

### Discussion.

**The Author**, in introducing the Paper, observed that there was always a human interest in the conflict of testimony of fact between two or more persons and in the conflict of opinion between two or more experts on a particular branch of science and in searching for the truth in the varying evidence given. Further, the legal problems concerned with the interpretation of contracts and the ascertainment of legal rights were often of general interest, because they reflected the workings of the human mind without having any scientific basis. The engineer's interest in that matter was probably the stronger because his main preoccupation was with science and he turned to those problems as a temporary relief from his more exacting pursuits.

Parties to a dispute on questions affecting engineering, in deciding whether they should refer their differences to the arbitration of a civil engineer rather than to the legal tribunals established and maintained by the State, generally sought the assistance of men who they considered could bring to their problems a mind trained in the science and practice of engineering rather than in the practice of the law. In doing so they showed a preference for the lay tribunal because, presumably, they believed that there would be an advantage in referring the dispute to a person who had been trained to deal with the problems with which they were concerned and they considered that his knowledge would enable the dispute to be the more readily as well as the more accurately determined in consequence of such understanding.

For the above-mentioned reasons, the majority of disputes arising out of engineering contracts of all kinds fell to be determined by engineers as arbitrators. That did not mean, however, that the arbitration could, in consequence, be conducted in a less formal manner than an action in the Courts, nor did it mean that the cost of arbitration would be lower than that of a trial in the Courts. The legislature, by the Arbitration Acts of 1889-1934, and the Courts, by their decisions under that code of law, required an arbitrator to observe certain principles of procedure and of law which they considered necessary to ensure that justice would be done between the parties. So-called "rough justice" was not, in the opinion of Parliament or of the Courts of Law, justice at all.

For that reason it was necessary for a civil engineer arbitrator to have a guide to the legislative code and to the principles of law which should be observed by him in the exercise of his important duties, and the Paper formed an attempt to provide such a guide and to make it as complete as possible, so far as the arbitrator might need it. The Paper was not intended to be in any sense an exhaustive treatment of the subject from the point of view of the lawyer to whom the arbitrator might refer for advice, though it might serve the lawyer too as an index to the matters

which he should consider and to the powers of the Courts which he should bear in mind.

The advice given in the Paper, that a civil engineer should not accept nomination as arbitrator under a contract of long duration, did not concern the engineer in control of the works, who under some contracts might have quasi judicial and arbitral functions. It concerned the engineer who might be requested to allow himself to be named in the contract, or might be requested to be a standing arbitrator under an agreement of long duration. By accepting such nomination he would preclude himself from advising either party during the period of the contract, and yet might well never be called upon to arbitrate at all. It was much wiser for an engineer so invited to say : " Ask me again if and when any dispute arises."

The Author wished to acknowledge the assistance rendered by Mr. R. D. Stewart-Brown in the preparation of the Paper and by Mr. Spencer Rodgers in the preparation of the Appendices. Mr. Kenneth Thomas had kindly read the Paper in draft form and had made valuable suggestions which had been gladly adopted. He was sure that those gentlemen shared his hope that the Paper would assist all civil engineers who were called upon to act as arbitrators.

**The President** observed that, with regard to the arbitration clause in the conditions of contract, which stated that the decision of the arbitrator was to be final and binding on all parties, that was not, in fact, the case, because one or other of the parties could state a case and go to the Courts. He did not know whether an alteration could be made in that connexion, because those who decided, rightly or wrongly, that they preferred to have an engineer as arbitrator, rather than go to the Courts, relied upon the good sense and judgment of the engineer in settling the matter.

**Sir Cyril Kirkpatrick** observed that the Paper would form a guide and help to all engineers who had to deal with arbitration. It was better than a textbook, because it dealt very clearly with a great many matters which were not found in any textbook. Possibly no one except the Author could have described more clearly the intricacies which arose out of the arbitration clauses.

Sir Cyril had had clients who insisted on going to the Courts, but he believed that quite 75 per cent. of cases were referred in the ordinary course to the President of The Institution to nominate a civil engineer arbitrator. He believed that that practice was increasing, showing that arbitration by a civil engineer was generally regarded as the most satisfactory means of reducing a dispute to a final settlement, which was almost always in pounds, shillings and pence.

He considered that the engineer arbitrator should not go too far without enlisting the help of a legal adviser, who would be a valuable and often an indispensable asset to his work.

**Mr. S. B. Donkin** observed that the merit of the Paper was that it

gave guidance specifically to engineers who had to arbitrate in engineering matters. His only criticism was that the Author had referred specially to the civil engineer, and not to the mechanical engineer or the electrical engineer, to whom such guidance would be equally useful.

He appreciated that the engineer arbitrator had great difficulty in deciding matters that had to be based on legal principles, and therefore any guidance that he could obtain from a legal assessor would be extremely valuable and might keep him on the rails when without it he might leave them. Could the Author state whether, supposing that during the hearing of an arbitration neither side nor the arbitrator had stated a case on a legal point, it was possible for either party to the dispute to state a case after the award had been given ?

Mr. Donkin had always found it of great value to regard expert witnesses as assistants to the arbitrator. An expert witness who tended to take sides in an arbitration did not help the arbitrator. He remembered a remark made long ago by a junior counsel that a very famous witness of that time had two ways of expressing "No," and two ways of expressing "Yes," and that any counsel who was used to his ways would know whether he meant the reverse or not !

The Author's statement that evidence of opinion could be rejected by the arbitrator if it was not in harmony with his own experience was a valuable hint to arbitrators ; and another useful piece of advice was that an arbitrator should, generally speaking, not refuse to hear evidence even if he thought it was redundant, because by refusing to hear it he might possibly indicate to both parties what his decision was likely to be.

Mr. Donkin wondered why the Author had recommended that the arbitrator's award should be drawn up by a lawyer or by the legal assessor at the arbitration. Did he feel that a lawyer, in drawing up the award, would so phrase it that no sentence could have a second or a third meaning ? If so, it would appear that the Author distrusted the ability of the engineer to write such sentences. Mr. Donkin believed that the engineer was the person most competent to write a concise sentence, with only one meaning, on engineering matters, whereas a lawyer might wrap up that one meaning in a number of peculiar phrases which would confuse the engineer. Perhaps the Author considered that if, after an arbitration, the case were taken to the High Court the learned Judges might more easily interpret legal phraseology than that of the engineer.

The ability of the engineer-arbitrator to understand the meaning of technical cases and technical problems was perhaps the reason why an engineer was appointed as arbitrator in such cases. Mr. Donkin recalled an arbitration in which Judges, acting as arbitrators, had ruled, no doubt for perfectly good legal reasons, that a cooling tower at a power-station was a machine, whilst a transformer was not. That formed an interesting example of a decision by a legal arbitrator not based on purely technical expert evidence.

The Appendices increased considerably the value of the Paper to an engineer who had not previously had experience in arbitration work. Mr. Donkin suggested that the Paper should be published separately, as well as in the Journal, so that it might be available as a pamphlet to non-members of The Institution for a small payment: and that a summary of Lord MacMillan's recent Lecture<sup>1</sup> might also be usefully included in that pamphlet.

**Mr. R. D. Stewart-Brown** observed that, although the powers of the Courts to order an engineer arbitrator to state a case were naturally resented by engineers, they did in fact exist. Frequently an arbitrator was placed in a very difficult position on that account. If both parties asked him to state a case, or to state his award in the form of a special case for the Courts, he would be well advised to do so, but sometimes it happened that whilst one party asked him to state a case the other party asked him not to, and he thus found himself in a quandary. If he refused to state a case, the party desirous of a case being stated might go to the High Court and, in certain circumstances, get an order that the arbitrator should state a case. In such event refusal might result in delay and expense, and the arbitrator would look rather foolish, which no arbitrator, least of all an engineer, liked to do. On the other hand, if he acceded to a request to state a case on a trivial point of law, having no real bearing on the case, he might merely postpone the making of the award and the date for payment of the money involved. The matter was governed by the Arbitration Act, 1934, but that was not very helpful, because all it said was: "An Arbitrator or umpire may and shall if so directed by the Court state (a) any question of law arising in the course of the reference, or (b) any award or any part of an award in the form of a special case for the decision of the Court."

The difficulty was what were the questions of law upon which an arbitrator would be ordered to state a case. Questions of law might vary from the construction of an Act of Parliament to what was a "leading question," and it was apparent that in the former case the Courts would be likely to order the arbitrator to state a case and in the latter they would not. Mr. Stewart-Brown had divided into four categories the questions upon which the arbitrator might be asked to state a special case.

The first class comprised what could be called obvious points of law, such as the true construction of an Act of Parliament or of the general conditions of contract in an engineering contract. He would take, as an example, the question whether an order in writing was a condition precedent to a claim for extra work. That was a point of law with which an engineer would certainly have no sympathy but could be compelled and might be glad to leave to the decision of the Court.

<sup>1</sup> "The Giving of Evidence before a Parliamentary Committee, in the High Court, and before an Arbitrator," Instn Civ. Engrs. Lecture in series on "The Presentation of Engineering Evidence" (1946).

The second class included points of law concerned with engineering practice, such as the construction of a specification. One example had already been given by Mr. Donkin—the question of what was or was not a machine—and another example was the meaning of “rock” in a specification. Often a contractor received a higher price for rock excavation, and a dispute arose as to the meaning of “rock” as defined by the specification. Those were matters which an engineer would feel, with justification, that he was entitled to decide, and one reason why an engineer was appointed as arbitrator was that he had special knowledge of them. The Courts, however, were very jealous of their jurisdiction, and if the matter were one of law, even if it were concerned with engineering practice, he considered that, generally speaking, they would be inclined to order the arbitrator to state a case.

The third class comprised what might be termed incidental points of law, such as questions of evidence. The admissibility of evidence was a question of law which frequently arose in the course of a reference, and the evidence, the admissibility of which was in dispute, might go to the root of the dispute and be decisive. An example was the question whether a report by a man who had died could be adduced in evidence. If the evidence might be decisive, the arbitrator might well be ordered by the Court to state a case. But if merely a question of some additional or unimportant evidence were raised, which did not go to the root of the dispute, the Court would probably allow the arbitrator to admit or reject it as he thought fit; and in such a case Mr. Stewart-Brown would advise the arbitrator not to accede to a request by one party only to state a case.

The fourth class comprised matters which were not really points of law at all, but only matters which should be decided on legal principles. One of them was the question of who had the right to open a case. He was quite sure that no Court would ever order an arbitrator to state a case on a matter of that kind. The arbitrator might or might not decide correctly, but the matter was one for his discretion and he should certainly decide it for himself.

One golden rule should be observed by an arbitrator when he was asked to state a special case, namely, to require the party making the request to formulate his point of law. He might be unable to formulate it, or the point might appear, when formulated, not to be a point of law at all. Observance of that rule would place the arbitrator in a much better position to take legal advice, if necessary, on whether he should state a case or not.

Mr. Stewart-Brown wished to repeat that if both parties asked the arbitrator to state a case he would be very unwise not to do so. Equally if neither party made such a request, the arbitrator was entitled to decide questions of law himself. In a long experience of the Author in arbitrations, Mr. Stewart-Brown had never heard him ask an arbitrator to state a special case, but he believed that that was due not to the Author's

confidence in arbitrators but to his confidence in his own ability to persuade an arbitrator to decide in his favour, whatever the law might be !

Mr. C. W. Knight observed that in most Papers presented to The Institution an engineer described something that he had done, or some materials that he had used, and many other engineers were ready to suggest alternative methods. But the Paper under discussion was so authoritative that it presented no basis for criticism and all that was possible was gratefully to accept the Author's precepts and seek further guidance from him where necessary.

The Author was competent to speak not only as a barrister-at-law but also as a qualified civil engineer. Mr. Knight had recently heard Professor Sir Charles Inglis, a Past-President of The Institution, speak at a meeting of The Institution and refer to the sect of people known as Christian Scientists. He gained the impression at the time that Sir Charles was concerned in his own mind as to whether Christians should be more scientific or whether scientists should be more Christian. An analogy sprang to his mind in that the Author might be regarded, with respect, as an engineer-barrister. Whether it would be any advantage to human affairs if barristers in general equipped themselves with some knowledge of engineering problems Mr. Knight was not prepared to say, but he certainly thought that engineers (especially young engineers) should make themselves more legally minded, and they should acquire some elementary knowledge of the law and of the Acts of Parliament with which they were likely to come into contact during the course of their careers. The legal aspects of arbitration were very important, and the Author's lucid exposition should enable all engineers thoroughly to master the legal procedure.

The Author had pointed out that before the proceedings in an arbitration commenced a preliminary meeting was usually held between the arbitrator and the contending parties, at which points of procedure were discussed and settled. It seemed apparent that the arbitrator was not entitled to employ a shorthand writer without the consent of the contending parties, who, no doubt, would balance the cost of employing a shorthand writer against the cost of a possible increase in the length of the proceedings if the arbitrator had to take everything down in longhand. Another question mentioned by the Author was whether a view of the subject matter should be held by the arbitrator and, if so, when. The Author had given certain reasons why it was advisable for the view to take place during or after the hearing, and those reasons would be appreciated. Would the arbitrator be entitled to visit the site by himself or had he to be accompanied by the contending parties or their representatives ? If the contending parties or their representatives were there, could the arbitrator ask them questions, and, if so, should the questions

and answers be recorded at site? Mr. Knight could hardly imagine the engineer arbitrator going round the site in gloomy silence.

He appreciated that the Author had given only a few examples of the innumerable points which should be discussed at the preliminary meeting, and he would like to refer to a few others.

First, it was desirable to settle who was to be responsible for the hiring of the room in which the proceedings were to be held. He had heard of a case in which the building had been decided upon, but no one had arranged for a room in the building; the arbitrator thought that the parties were arranging for the room, and the parties thought that the arbitrator was doing so. In consequence, when they all arrived at the building there was nowhere for them to go. The point was a small one, but some inconvenience was likely to be caused if it was not given proper attention.

Then there was the question of how the parties would be represented. He believed that if one party appeared in person and the other party appeared with a solicitor and/or counsel, without having given an intimation to that effect, the arbitrator would be quite justified in adjourning the proceedings in order to give the party who appeared in person an opportunity of obtaining legal assistance if he desired so to do.

Another question which might be brought up at the preliminary meeting was whether the Press and the public were to be admitted to the hearing. An arbitration case was a private matter and, even if the parties desired the presence of the Press and the public, it was, he believed, the prerogative of the arbitrator to sanction it or not.

The Author had given a very clear account of the way in which costs were dealt with in an arbitration, the principle being that they "followed the event," and the loser paid. What would happen if the party who lost the case was unable to pay the costs? Presumably he would be made bankrupt.

If the arbitrator, prior to the proceedings, had a shrewd idea that the financial position of one of the parties was not good and that he would be unable to pay the costs if he lost the case, should precautionary measures be taken by the arbitrator?

Throughout the Paper the Author had made it quite clear that every step that the arbitrator took should reveal a judicial attitude of mind. He should never show the slightest suspicion of partisanship. The late Sir Guilford Molesworth, K.C.I.E., Past-President, in his "Life,"<sup>1</sup> had described a big case in which he was one of two arbitrators sitting with an umpire. For a time everything went well, and then Sir Guilford became acutely aware that the other arbitrator and the umpire were holding private conversations with the respondents. He was convinced that they had departed from a strictly judicial attitude and the only thing he could

<sup>1</sup> "Life of Sir Guilford L. Molesworth," London, 1922.

do was to withdraw from the case and inform the contractor, who was the claimant, of what was going on. The contractor also withdrew from the case, and ultimately it was settled by the Foreign Office in favour of the contractor.

One could not study the Paper without realizing that the position of the engineer-arbitrator was one of great responsibility and dignity. He was indeed a minister of justice, comparable with Judges of the High Court, whom one could not but admire for their modest and unassuming lives of almost isolation. The engineer-arbitrator also, during the hearing of a case, was in a position of almost isolation.

The members of The Institution, as a body, owed a great debt of gratitude to the legal profession for the Paper and for Lord MacMillan's Lecture. The Paper was as absorbing as it was interesting, and it would permanently enrich the records of The Institution.

**Mr. Kenneth Thomas** observed that the Author, with much skill and judgement, had compressed into a few pages a mine of information with regard to the powers and duties of an engineer when acting as an arbitrator. The Paper was a model of orderly compression and relevance, and it merited, even more than the description of an arbitrator's handbook, that of an arbitrator's vade-mecum, at all events so far as engineer arbitrators were concerned.

It was perhaps natural that, in preparing the Paper, the Author should have refrained from discussing those circumstances in which an arbitrator might be or become disqualified from acting in that capacity, since the latter subject was almost the antithesis of the former. In the "Introduction," however, the Author had indicated certain considerations which might advisedly induce an engineer to hesitate before accepting, in certain circumstances, the position of arbitrator. The particular considerations mentioned in the Paper did not apply, as the Author had stated in his introductory remarks, where an engineer acting under a contract was requested to serve as arbitrator in the event of disputes or differences, arising out of or in the course of the contract, between the building owner and the contractor. The engineer's acceptance of such a position did not preclude him from acting as the employer's engineer under the contract or from accepting the appropriate fee for those services.

Mr. Thomas suggested, however, that an engineer might be influenced to decline to occupy the position of arbitrator by the possibility that, a dispute having arisen, an application might be made to the Court to restrain him from acting, on the ground that he might not be impartial. It was noteworthy that the statutory provision to that effect related the possibility of the engineer not being impartial to his relationship to any other party to the contract or to his connexion with the subject referred to arbitration. The statutory provision in question was contained in Section 14 (1) of the Arbitration Act, 1934. So far as Mr. Thomas knew, parties to contracts had had little occasion so far to pray that section in

aid, and therefore it was not quite as widely known as it otherwise might be. The section covered very precisely the circumstances which arose when an engineer under a contract was appointed as arbitrator to determine disputes or differences arising under that contract. It referred, for example, to "disputes which may arise in the future" being referred to "an arbitrator named or designated in the agreement," and it was contemplated in the section that, after a dispute had arisen, it might appear that the arbitrator designated might not be impartial, that being admitted as a ground for an application to the Court "for leave to revoke the submission or for an injunction to restrain any other party or the arbitrator from proceeding with the arbitration." The section went on to say that the mere fact that, when the agreement was entered into, the party making such an application knew or ought to have known that the designated arbitrator might not be capable of impartiality, by reason of his relation to any other party to the contract or his connexion with the subject of the dispute, should not be a ground for the refusal of the application.

In fact, that provision had been inserted in the Act as the result of a recommendation of the Committee presided over by Mr. Justice MacKinnon appointed to consider the then existing law of arbitration, and express reference was made to building and engineering contracts in the report of that Committee, dated 10 January, 1927, which was the basis of the Arbitration Act of 1934. Paragraph 34 (c) of that Report read as follows: "Several of our correspondents have referred to the common practice by which, in building and engineering contracts, contractors are required to tender upon and agree to a form of printed contract by which all disputes are to be decided by an architect or engineer who is in the employ of the other party, and very often of one whose own acts or requirements on behalf of his employer may create the dispute which must be referred to his decision." The connexion between that paragraph and the section of the Act to which Mr. Thomas had referred was quite obvious. At the time when a contract was entered into it was impossible to foresee the nature of any particular kind of dispute which might arise out of it, but it was equally clear that many of such disputes would involve the designated arbitrator in becoming *de facto* a judge of his own cause, whilst many more might be of a nature in which his mind, however unconsciously, and however determined his intention might be not to be swayed by extraneous considerations, might be biased by reason of the fact that the building owner was either his employer or his client.

Members of the judiciary had emphasized over and over again the importance of maintaining the principle not only that justice should be done but also that justice should appear to be done; and such a consideration might well deter an engineer from permitting himself to be placed in a position in which he might not be able to exercise the strictest impartiality or in which he might find that very position attacked in open Court on an application under Section 14 of the Arbitration Act, 1934.

A point of practice which had been mentioned in the Paper and which deserved some emphasis related to the case in which the actual nomination of the arbitrator rested in the hands of the President of some professional Institution or Association. As a general rule, the class of contract providing for the nomination of such a gentleman prescribed that the nomination was to be made, assuming that there was a failure of the parties to agree upon an arbitrator, on application to the President of the named Institution or Association by either party. In those circumstances, the President concerned was entitled to and ought to act upon the application of one party, but there was, at all events so far as some bodies were concerned, a tendency to insist that both parties to the dispute should join in the application for the nomination of an arbitrator. In cases in which one of the parties desired, for some reason or another, to avoid or impede the settlement of the dispute by arbitration, such a practice tended to defeat the ends of justice and was greatly to be deprecated. The President of the Institution or Association concerned could always satisfy himself that he was entitled to act, on being asked to make the nomination by one party only, by calling for inspection of the clause in the contract under which the application purported to be made.

Mr. Thomas suggested that, where the parties were in complete agreement on the course which the preliminaries should follow, it was unnecessary to hold a preliminary meeting which was a pure formality involving the parties in needless costs and the arbitrator himself in waste of time and trouble in arranging it. No reasonable arbitrator would consider the parties guilty of any discourtesy towards him in dispensing with such a meeting.

The Author had made some very pertinent and valuable observations on the extremely important matter of costs. Costs in arbitration proceedings were invariably considerably heavier than in High Court litigation, not only because the expense of remunerating the judge (that was, the arbitrator), and of providing the necessary accommodation for the hearing fell upon the parties, but also because the dates and times of the hearings were usually arranged to suit the convenience of the counsel and solicitors of the parties and of the arbitrator himself and the hearings were not infrequently sandwiched in between times when the arbitrator and the legal gentlemen concerned were engaged on other professional business. That tended to increase the amounts payable to counsel and solicitors, and the costs therefore assumed especial importance.

The Author had emphasized the desirability of arbitrators adhering to the general principle followed by the Courts, that "the costs follow the event," unless there was very good reason for ordering otherwise. That did not mean that the costs should be divided in proportion to the extent to which the claimant succeeded in his claim, but that the claimant should have his costs if he succeeded at all. The whole point was that the respondent, in refusing to pay the claimant's claim, had forced the latter to

come to the Court or to the arbitrator in order to get that to which he was entitled, and, if he had claimed more than he was entitled to, that was quite irrelevant, because the respondent, if he admitted that the claimant was entitled to something, could always protect himself, as had been pointed out in the Paper, by making an offer of what he thought was proper, which the arbitrator, after giving his award, could take into consideration when determining what order he should make as to costs.

In that connexion, the following paragraph appeared in Russell on "Arbitration," 13th edition, 1935, p. 442, under the heading "Awarding each party to pay his own costs" ;

"Where he does not wish to give a preference to either party and there is no special reason for awarding otherwise, the arbitrator should direct that each party shall bear his own costs of the reference and pay half the costs of the award. This will save the trouble of taxing the costs of the parties, which would be necessary if the award directed that each party should pay half the costs."

That paragraph might mislead an arbitrator into thinking that the normal course for him to take was to award that each party should bear his own costs of the reference, but all that was intended by it was to indicate the form that the arbitrators' award as to costs should take if he made up his mind, for some particular reason, that each party ought to bear his own costs. No attempt was made to lay down the normal course of procedure, which it was suggested should follow the practice of the Courts, that "the costs follow the event."

Finally, Mr. Thomas wished to refer to one point which naturally had found no place in the Paper, namely, the common delusion, on the part of contractors in particular, that an arbitrator was in some mysterious omnipotent way free from the trammels of the law and was in a position to give a decision by reference to what he thought was fair, without applying the law at all. The number of times that Mr. Thomas had been asked the very ingenuous question : "Is an arbitrator really bound to give his decision according to law ?" was almost incredible, and the sooner that delusion was dispelled the better it would be for all concerned. An arbitrator was bound by the law and was bound to give his decision in accordance with the law, just as any other judge was bound—and he had no dispensation, either human or divine, from that obligation !

**Mr. J. H. W. Turner** observed that in the arbitration clause in the general conditions of contract agreed between The Institution and the Federation of Civil Engineering Contractors it was stated quite clearly that the award of the arbitrator was to be final and binding on the parties. Yet he understood that the disappointed party could dispute the arbitrator's award. Could the Author state where the loophole was in that apparently straightforward declaration, and how it was that the disappointed party could get round that clear-cut statement ?

It was clear that, for the fulfilment of the technique described in the

Paper, the engineer-arbitrator should be a man of outstanding qualifications. Not only should he have a wide general experience of technical matters but he should also have a flair for assessing human strengths and weaknesses, and human character; he should be able to discriminate between large and small issues; he should be patient, tolerant, and of the highest integrity; and, not least, he should be methodical in handling documents and drawings—an attribute which all engineers did not possess! Since all those outstanding qualities were required, Mr. Turner believed that it was almost possible to measure the stature of the civil engineering profession by the number of competent arbitrators that it contained. In the past the profession had been rich in men of the calibre in question, and that was also true to-day.

Certain trends were visible, however; for instance, a constant trend towards increasing specialization. He wondered whether that trend might not breed a generation of engineers with a narrower outlook, and hence with a diminished competence for arbitration work.

Further, was it reasonable to expect that the closer working which was now taking place between The Institution and the Federation of Civil Engineering Contractors would lead to a diminished number of arbitrations?

Lastly, could the Author indicate to engineers who had been stimulated to take an interest in the arbitration aspect of the civil engineer's work the existence of any literature available on the subject, which the non-legal engineer could be expected to understand? The value of the Paper would be considerably enhanced by the inclusion of a short bibliography.

**Sir Arthur Whitaker** observed that he wished to deal with the subject from the point of view of the engineer who was dealing with the contractor on the site and was confronted with a conflict of opinion on the drawings or the specification or on some unknown factor which had not been visualized when the contract was placed and was not adequately settled. All engineers were, at almost every stage of their careers, arbitrators in some degree, and he could not altogether agree with the statement that the profession could be measured by the number of competent arbitrators that it produced. He considered that it could be measured better by the number of arbitrations which it managed to avoid. An arbitrator, when he came to deal with the matter in dispute, was guided largely by the specification, the drawings, and the correspondence and particulars that had passed between the parties, and Sir Arthur believed that much arbitration could be avoided if engineers were more concise and more exact in their treatment of a dispute. He had some sympathy with the Author's suggestion that the arbitrator should seek legal advice when his award was put into writing. He considered that many arbitrations would be avoided if legal advice were given in much of the correspondence that formed the basis of disputes, and that it was not possible to emphasize too strongly the need for ensuring that any element of doubt in a specifica-

tion or a letter, or even in the oral expression of an engineer's wishes, should be clarified as much as possible.

Sometimes the engineer had great sympathy with the contractor who might have met with an unexpected difficulty which would cost him a large amount of money ; yet under the contract the engineer was unable to make any award. During the course of the discussion the view had been expressed that an arbitrator could function only in accordance with the law, and that was rather disappointing in view of the kind of case to which he had just referred. If the engineer was with a public body, that body expected him to operate within the close confines of the contract ; but if the money were his own he could treat the case on a broad basis and doubtless easily arrive at a settlement. If the engineer had to keep strictly within the law, could the Author suggest any means by which such a case could be dealt with satisfactorily ?

\* \* **Mr. N. G. Gedye** observed that he wished to emphasize the Author's remarks on (1) the need to furnish each party with a copy of every written communication, etc. ; (2) the danger of proceeding without competent legal advice in cases where important points of law emerged ; and (3) the advisability of having an award settled by the arbitrator's legal advisers, especially if the award were in the form of a special case stated for the decision of the High Court. Nearly 40 years' experience of arbitration proceedings had convinced Mr. Gedye of the need for meticulous care on the part of the arbitrator. The Author's advice to civil engineers when acting in that capacity was very useful.

About 20 years ago, Mr. Gedye had acted as sole arbitrator in a case in which the Witham Outfall Board claimed from the Boston Corporation in respect to damage to the banks of the outfall following the stranding of a steamship therein. The facts were not seriously in dispute and the amount of the claim was relatively small. Moreover, the amount of the damage had been increased by reason of the refusal of both parties to undertake repairs before decision as to liability had been reached. That question of liability involved the legal interpretation of certain sections of the Boston Dock Act, 1881. At the request of both parties he had made his award in the form of a case stated for the opinion of the High Court on the questions of law involved.

The award which was settled by an eminent counsel now in the House of Lords, was drawn in the form of an award as to damage and costs based on an interpretation of the legal position, as it appeared to Mr. Gedye, followed by alternative awards suited to one or other of several possible decisions of the High Court. He recollected that the learned counsel who settled the case for reference was doubtful whether the award should contain those several findings to suit various possible interpretations of the legal position by the High Court. The alternative was for

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\* \* \* This contribution was submitted in writing.—Sec. I.C.E.

Mr. Gedye to state the facts of the case and the points of law and await the decision of the Court before proceeding to make the award. In the event the award was made in the form he had indicated, which provided final solutions suited to any one of the possible legal interpretations.

The award was taken up by the Witham Outfall Board and proceedings followed thereon in the Kings Bench Division of the High Court. Mr. Justice Rowlatt decided the points of law in favour of the defendants (the Boston Corporation), refusing to accept the interpretation of the legal position which Mr. Gedye had assumed in making his main award in favour of the Witham Board. That Board took the case to the Court of Appeal, where Mr. Justice Rowlatt's judgement was reversed. The Boston Corporation then carried the case to the House of Lords where, about six years after the occurrence of the first damage, judgement was given dismissing the appeal and confirming the decision of the Court of Appeal.

The result was that the Witham Board succeeded in their claim for damages in accord with the main award Mr. Gedye had set out in the Special Case.

The cost of those lengthy legal proceedings, over a claim for damages amounting to less than £3,000, must have been many times the amount of the claim.

Mr. Gedye wished to inquire whether, in the Author's view, the course adopted in the Witham Outfall case—setting out alternative awards in the Special Case—was the best in the circumstances, or whether it would have been preferable to await the decision of the Courts on the points of law before making a final award?

The Author, in reply, observed that he had regarded the quasi judicial functions of an engineer in charge of works as outside the scope of the Paper. Section 14 of the Arbitration Act of 1934, was undoubtedly inserted by the legislature in order to avoid the necessity of persons going before an arbitrator who was himself interested in the subject matter of the arbitration, and in the light of that section legal advisers would be unwise to advise a corporation employer to require its engineer to act as arbitrator between itself and the contractors, because the Courts would, in the opinion of the Author, undoubtedly remove that engineer from the position of arbitrator. In civil engineering contracts, however, the engineer was often called upon to perform the quasi judicial function of holding the balance fairly between one party and another during the currency of the contract, and the reason that aspect of the matter had not been dealt with in the Paper was that he did not regard it as arbitration in the true sense. Some years ago he had presented to The Institution a Paper<sup>1</sup> in which he dealt with the engineer acting in that capacity.

He wished to make it quite clear that the reason why an arbitrator's decision was not necessarily final and conclusive, even though the contract

<sup>1</sup> "The Conditions of Engineering Contracts," J. Instn Civ. Engrs, vol. 11 (1938-39), p. 3 (Feb. 1939).

said it was to be so, was that Parliament had determined that it should not be final and conclusive if it was known to be founded on a wrong decision of law. If the decision of the arbitrator was not in accordance with the legal principles which governed all citizens of Great Britain, that was surely a very good reason why it should not be final and binding. In introducing the Paper, he had stated that Parliament did not consider that "rough justice" was justice at all. There was, however, the qualification that if both parties were quite content to leave a matter of law to the arbitrator—even a very abstruse matter of law—he could decide it, and in that event if he decided it wrongly his decision was binding upon the parties, unless the error in law was shown on the face of the award. He had stated in the Paper (and he thought the matter needed to be emphasized) that: "There would appear, however, to be no reason for an arbitrator to state his award in the form of a special case unless requested by one of the parties to do so, for he is entitled to assume that, if neither party does ask for his award to be so stated, the parties are willing to accept his ruling on the legal issues, as on any other issues in the case."

Mr. Donkin had asked why it was necessary for the engineer arbitrator to seek the assistance of a lawyer in drawing up his award. The answer was that the arbitrator would be wise to consult a lawyer to ensure that the award should be put into the proper form and to avoid stating in it anything that might be prejudicial to the decisions that the arbitrator had made. If the engineer arbitrator drew up the award himself he might be inclined to give reasons for his award, whereas a lawyer would say to him: "For goodness sake do not put in any reasons." Again, the engineer-arbitrator might show on the face of the document that he had come to an utterly wrong decision on a point of law, which would give rise at once to an attempt on the part of the party who disliked the award to upset it on that ground. The main purpose of the engineer arbitrator in seeking legal advice in drawing up his award was not that something might be stated better than he himself could state it, but that the form of the award should be right and that it should be proof against attack.

The Author was obliged to Mr. Stewart-Brown for clarifying several points with regard to the conditions in which an arbitrator should state a consultative case during the hearing.

He considered that the preliminary points mentioned by Mr. Knight were matters which the parties ought to agree without the necessity of any directions, and usually it was not necessary to include them in the matters dealt with at the preliminary meeting.

A decision to be represented by counsel could not perhaps be definitely determined at the time of the preliminary meeting, and so long as notice of intention to be so represented was given by one party to the other in good time no objection could be taken.

Failure to give notice had been dealt with in paragraph (l) of Appendix III.

The Author was glad to have Mr. Knight's question about the visit of the arbitrator to view the site, because that was a matter which required some consideration. On his visit to the site it was most undesirable for an arbitrator to view the subject matter of the dispute alone, and certainly he should not have any conversation with parties to the dispute or their employees in the absence of the other party. The proper course was for the arbitrator to fix the date of his visit and to give notice to both parties, inviting each to send a representative to be present at the view. The parties should be allowed to be represented by whomever they wished to appoint for the purpose and the arbitrator should be careful to ask only such questions as would enable him better to understand the facts relating to the subject matter. He should confine his questions to the ascertainment of facts relating to the view and he should severely discountenance any attempt on the part of either party to introduce new evidence into any of the conversation he might hold. Mr. Gedye's experience raised the interesting problem whether or not it was more desirable for an arbitrator to state a case for the opinion of the Court on a point of law during the hearing and before making his award, or to hear the evidence and then state his award in the form of a special case with alternative awards should the Court accept one or other of the legal contentions of the parties. The choice of procedure was usually made for the arbitrator by agreement between the parties but, failing such agreement, the arbitrator should take into consideration the views of the parties, and with the assistance of his legal adviser, decide which course would be the more likely to lead to the most economical and expeditious determination of the dispute.

The other and wider questions that had been raised were rather outside the scope of the Paper. With regard to the difficult questions raised by Mr. Turner, it would at least be said that the old types of contract, which made one of the parties to the contract believe that he was suffering an injustice by not having the semblance of impartiality in regard to arbitration, did perhaps tend to make him feel very litigious and bitter. If the civil engineering contracts of the future should include—as such contracts were tending to include—an arbitration clause which referred all matters of dispute to an independent arbitrator, there might be a greater tendency for the parties to settle their difficulties amicably without recourse to litigation.

He appreciated the warmth of the kind reception accorded to the Paper, and he hoped that it would be of some real value to the members of a profession to which he also belonged.