when partially or

not be *ſet aſide* for ſuch defects after the end of the next term. 1 *Eaſt.* 276.

Submiſſions to arbitration were entered into by a rule of the court at the common law when a cauſe was depending, and the ſtatute of king William was intended to give the ſame efficacy to awards where no ſuit or action was inſtituted. 2 *Burr.* 701. A verbal agreement to abide by an award cannot be made a rule of court. 7 *T. R.* 1.

A ſubmiſſion to an award cannot be made a rule of court, where an indictment as for an aſſault has been preferred for the ſubject referred. 8 *T. R.* 520. An agreement to enlarge the time of making an award muſt contain a conſent to make it a rule of court, otherwiſe no attachment will be granted for non-performance. 8 *T. R.* 57.

Where a cauſe is referred by an order of *niſi prius*, and it is agreed that the coſts ſhall abide the event of the award, this ſignifies the legal event; and if the arbitrator awards ſuch damages for a treſpaſs or an aſſault as would not, if given in a verdict, carry coſts to the plaintiff, he cannot recover them under this reference, the award in ſuch inſtances being not equivalent to the certificate of a judge. 3 *T. R.* 138. But arbitrators may award coſts at their diſcretion, unleſs there is an expreſs proviſion in the rule, that the coſts ſhall abide the event of the award. 2 *T. R.* 644. If it is awarded that one of the parties ſhall pay the coſts of the action, the coſts of the arbitration are not included. *H. Bl. Rep.* 223.

When arbitrators have the power of electing an umpire, they may chuſe him and call in his aſſiſtance as ſoon as they begin to take the ſubject into conſideration. And this is the more convenient practice, as it ſecures a deciſion upon a ſingle inveſtigation of the controverſy. 2 *T. R.* 644. The agreement to a reference muſt be expreſſed with great caution and accuracy, for if it is agreed to refer all *matters in difference between the parties in the cauſe;* the arbitrators are not confined to the ſubject of the cauſe alone, as they are when it is agreed to refer all *matters in difference in the cauſe between the parties*. 2 *T. R.* 645. Yet after an award under a reference in the firſt caſe, either party may main-

illegally made; or to enforce their execution, when legal, by the ſame proceſs of contempt, as is awarded for diſobedience

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tain an action for a right or demand ſubſiſting at the time of the reference, but not diſputed before, or referred to, the arbitrators. 4 *T. R.* 146.

The court will not grant an attachment againſt a member of parliament for non-payment of money according to an award. 7 *T. R.* 448. If an arbitrator award that an adminiſtrator, who has ſubmitted to the award, ſhall pay a certain ſum, he is precluded afterwards from objecting that he has no aſſets to ſatisfy the demand. 7 *T. R.* 453.

Courts of equity exerciſe a juriſdiction in ſetting aſide awards, particularly if a diſcovery or an account be prayed; but an arbitrator cannot be made a party, if it is agreed by the ſubmiſſion bond that no bill in equity ſhall be filed againſt him. 2 *Atk.* 395. Where it was one of the articles of co-partnerſhip that all differences ſhould be referred to arbitration, it was decided, that a court of equity could entertain no juriſdiction of the ſubject until the parties had referred their diſputes to the conſideration of arbitrators. 2 *Bro.* 336. But it has ſince been determined that an agreement or covenant to refer all differences to arbitration, and not to file any bill in equity, or bring any action at law, cannot take away the juriſdiction of any court in Weſtminſter Hall. But an action might be brought for the breach of this covenant. 2 *Veſ. jun.* 129. And where a ſubmiſſion to an award is made a rule of court, and it is part of the rule that the parties ſhall file no bill in equity, it is in the diſcretion of the court of law, whether they will enforce that part of the rule by attachment or not. *Ib.* 451.

The ſame has alſo been decided by the court of King's Bench. 8 *T. R.* 139.

When a verdict is taken *pro formâ* at the trial for a certain ſum, the plaintiff is entitled to enter up judgment for the amount of the ſum awarded, without applying to the court for leave. 1 *Eaſt.* 401. 3 *B.* & *P.* 244.

An award to pay money in conſequence of ſuch an illegal tranſaction as would have been a bar to it's recovery in an action, will be ſo far ſet aſide. 3 *B.* & *P.* 371.

An award will be ſet aſide if it is contrary to law. 3 *Eaſt* 18.

to thoſe rules and orders which are iſſued by the courts themſelves.

Unleſs it was clearly agreed by the parties, that the judgment of the arbitrator upon the queſtion of law ſhould be concluſive. 9 *Veſ. jun.* 364.

Arbitrations being unattended by the inevitable delay and expence of public litigation, are of ſuch infinite importance to the community, that it is rather ſurprizing that the legiſlature has not yet given to arbitrators a power of compelling the attendance of witneſſes, or of adminiſtering an oath to them. For until they poſſeſs this authority, like courts of juſtice, however wiſe and righteous their awards may be, it cannot be expected that they can give the ſame ſatisfaction to thoſe who are intereſted in the event of the controverſy.