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SOME CONFUSING MATTERS RELATING TO ARBITRATION IN WASHINGTON

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A REVIEW of the case law and statutes of the state of Washington relating to arbitration points up several issues which are of importance to those who may become concerned with arbitrations in the state of either commercial or labor controversies. Some of these issues result from the views which were advanced by the supreme court relating to the arbitration statute of 1881. These issues are still open, although that statute was repealed by the present act, which was originally enacted in 1943. Other uncertainties inhere in the views which have been advanced by the court since the enactment of the present arbitration statute, and still others relate to the intent of the statute after the 1947 amendment of the first section.

These matters of uncertainty are bound to plague any lawyer who is called upon to advise any client whether or not to enter upon any arbitration agreement or upon any arbitration. And in the case of employees (or their union) and employers who would agree upon grievance machinery and arbitration provisions in their collective agreements, there is question whether or not their agreement or any arbitrations or awards thereunder will be honored by the courts.

These questions may be summarized as follows:

1. Does the present arbitration statute operate to exclude common law arbitration, or may the parties elect to arbitrate under the statute or at common law?

2. May employers and their employees (or their unions) qualify their agreements for grievance procedures and arbitration under the present statute? What are the consequences of their arbitration agreements and any arbitrations and awards thereunder?

History and Scope of Statute. The present general arbitration statute was enacted in 1943.[1] It repealed the earlier arbitration act of 1881.[2] The first section of the original act of 1943 was amended in 1947.[3]

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[1] Wash. Laws 1943, c. 138, §§ 1-23; REM. REV.STAT. §§ 430-1 *et seq.* (Supp. 1943) [P.P.C. §§ 8-31 *et seq.*].

[2] Wash. Code 1881, c. 20, §§ 264-274; REM. REV. STAT. §§ 420-430.

[3] Wash. Laws 1947, c. 209, § 1; REM. REV. STAT. § 430-1 (Supp. 1947).

The effect of this amendment is more fully reviewed below. As there appears, the 1947 amendment created some uncertainty as to whether or not the statute is applicable, or can be made applicable, to agreements between employees (or their union) and their employer to arbitrate what are commonly called labor controversies.

Labor matters aside, the statute purports to embrace: (1) provisions in written agreements to settle by arbitration controversies which may thereafter arise in relation to such an agreement and (2) written agreements of submission of existing controversies which might be the subject of an action between the parties. It declares that such arbitration agreements shall be "valid, enforceable and irrevocable," and provides specific remedies to effectuate that declaration. These remedies include motion proceedings to stay any action upon a cause embraced in such agreements, to require a recalcitrant party to carry out his part of the arbitration agreement, and to procure court appointment of arbitrators when a party fails or refuses to participate in the original appointment or in filling a vacancy of the arbitral board. Provisions also are made for the confirmation, vacation and correction of awards in motion proceedings. Accordingly, the statute follows the general pattern of the arbitration statutes of Arizona, California, Connecticut, Hawaii, Louisiana, Massachusetts, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, and Wisconsin.[4]

I

Effect of the Statute Upon Common Law Arbitration

There are no provisions in the general statute which expressly reserve or outlaw the privilege of parties to arbitrate outside the statute as at common law. If parties enter into an arbitration agreement which does not qualify under the statute, or if they stipulate in connection with an agreement which otherwise complies with the statute that it shall not apply, it seems that the agreement and any arbitral proceedings and award thereunder should be accorded validity according to common law.

This conclusion is open to question, however, because of the recurring thesis advanced by the supreme court during the life of the prior arbitration statute that common law arbitration was supplanted. The

[4] See also United States Arbitration Act, 43 Stat. 883 (1925), 9 U.S.C. §§ 1 *et seq.* (1946).

court advanced the view from time to time that the earlier arbitration statute was intended to cover the whole subject of arbitration to the exclusion of common law arbitration. This view tended to indicate that arbitration agreements which did not qualify under the statute and arbitral proceedings thereunder were legal nullities. Like the present statute the earlier one did not purport to reserve or to outlaw common law arbitration.[5]

It may, of course, be urged that the foregoing thesis will be given effect in connection with the present statute. It seems, however, that it should be abandoned. There are several reasons for this conclusion.

In the first place, since the court has consistently recognized and held, as have the courts of other jurisdictions, that the arbitral process is predicated upon, and is in furtherance of, the voluntary contract of the parties to arbitrate, and since the arbitration statute does not expressly outlaw common law arbitration, it seems of dubious validity for the court to strike down the freedom of contract of the parties and deny their privilege to choose either statutory or nonstatutory (common law) arbitration. The court does not appear to have assigned any substantial reasons why it ought to do so. It has referred to inconveniences attending common law rules of revocability of arbitration agreements and those attending the necessity of enforcing a common law award by original action.[6] But if parties desire to contract for arbitration with such law in view, it is not clear why they should not be allowed to do so. Certainly it was not necessary to abolish common law arbitration *in toto* in order to overcome the inconveniences attending traditional common law rules of revocability or those making necessary the institution of an original action to enforce a common law award. This does not argue for restitution of the traditional common law rules of revocability and nonenforceability of arbitration agreements, which were largely overcome in Washington at an early date by the decisions of the supreme court.[7] But if parties enter into an arbitration agree-

[5] That this view has been contrary to that of other American jurisdictions *see, e.g.*, McClelland v. Hammond, 12 Colo. App. 82, 548-538 (1898), *approved in* Hilley v. Tuttle, 52 Colo. 121, 125, 117 Pac. 896 (1911), ANN. CAS. 1913W 196. STURGES, COMMERCIAL ARBITRATION AND AWARDS, § 1.

[6] Dickie Mfg. Co. v. Sound Construction Co., 92 Wash. 316, 159 Pac. 129 (1916).

[7] Prior to the enactment of the present statute the Supreme Court had refused to apply traditional common law rules of revocability at least to provisions in written general commercial contracts to arbitrate future disputes arising between the parties. They were held irrevocable. Zindorf Const. Co. v. Western Am. Co., 27 Wash. 31, 67 Pac. 374 (1901) (revocability by action denied); Herring-Hall Marvin Safe Co. v. Purcell Safe Co., 81 Wash. 592, 142 Pac. 1153 (1914), *aff'd on rehearing*, 86 Wash. 694, 150 Pac. 1162 (1915) (same); Wager v. Odden, 148 Wash. 188, 268 Pac. 151 (1928) (same); State *ex rel.* Fancher v. Everett, 144 Wash. 592, 258 Pac. 486 (1927)

ment which does not qualify under the statute, and therefore does not become irrevocable or enforceable as therein provided, or if they stipulate in an arbitration agreement otherwise qualifying under the statute for its revocability or nonenforceability in one or more particulars, or that the arbitration shall be according to common law rather than according to the statute, it seems that their agreement should be respected. This issue is, of course, of special importance to employees (or their unions) and their employers if it shall finally be determined, as the supreme court seems to have indicated, that they cannot invoke the statute nor qualify their arbitration agreements, arbitrations or awards otherwise than as "appraisements."

In the second place, with the exception of the cases of *Smith v. The Department of Labor and Industries*,[8] *Owen v. Casey*,[9] and *Fisher Flouring Mills Co. v. United States*,[10] which are discussed below, the declarations of the court, that common law arbitration has ceased to exist in the state, have been used only in general exposition and dictum. Except for these cases, the court's views have not been applied to the extent of holding that when parties entered into an arbitration agreement which did not qualify under the statute, or that when parties stipulated in connection with an agreement which otherwise complied with the statute that it should not apply in one or more particulars, or at all, the agreement and any arbitral proceedings and award thereunder were void because they were a common law arbitration outside the statute.

(revocability by notice denied). *See also*, Van Horne v. Watrous, 10 Wash. 525, 39 Pac. 136 (1895); Jackson v. Walla Walla, 130 Wash. 96, 226 Pac. 487 (1924). *Cf.* Sullivan v. Boeing Aircraft Co., 29 Wn.(2d) 397, 187 P.(2d) 312 (1947) (revocability of an arbitration provision in a collective bargaining agreement. It is reviewed below in this article.) These provisions did not appear to qualify under the terms of the then existing arbitration statute, which did not mention future disputes provisions, but seemed to embrace only written agreements for the submission of existing controversies. Apparently, however, the court came to regard such provisions for arbitration as fit basis for sustaining an arbitration under the statute. *See* Mitsubishi Goshi Kaisha v. Carstens Packing Co., 116 Wash. 630, 200 Pac. 327 (1921); Zindorf Const. Co. v. Western Am. Co., *supra*; State *ex rel.* Fancher v. Everett, *supra*.

No decisions have been discovered prior to the enactment of the present arbitration act in which the court determined whether a provision for arbitration in a written contract was specifically enforceable, or whether application would lie for court appointment of one or more arbitrators to carry out an arbitration under such a provision. *Ex parte* arbitrations and awards under such provisions were sustained as valid and enforceable under the arbitration statute. Zindorf Const. Co. v. Western Am. Co., *supra*; Mitsubishi Goshi Kaisha v. Carstens Packing Co., *supra*; State *ex rel.* Fancher v. Everett, *supra*.

No decisions have been discovered determining whether agreements for submission to arbitration of existing disputes, qualifying or not qualifying under the former arbitration statute, were revocable or irrevocable, enforceable or nonenforceable.

[8] 176 Wash. 569, 30 P.(2d) 656 (1934).

[9] 48 Wash. 673, 94 Pac. 473 (1908).

[10] 17 F.(2d) 232 (C.C.A. 9th 1927).

And finally, as appears in *Gord v. F. S. Harmon & Co.*,[11] which is more fully considered below, the court, being under pressure of judicial conscience to facilitate the amicable settlement of controversies, held valid certain agreements for *arbitration* between employers and unions of their employees and awards rendered thereunder, although, according to the court, they could not comply with the former arbitration statute because the labor controversies which were involved could not be submitted under the statute. There being no common law arbitration by the view of the court, it sustained the agreements and proceedings by assigning them to the confused and indeterminate category of "appraisement." The court so ruled although the parties' agreement expressly provided for *arbitration.* If common law "appraisement," when agreed upon by the parties, could survive, why could not common law *arbitration* survive? And if common law "appraisement" could survive under an agreement for *arbitration,* why could not common law *arbitration* survive under such agreement? The justification under Washington law for this formal discrimination has not been established by the court.

The doctrine in question was first voiced by the court in *Dickie Mfg. Co. v. Sound Construction Co.*[12] The parties had accomplished a submission agreement which qualified under the former statute; arbitration was had thereunder; award was rendered; and in proceedings pursuant to the statute the award had been confirmed and put in judgment. Plaintiff filed no exceptions, though permitted by the statute to do so, in opposition to the entry of judgment on the award. Thereafter plaintiff sued as at common law to vacate the award and judgment. The court affirmed the ruling of the court below which had sustained demurrer to the complaint. Substantially the same issue already had been decided the same way in *McElroy v. Hooper.*[13] The plaintiff in this earlier case sought to vacate an adverse award and judgment entered pursuant to the arbitration statute, by petition under REM. REV. STAT. § 464 [P.P.C. § 71-1]. As in the *Dickie Mfg. Co.* case, the petition was predicated upon causes which the plaintiff had not asserted in any exceptions against confirming the award. One of those grounds was to the effect that the arbitrators did not decide all matters submitted to them. Denial of the petition was sustained without refer-

[11] 188 Wash. 134, 61 P.(2d) 1294 (1936).
[12] 92 Wash. 316, 159 Pac. 129 (1916).
[13] 70 Wash. 347, 126 Pac. 925 (1912).

ence by the court to the thesis subsequently advanced in the *Dickie Mfg. Co.* case.

In so putting an end to litigation attacking awards and judgments which have been judicially affirmed and entered as provided in the arbitration statute and with full regard for the requirements of due process, the actual decisions of the court seem entirely meritorious.

The plaintiff in the *Dickie Mfg. Co.* case, however, had alleged in his complaint (to which there was the demurrer) that, among other causes for vacating the award and judgment, the parties had agreed orally that the arbitration should be at common law and not under the statute. Accordingly it was argued that it was inequitable for the defendant to have the award confirmed by the statutory procedure and judgment entered thereon. It was with reference to this allegation in particular that the court first brought in the general thesis now under consideration. Said the court:

> Everything the plaintiff now complains of could have been reached by statutory exceptions. These were wholly omitted. Accordingly the suit before us can be maintained only on the theory that there was no statutory arbitration to begin with or that it had finally become void. On both points we must hold decidedly against plaintiff. *In the face of so complete an act as ours we are clear, and find this proper occasion to say, that common law arbitration does not exist in this state and that the plain purpose of our legislation was to clear much unsettled practice by codifying arbitration.* The agreement, quite ample to engage this statute, says not a word excluding it or referring to a different kind. It is of little moment if anything was said by the parties after they had signed the arbitration agreement. Their minds had already met upon the statute. (Italics supplied)

The court again remarked as follows:

> Much confusion has been brought into our arbitration practice by common law doctrines and decisions under statutes of other states, nor have the opinions of this court been entirely harmonious.
>
> That common law arbitration was excluded by our statute is plain. For instance, either party under the former could repudiate the proceedings before an award was actually returned, and even afterwards, should he refuse to pay it, there was nothing left the prevailing party but to bring a suit upon it. Both these burdensome rights are in express terms swept away, for the statute makes the arbitration a preliminary part of judicial hearing, the award in a sense automatically passing into judgment unless the losing party can persuade the court to modify or set it aside. Nor is there even recognized or suggested the right of revoking the award at any stage, of independent suit to cancel it, or of proceedings that ignore it. On the con-

trary, the act directly provides, as we have seen, for excellent internal review.

Following a review of some earlier cases, which does not seem to be of aid in clarifying or particularizing the intent of the court's over-all thesis upon the supplanting of common law arbitration in the state, the view is reiterated as follows:

> Those who enter into arbitration accept in advance the jurisdiction of the superior court. The board is a preliminary, voluntarily created tribunal or referee, and the jurisdiction of the superior court is first to be exerted in a revisory capacity and only when appealed to by exceptions. If it cannot adequately correct errors on the exceptions, it may take the whole controversy over and proceed without a jury. *Common law arbitration has ceased to exist. If there is no proper agreement under the statute, then there is no arbitration at all.* (Italics supplied)

In evaluating the significance of this general thesis in the foregoing case, it seems fit to conclude that it was unnecessary to the determination of the precise issue in the case; it seems to have served at most as only a remote argumentative factor in that determination. As the court pointed out, the agreement of submission qualified under the statute, it was "quite ample to engage" the statute, and not a word was said in the agreement limiting or displacing the application of the statute. Accordingly was the thesis of the abolition of common law arbitration hypothetical to the case at hand. It seems that the court fully denied the basis of the plaintiff's complaint when it resolved that, "It is of little moment if anything was said by the parties after they had signed the arbitration agreement. Their minds had already met upon the statute." It is not clear how the thesis of the abolition of common law arbitration facilitated the feasibility or plausibility of this ruling on the evidentiary conclusiveness of the agreement. And, to repeat, the thesis was not even voiced in deciding substantially the same issue in the same way in the earlier case of *McElroy v. Hooper.*

In *Suksdorf v. Suksdorf*[14] the court again declared its view that, "common law arbitrations have been entirely supplanted by our statutory regulations on the subject," citing the *Dickie Mfg. Co.* case. The court also approached the reality of its thesis by again touching upon the point of whether an arbitration agreement not qualifying under the statute and arbitral proceedings and award thereunder would be void. The court suggested the *possibility* as follows: "Possibly it might fol-

[14] 93 Wash. 667, 161 Pac. 465 (1916).

low from this that, if the submission was insufficient under the statute the entire proceedings would be a nullity; but, as we have indicated, we cannot conclude that this agreement was thus insufficient."

The views of the court were advanced in the *Suksdorf* case under the following circumstances: a money award had been confirmed over exceptions by the respondent and judgment entered thereon—all in conformity with the arbitration statute. The respondent then "filed a motion to vacate the judgment and order affirming the award" in the superior court on the ground "that the agreement to arbitrate contained no express stipulation that the parties thereto would abide by or perform the award." The lower court granted the motion and vacated the judgment. The supreme court reversed with instructions to reinstate the judgment. Apparently the respondent did not include the foregoing cause in his assignment of exceptions to the award.

It was held that the arbitration statute did not require arbitration agreements to recite that the parties would "abide by or perform the award" to qualify under the arbitration statute (although, as the court concedes, a quite specific dictum in an earlier opinion strongly suggested such requirement).

The foregoing thesis as to the displacement of common law arbitration was advanced by the court as follows: the respondent contended that, even if the foregoing recital was not necessary to qualify an arbitration agreement under the arbitration statute, the agreement in question was one at common law rather than under the statute because "the agreement nowhere discloses that it is the intent of the parties to follow the statutory procedure." Instead of disposing of this argument on the ground that nothing in the arbitration statute required or provided for any disclosure of such intent beyond the making of the arbitration agreement as therein set forth, the court met the argument by challenging its assumption that common law arbitration obtained in the state. The court remarked that it had recently ruled that "common law arbitrations have been entirely supplanted."

Once again, it will be observed that the court employed its thesis only *arguendo*; it has not yet been put into effect by a ruling that parties who enter into an arbitration agreement which does not comply with the arbitration statute, or who stipulate in an arbitration agreement otherwise qualifying under the statute that it shall not apply in one or more particulars, or at all, commit a legal nullity.

The court next advanced its general view in *Puget Sound Bridge &*

Dredging Co. v. Frye.[15] The case came up on appeal from a judgment entered upon an award pursuant to the arbitration statute. No issue was raised that the agreement, arbitral proceedings or award, did not comply with the arbitration statute beyond assignment in the exceptions that the arbitrator committed various errors of law and fact. The court below overruled the exceptions, confirmed the award and entered judgment. The court advanced its thesis of there being no common law arbitration in the state quite incidentally and, apparently, only by way of preface to its statement of the general principle that in reviewing such statutory awards on appeal under the arbitration statute the rights of the parties are deemed to be governed by the arbitration statute. The court said, "Construing these statutes [certain sections of the arbitration statute just previously quoted in the opinion], this court has held that there is in this state no such thing as a common law arbitration; that the proceeding is wholly statutory; and that the rights of the parties to the proceeding are governed and controlled by the statute," citing and quoting from the *Dickie Mfg. Co.* case.

To repeat, it seems quite clear that the general thesis, as voiced in the foregoing quotation, had no other consequence in the case than to serve as some inducement or argumentative reinforcement of the general statement of principle that in a statutory arbitration the rights of the parties to the proceeding are governed by the statute in so far as the statute may bear expression.

The view of the court was next stated in *Smith v. The Department of Labor and Industries.*[16] The case came to the court on appeal from a judgment of the superior court which had increased the amount of an award made to an injured workman under the Workmen's Compensation Act.

The workman originally presented his claim to the Department of Labor and Industries and disability was classified by it as permanent partial of nine degrees. Being dissatisfied therewith, he applied to the joint board of the department for rehearing. The application was granted and hearing had by the board in January, 1931. While this proceeding was pending the Department of Labor and Industries and the claimant entered into a written arbitration agreement to arbitrate the extent of his disability. The arbitrators returned an *unverified* report to the Department finding claimant's disability as permanent partial of 5¾ per cent. Thereafter the joint board concluded its foregoing

[15] 142 Wash. 166, 252 Pac. 546 (1927).
[16] 176 Wash. 569, 30 P.(2d) 656 (1934).

proceedings by awarding further increase in his disability rating. It based its award upon the transcript of testimony taken before it in January, 1931, and upon the *unverified* report of the arbitrators. Claimant then appealed to the superior court and after hearing, but without additional testimony, the court entered judgment for a still greater degree of disability. Upon appeal from this judgment to the supreme court by the Department of Labor and Industries one assignment of error to the action of the court below made the point that the claimant was bound "by the arbitration agreement." Since the arbitrators are reported to have "filed an unverified report" it seems more probable that the foregoing assignment was directed to the point that claimant was concluded by the arbitrators' award or "report." While the arbitration agreement had been in writing, apparently no steps had been taken to have the award confirmed as provided in the arbitration statute, nor had the arbitrators been sworn in compliance with the statute.

In denying the conclusiveness of the award the court observed: "It is enough to say that, because of REM. REV. STAT. §§ 420 *et seq.*, [the arbitration statute] common law arbitration does not exist," citing the *Dickie Mfg. Co.* case; and that it could not be sustained as a valid statutory award because of the foregoing items of noncompliance with the statute. Perhaps this decision should be reckoned as one which gives direct effect to the court's thesis that common law arbitration was banished from the state during the life of the prior arbitration statute. This part of the opinion comes seriously close; the thesis becomes more than a general exposition or remote argumentative factor. On the other hand, the court followed its foregoing opinion with a reference to and quotation from provisions of the statutes[17] requiring that rehearings before the joint board of the Department of Labor and Industries be *de novo* and summary, *"but no witness' testimony shall be received unless he shall first have been sworn."* The court concluded that because of this statutory requirement the *unverified* report of the arbitrators could not be used by the board for any purpose. By the same token, it seems that, because of this statutory provision, no unverified common law or statutory award could have been relied upon in support of the Department's case or its appeal.

Perhaps it should be concluded that, while the court might have denied the Department's foregoing assignment of error on this second

[17] REM. REV. STAT. § 7697 [P.P.C § 704-1].

ground, it did not do so for the very purpose of giving direct effect to its foregoing general thesis by ruling the award in an arbitration not conforming with the statute to be a nullity. On the other hand, it seems clear that, notwithstanding this decision, the court may be free generally to accord freedom of contract of parties in the premises and to permit them to contract with legal effect for nonstatutory arbitration. The actual decision to give the award no effect does not seem to rest exclusively or indispensably upon the general thesis.

In the earlier case of *Owen v. Casey*[18] the court had passed upon a similar situation in which the conclusiveness of an award was put in issue as follows: defendants pleaded an arbitration and award to defeat an action brought against them to foreclose a labor lien. *Held,* that the answer was subject to demurrer because it "failed to allege any written agreement for arbitration, any award filed with the clerk of the superior court, or any approval of the same by the court." (Filing of an award and confirmation by the court were steps provided in the arbitration statute for enforcement of a statutory award.) The court made this judgment without mention of its general view about common law arbitration being supplanted. It was decided, of course, before the *Dickie Mfg. Co.* case in which the doctrine seems first to have been voiced. The decision lends itself, however, to being cited as a direct, though undeclared, application of the court's general doctrine.

In *Fisher Flouring Mills Co. v. United States*[19] issue was raised as in the last two cases, as to whether or not an award was conclusive upon the defendant who sought by counterclaim to put in litigation claims which were deemed to have been embraced in the arbitration and award. It does not appear whether or not the arbitration agreement qualified under the statute, nor whether the arbitrators and proceedings followed the statute. No steps had been taken, however, to have the award confirmed under the statute nor to have judgment entered thereon. The court took the position that on these facts (the award being unconfirmed and without judgment) it was not conclusive as a statutory award and that it did not preclude the litigation of the original cause or any part of it.[20] The court appears to have relied upon the general thesis of the Supreme Court of Washington in holding that

[18] 48 Wash. 673, 94 Pac. 473 (1908).
[19] 17 F.(2d) 232 (C.C.A. 9th 1927).
[20] Under the present statute it seems that substantial parts of the rulings in *Owen v. Casey* and *Fisher Flouring Mills Co. v. United States* are overcome by the last sentence of REM. REV. STAT. § 430-15 (Supp. 1943), which reads as follows: "The validity of an award, otherwise valid, shall not be affected by the fact that no motion is made to confirm it."

the award was of no consequence as a common law award. The court cited the *Dickie Mfg. Co.* and *Suksdorf* cases for the proposition that, "it has become the settled law of that jurisdiction that common law arbitrations are entirely supplanted by the state statute." The court expressly undertook to follow the state law in its decision and recognized its binding effect in the federal court. It could have arrived at the same result without sponsoring the foregoing thesis by relying upon *Owen v. Casey.*

We next come to the case of *Gord v. F. S. Harmon & Co.*[21] In October, 1934, the employees of various manufacturers went on strike. Increased wages were among the demands of the employees. An official of the United States Department of Labor intervened and induced the employers' association and the unions of the striking employees to refer their disputes to the Regional Labor Board; written agreement was consummated between the parties for the arbitration of their controversies and a panel of three arbitrators was established. The agreement was for *arbitration* and the panel was designated as a panel of *arbitrators.* The board returned an award which fixed the rates of wages to be paid. The new rates were higher than the old rates. By the terms of the arbitration agreement, the wage rates fixed by the award were to be retroactive to an earlier date on which the striking employees returned to work. Upon delivery of the award the employers rejected it. Action was instituted by several employees against their employers to recover the excess over the old rates which had accrued under the rates fixed in the award for the foregoing period.

A first defense against the action as considered by the court was that the award was invalid because the arbitration did not conform to the arbitration statute. In what particulars it did not conform to the statute is not disclosed in the court's opinion. The court readily volunteereed the view, moreover, that such an arbitration could not conform to the statute. Said the court, "The statute referred to is wholly inapplicable to the adjustment of a labor dispute between an employer and employees. It contemplates such an arbitration that, when the award is filed with the clerk of the superior court, judgment may be entered thereon and execution issued. *In view of the statute referred to* [the arbitration statute] *it has been held by this court that there was not, in this state, what is known as a common law arbitration,*"—citing the *Dickie Mfg. Co.* case, among others. (Italics supplied) (The position

[21] 188 Wash. 134, 61 P.(2d) 1294 (1936).

of the court that the arbitration statute was "wholly inapplicable to the adjustment of a labor dispute between an employer and employees" is discussed below.)

Although the general thesis of the nonexistence of common law arbitration was so reiterated, nevertheless, the court sustained the validity of the award and affirmed the money judgment of the court below in favor of the plaintiffs.

The court resolved its dilemma by classifying the "arbitration" as an "appraisement."

Said the court:

> *Even though the arbitration here did not, and could not, have conformed to the statute, and there is no common law arbitration in this state, it does not follow that there is no way by which employers and employees may settle their differences by mutually agreeing upon certain persons to make the adjustment.*
>
> Thus far we have been using the term "arbitration," which was used in the agreement. But what was done here was neither a statutory arbitration nor a common law arbitration. *It is what is referred to in the books as an appraisement.* (Italics supplied)

These questions seem pertinent: in view of the readiness of the court to recognize the validity of employers and employees mutually agreeing upon certain persons to adjudge their controversies by "appraisement," outside the arbitration statute, why might they not mutually agree upon common law arbitration? Upon what basis may this discrimination in the privilege of contract be justified? The court has not given the answers to these questions.

The position of the court as to the nonexistence of common law arbitration in the state was next stated in *In re Arbitration Puget Sound Bridge & Dredging Co.*[22] It is there declared that "Contrary to the practice and procedure in the vast majority of the states, this jurisdiction does not recognize or permit common law arbitration, one of the distinguishing features of which is that an agreement for such arbitration is revocable. In this state, the proceeding is wholly statutory, and the rights of the parties thereto are governed and controlled by statutory provisions."

Careful study of the issues presented on the appeal and of the determination of them by the court fails to disclose the pertinency, even *arguendo,* of the restatement of the matter. The above statement identifies common law arbitration with the common law rules of revocability

[22] 1 Wn.(2d) 401, 96 P.(2d) 257 (1939).

of agreements for such arbitration. But the court had been quite effective in repudiating these rules in earlier cases in which the precise question was presented.[23] With these rules of revocability already overcome, why should it be deemed necessary to repudiate arbitral proceedings and awards had in accordance with rules of the common law, or other rules as might be agreed upon by the parties, outside the statute? The court has never made any clear answer to this question.

In view of the dubious position of the foregoing thesis as it appears in the above cases decided while the former arbitration statute was in effect, it seems reasonable to urge that in connection with the new statute parties should be accorded the privilege, as in other jurisdictions, to choose whether to arbitrate under agreements for arbitration and by procedures which do or do not follow the statute. If their arbitration agreement qualifies under the statute, let the statute apply.[24] If the parties stipulate in an arbitration agreement otherwise qualifying under the statute that it shall not apply, let the agreement be judged as at common law. Let the common law rulings of irrevocability of arbitration agreements as already established by the court apply to arbitration agreements which do not qualify under the statute unless the parties in the given case shall stipulate otherwise. (The feasibility of blacking out common law and statutory arbitration and the substitution of "appraisement" in labor causes is further considered below.)

To parties concerned in using arbitration and agreements for arbitration the question whether common law arbitration is permissible will generally assume little importance, *provided* the parties and subject matter are such that the statute may be invoked. Whether or not employees (or their unions) and employers can invoke the present statute, is not free from doubt. If parties can invoke the present statute and the subject of dispute may be brought within the statute, it seems that statutory arbitration will generally be preferred. There are few requirements for compliance with the statute and the procedures under the statute for enforcing the agreement, and for enforcing, correcting or vacating an award are superior to those at common law.

[23] See note 7 *supra.*

[24] If the arbitration agreement qualifies under the statute but the proceedings thereunder fail substantially to comply with the statute, difficult questions arise as to the fitness of recognition of the validity of an award. Should it be subject to enforcement, or to a vacation or correction as a common law award? See STURGES, *op. cit., supra* note 5, §§ 5, 6.

II

WHETHER OR NOT ARBITRATION AGREEMENTS BETWEEN EMPLOYERS AND EMPLOYEES ARE SUBJECT TO THE PRESENT ACT—WHAT CAUSES MAY BE SUBMITTED THEREUNDER, WITH SPECIAL REFERENCE TO LABOR CONTROVERSIES

General. Under the present general arbitration statute parties may include a provision "in a written agreement" to settle by arbitration "any controversy thereafter arising between them out of or in relation to such agreement."[25] Parties also may agree in writing to submit to arbitration "any controversy *which may be the subject of an action existing between them* at the time of the agreement to submit."[26] Although the latter part of this text is somewhat ambiguous, it seems probable that it contemplates the submission of any existing controversy which *might* be the subject of an action and that it is not intended to restrict the causes which may be submitted to those that are in pending litigation between the parties.

It also may be doubted that any substantial difference in arbitrable causes is intended by providing that parties may embrace in a future disputes provision "any controversy" thereafter arising between them, while the submission of an existing controversy may embrace "any controversy which may [*might*] be the subject of an action."

Labor Causes. Whether or not the statute is applicable, or can be made applicable, in any manner to arbitration agreements and arbitral proceedings and awards involving labor controversies is made doubtful by the obviously ambiguous second paragraph of the first section. Especially is this true when that paragraph is read in the light of its coming into the statute in 1947 as an amendment to the corresponding paragraph of the statute as originally enacted in 1943.

Postponing further consideration of these ambiguities in the text of the statute for the moment, the answer to the general question of whether or not labor controversies may be arbitrated under the statute is further complicated by the decision and rationale of the court in *Gord v. F. S. Harmon & Co.*[27] It presents the preliminary question of whether labor causes may be the subject of *any arbitration* or must be allocated to the tenuous category of "appraisement." To further report the case: employees and their employer had entered into an agreement

[25] Wash. Laws 1947, c. 209, § 1; REM. REV. STAT. § 430-1 (Supp. 1947).
[26] *Id.*
[27] 188 Wash. 134, 61 P.(2d) 1294 (1936).

of submission in writing for the *arbitration* of employees' claims for increased rates of wages, and arbitration was had and an award for increased rates was rendered. In an action brought by the employees upon the award to recover a money judgment for additional wages due according to the arbitration agreement and award, the supreme court affirmed the money judgment in favor of the plaintiffs as entered in the court below. As reported above, the court saw fit, however, to declare that the proceedings would not be counted valid as either a statutory or common law arbitration. Instead, according to the court, they must be recognized by what "is referred to in the books as an appraisement."[28]

[28] The Washington court seems to have been the first (and as yet appears to be the only) court to have projected arbitration agreements covering labor causes and the proceedings and awards thereunder into the category of "appraisement" and out of the category of *arbitration*. "Appraisement" and "appraisals" are terms which most commonly have been identified with agreements and proceedings to determine loss or damage under property insurance contracts, and to determine the value or price of property, such as the re-rental value of property under lease. They also have been associated with agreements and proceedings relating to the action of architects or engineers in the settlement of controversies arising in connection with construction, installation and similar contracts. Even in their more traditional habitat these categores are confusing and indeterminate as to when and how they are like unto and distinctive from *arbitration*. For a general review of this confusion of tongues among the decided cases, see STURGES, COMMERCIAL ARBITRATIONS AND AWARDS, §§ 7-11. The most prevalent distinction, that appraisal clauses were held irrevocable while arbitration clauses were revocable, ceased to exist in Washington beginning with the *Zindorf* case in 1901.

More specifically concerning the foregoing diversities, and by way of example, there is a variety of judicial rulings as to whether "appraisals" of one kind or another require that notice and opportunity of hearing shall be accorded the parties as in the case of either common law or statutory arbitrations. See STURGES, *op. cit., supra,* §§ 8, 9, 11. In making up for "appraisements" significant differences from *arbitration* of labor controversies, does the supreme court intend to go along with the decisions which have held against the right of notice and opportunity to be heard—at least in some classes of "appraisals"—or will it follow other authorities requiring opportunity of full hearings as in *arbitrations?*

The court has generally indicated its solicitude in cases under the former arbitration statute that arbitrators accord each of the parties opportunity for full hearing, and has held that arbitrators are guilty of misbehavior and their award shall be vacated if they deny the parties, or either of them, opportunity for fair hearing, including the privilege of cross-examination. The parties have a right to a day in court unless they waive it. Thus, in *Brown's Exrs. v. Farnandis,* 27 Wash. 232, 67 Pac. 574 (1902), the arbitrators received written statements from the parties setting forth their respective claims. They next "called in the parties separately, and allowed them to make explanations of their own statements." From these statements and explanations the arbitrators made up their award. The court also reports that, "there is nothing in the record to show that Farnandis [the party challenging the award] consented to this mode of trial; on the contrary, it appears that the arbitrators refused to permit the parties to appear together." In holding the award invalid, the court said, "While arbitrators are not required to proceed with the formalities of a court, they must proceed in such manner as to give a full hearing to each of the parties, not only upon the several items of the claim presented by himself, but also upon the claim of his adversary, and upon the evidence adduced in support of that claim. This they cannot do without hearing a party and his witness in the presence of the opposing party. Unless this right is waived by the party, either in the agreement of submission or by conduct amounting to a waiver, an award made under such circumstances is clearly void." *See also* McDonald v. Lewis, 18 Wash. 300, 51 Pac. 387 (1897); *In re* Arbitration Puget Sound Bridge & Dredging Co. v. Lake Washington Shipyards, 1 Wn.(2d) 401, 96 P.(2d) 257 (1939); and especially the opinion in Hatch v. Cole, 128 Wash. 107, 222 Pac. 463 (1924).

This view was reaffirmed in *Hegeberg v. New England Fish Co.*,[29] which was very similar to the *Gord* case.

The court declared in the *Gord* case that the arbitration had not conformed to the statute and, therefore, the award could not be sustained as a statutory award, and, under its general thesis that common law arbitration had been displaced in the state, it could not have any validity as a common law award. The award could be sustained and enforced as, but only as, an adjustment in an "appraisement." The court went further, however, and declared that the earlier arbitration statute must be deemed *"wholly inapplicable to the adjustment of a labor dispute between an employer and employees. It contemplates such an arbitration that, when the award is filed with the clerk of the superior court, judgment may be entered thereon and execution issued."* Said the court further, *"The case now before us falls under the classification of an appraisement. So far as we are now concerned, there was an issue submitted to the board to determine a future fact, which was wages, the award of which should be retroactive, as above stated."* (Italics supplied.)

These considerations do not seem very persuasive for taking the *arbitration* of controversies between employees and employer out of the former statute. Nor would they be persuasive as support for a ruling that such causes may not be arbitrable under the present act for like reasons. The provisions of the two statutes in the particulars considered by the court are substantially similar. The former statute broadly authorized the submission of "any controversy, suit or quarrel."[30] True, "judgment" was to be entered upon the award (as under the present statute), but this did not require that the award should be such as to support such a judgment as would, in turn, support an execution. The statute provided that the judgment entered on an award "shall be in all respects like any other judgment of the superior court."[31] Under existing code provisions relating to civil procedure,[32] forms of action had been abolished, legal and equitable relief was pursued in the one action, and a "judgment" was the terminal of the action. These provisions relating to civil procedure are pertinent, for the court has emphasized that the chapter of the code relating to arbitration and award is an integral part of the code of civil procedure. "It was enacted with the

[29] 7 Wn.(2d) 509, 110 P.(2d) 182 (1941).
[30] Wash. Code 1881, c. 20, § 264; REM. REV. STAT. § 420.
[31] Wash. Code 1881, c. 20, § 274; REM. REV. STAT. § 430.
[32] REM. REV. STAT. §§ 153, 255, 404, 435, 512 [P.P.C. §§ 3-1, 85-1, 62-1, 62-19, 48-1].

code of civil procedure and forms an integral part thereof."[33] Accordingly, it seems clear that the judgment entered under the arbitration statute upon an award could and should confirm and conform to the award according to its intent whether it be for the recovery of money or property, the declaratory adjudication of controverted claims, or for more executory action as in the nature of an equitable decree. Certainly it could not have been intended by the court that the arbitration statute contemplated only such an award as would, when entered in judgment, sustain execution. An award, for example, *denying* the recovery of the simplest controverted claim for money would support no judgment which would sustain an execution, but such controverted claim would have been arbitrable under the statute.

It seems equally dubious to have characterized the award in the *Gord* case as the determination of "a future fact." What the court had in mind by "a future fact" it does not explain, and the characterization of the award, theretofore rendered, as the determination of "a future fact" is not clear. Furthermore, if *arbitrators* cannot make a determination of "a future fact" it is not clear how *appraisers* can do so. But the court did allow its enforcement by action—as an "appraisement." If appraisers can make such determination, it is not clear why arbitrators cannot do so.

The court also entered upon certain generalizations as to how "appraisement" differs from arbitration. They are not very convincing. Said the court, "As a rule, what is called an arbitration does not relate to the future, and where it does so relate, it is not in the proper sense an arbitration, but only the ascertainment of some fact as a condition precedent to the bringing of suit." It seems clear that, at least in the present case, neither of the parties had any purpose of going through the arbitration in order to ascertain some fact "as a condition precedent to the bringing of a suit." The whole program, from agreement to award, was designed to liquidate a strike and adjudicate a wage scale to be applied retroactively and probably for a future period, though its length was not disclosed nor covered in the arbitration agreement. In *Hegeberg v. New England Fish Co.*,[34] which, as indicated above, was very similar to the *Gord* case, while the court reaffirmed its position that the arbitration was an "appraisement," it emphasized that "the essence of the matter was to settle what was apparently a bitter dispute between

[33] Mitsubishi Goshi Kaisha v. Carstens Packing Co., 116 Wash. 630, 200 Pac. 327 (1921).

[34] 7 Wn.(2d) 509, 110 P.(2d) 182 (1941).

employers and employees and enable the fishing to proceed, thereby avoiding great loss to all parties concerned."

The court further declared in the *Gord* case that "It is an appraisement, and not an arbitration, where the arbitrators or appraisers, whichever they may be called, act in the twofold capacity of arbitrators and experts." It certainly is not conceded by those holding generally accepted conceptions of arbitration that arbitrators must be devoid of expertness. And granting there is the foregoing "twofold capacity" of persons who are to make an award, it is not clear why it should preclude *arbitration* by *arbitrators* of labor controversies between employees and their employer under the then existing arbitration statute authorizing the arbitration of "any controversy, suit or quarrel."

The views of the court that the settlement of controversies between employees and their employer must be by "appraisement," and may not be by common law or statutory arbitration also seem out of harmony with the views of the legislature as set down in Chapter 6 of the labor law.[35] By that legislation it is made the duty of the state labor commissioner, if he fails in negotiating a settlement of a labor dispute between employees and employer, to endeavor "to have said parties consent in writing to submit their disputes to a board of *arbitration.*" Such board shall consist of three citizens, one selected by each party and the two so elected to select a third. The three so selected "to constitute the board of *arbitration* and the findings of said board of *arbitration* to be final." (Italics supplied.) Had the legislature intended "appraisement" and not *arbitration* it could easily have said so. The present arbitration statute uses the term "arbitration," and its enactment in 1943 was after the foregoing decisions and opinions in the *Gord* and *Hegeberg* cases. If the legislature had intended "appraisement" and not *arbitration* again it could easily have said so.

Granting, however, that labor controversies arising between employees and their employers may be amenable to settlement by *arbitration* (that they are not inevitably relegated to the nebulous and indeterminate category of "appraisement"), there still is doubt whether or not the arbitration agreements of such parties may come under the present statute. While the second paragraph of the first section of the present statute expressly purports in one part to render the act inapplicable to arbitration agreements between employees and employers, in another

[35] REM. REV. STAT. §§ 7667-7672 [P.P.C. §§ 686-1 *et seq.*].

part of the same paragraph it is provided that such parties may agree upon *"any method and procedure for the settlement* of existing or future disputes and controversies" and that "any such procedure shall be valid, enforceable and irrevocable." (Italics supplied.)

The first section of the present statute reads as follows:[36]

Written agreement for submission to arbitration—Validity and enforceability—Agreements between employers and employees or associations of employees. Two or more parties may agree in writing to submit to arbitration, in conformity with the provisions of this act, any controversy which may be the subject of an action existing between them at the time of the agreement to submit, or they may include in a written agreement a provision to settle by arbitration any controversy thereafter arising between them out of or in relation to such agreement. Such agreement shall be valid, enforceable and irrevocable save upon such grounds as exist in law or equity for the revocation of any agreement.

The provisions of this act shall not apply to any arbitration agreement between employers and employees, and as to any such agreement the parties thereto may provide for any method and procedure for the settlement of existing or future disputes and controversies, and such procedure shall be valid, enforceable and irrevocable save upon such grounds as exist in law or equity for the revocation of any agreement.

Granting the uncertainty of the total text of this section—and especially of the second paragraph—it seems reasonably clear that the statute contemplates that agreements for the settlement of labor disputes arising between employees and their employer and the procedure agreed upon for their settlement may be by *arbitration* and may qualify under the statute and thereby be "valid, enforceable and irrevocable" in the manner and by the remedies provided in the statute to the extent that they are adaptable. The following analysis of the statute leads to this conclusion.

The present text of the last paragraph of this section came into the statute in 1947 by way of amendment of the corresponding paragraph in the act of 1943. The earlier paragraph reads as follows:[37] "The provisions of this act shall not apply to any arbitration agreement between employers and employees or between employers and associations of employees, unless such agreement specifically provides that it shall be subject to the provisions of this act."

The original text of this paragraph clearly intended that arbitration agreements between employers and employees or their associations and

[36] Wash. Laws. 1947, c. 209, § 1; REM. REV. STAT. § 430-1 (Supp. 1947).
[37] REM. REV. STAT. § 430-1 (Supp. 1943) [P.P.C. § 8-31].

unions, though otherwise qualifying thereunder, should not come under the act unless the parties expressly so stipulated therein. It is readily inferred, on the other hand, that it was intended that if such parties did so stipulate in an agreement for arbitration which otherwise qualified under the act, the agreement, the arbitral proceedings and award would be subject to the provisions of the act.

The present text seems, on first impression, to give such parties no opportunity to invoke the act, not even if they purport to stipulate themselves into it. It does provide, however, that if such parties enter into "any such agreement" (which, as a matter of context, refers to "any *arbitration* agreement"),[38] they may "provide for *any method and procedure for the settlement* of existing or future disputes and controversies, and such procedure shall be valid, enforceable and irrevocable save upon such grounds as exist in law or equity for the revocation of any agreement."

The text prompts the conclusion that the over-all intents and purposes of the new paragraph are as follows: (1) To perpetuate the *formal* exclusion, as in the original paragraph, of arbitration agreements between employers and their employees from the statute. (Why? A mystery.) And this exclusion, by the amendment, seems to render the act inapplicable and unavailable in such cases even though the parties stipulate for its application. (2) That notwithstanding this formal exclusion, such parties may in any arbitration agreement in writing "provide for *any method and procedure for the settlement of existing or future disputes and controversies*" and "such procedure *shall be valid, enforceable and irrevocable.*" This second part of the paragraph seems effectively to overcome the formal exclusion in the first part of the paragraph (except, probably, when the parties stipulate that the act shall *not* apply). It is inferred, however, that the process of amending the paragraph was not deliberately intended to accomplish merely such circuity. Instead, it is believed that the foregoing second part of the paragraph was intended *to serve as a positive legislative mandate* to the courts to overcome the ruling of the lower court in *Sullivan v. Boeing Aircraft Co.*[39]

It remains to consider in this connection the court's disposition of

[38] While this text, "any arbitration agreement," might include one not in writing, it seems probable, in view of its setting in the statute and the scope of the statute as a whole, that an arbitration agreement *in writing* is intended. This conclusion is supported by reference to the first paragraph of section 1 of the 1947 amendment, and section 430-20(1) of the 1943 statute.

[39] 29 Wn.(2d) 397, 187 P.(2d) 312 (1947), 174 A.L.R. 566 (1948).

the *Sullivan* case. It seems to have ruled that whether an arbitration provision in a collective bargaining agreement and an award thereunder were to be regarded as a *valid arbitration* or a *valid appraisal,* they were, nevertheless, *legal* nullities.

The arbitration provision was treated as revocable and the award was ignored.

Sullivan was an employee of the defendant company and a member of International Association of Machinists and Aeronautical Industrial District Lodge No. 751. On January 1, 1944, the union and the company entered into a written collective bargaining agreement. Included in this agreement were provisions, among others, setting forth seniority rights of the employees and provisions for the arbitration of grievances arising between the parties. While the agreement was in effect, the company notified Sullivan of a change of his shift (from the "first" to the "second") and that on May 1, 1944, he should report for work on the second shift. Sullivan refused to work on the second shift, but stood ready to continue on the first shift. On the date of the foregoing notice to him, Sullivan filed written claim of grievance with the arbitrator as provided in the general agreement. He claimed that the change of shifts as ordered by the company was in violation of his seniority rights as established in the general agreement. According to the court, he also was "claiming pay for time lost because of such transfer." Apparently, however, no claim for lost wages was included in the submission, and the trial court set forth in its findings of fact that there was not "any submission thereof made to arbitration." Briefs for both parties on appeal likewise indicate that no such claim had been submitted to the arbitrator.

The arbitration board returned its award on July 3, 1944. From May 1, to July 13, 1944, Sullivan would not report for work on the second shift and the company would not employ him on the first shift. The arbitral board ruled in favor of Sullivan's claim, holding that, on the facts in the case and in light of the seniority provisions of the general agreement, Sullivan was entitled to the first shift. The company reinstated Sullivan on the first shift upon receipt of notice of the arbitrator's award. He then made demand upon the company for back pay. The company refused. He thereupon instituted this action for the back wages relying upon the award of the arbitrator that the company's action was in breach of the provisions of the general agreement. The plaintiff finally prevailed in the lower court and defendant appealed from the judgment.

The defendant relied upon the arbitration provisions to bar this action, it being contended that those provisions were valid and irrevocable and plaintiff must first submit the issue to arbitration as provided in the general agreement. The trial judge declared and ruled that they were invalid. He assigned no reasons for this conclusion. He also took the position that "we are not here dealing with a case of appraisement." As stated above, the plaintiff's action for the wages appears to have been based upon the award and the general agreement. Recovery was allowed by the trial court apparently on the basis that the company had, as found in the award, wrongfully denied plaintiff's right to continue to work on the first shift, and in an amount equal to the number of work days so lost multiplied by the wage-rate provided in the general agreement. The supreme court reversed the lower court's ruling after reviewing the elaborate provisions of the general agreement relating to seniority. The court pointed out that as seniority became involved in various different situations covered in the agreement so were various forms of expression used to indicate how seniority was to be effective, *i.e.* (1) in some the company "shall have regard to seniority," (2) in others "will be governed by seniority," (3) in others "seniority shall prevail," and (4) in others "seniority shall be given first opportunity." The court concluded from the various provisions that plaintiff's situation was one in which the company should "have regard to seniority." The court then determined, with the aid of dictionaries, that to "have regard to" meant no more than that the company should take account of seniority, but was not bound by it. Accordingly, the company was held not to have violated the general agreement.

The court also took the further position that since the plaintiff had not taken any steps to mitigate his damages he should recover nothing.

For both of these reasons, as the court said, it reversed the judgment of the court below and directed dismissal of the action.

But what may be concluded about (1) the validity and conclusiveness of the arbitrator's award and (2) the declaratory ruling of the court below that the provisions for the grievance procedure and arbitration were of no legal effect and no bar to plaintiff's action? In the brief and argument for the company, attempt was made to obtain specific ruling by the supreme court reversing the blanket invalidation of the arbitration system provided in the general agreement as uttered by the trial judge.

The supreme court refused to pass upon this matter as urged by the company, and proceeded to decide the case as above set forth, and with-

out purporting to invalidate or to vacate the award. No discussion in the opinion takes account of the opinions or rulings of the court in the *Gord* or *Hegeberg* cases, which sustained and enforced like awards. It by-passed the award as if there were none and seemingly in reversal of its rulings sustaining the validity and enforceability of similar awards in the last cited cases. There is no suggestion that the arbitral board had proceeded upon a "fundamentally wrong basis," which has been declared by the court a proper cause to upset an *appraiser's* award.[40]

The only reference to either of the foregoing matters (revocability of the agreement or conclusion of the award) was as follows: "One of the questions discussed at length in the briefs is whether the grievance procedure which was followed in this instance constituted either a valid arbitration or a valid appraisement, or appraisal, under the law of this state. The authorities cited, together with some which we have added, bearing on that question, are the following. . . ." The court listed the citation of the present arbitration statute and several cases, including the *Gord* and *Hegeberg* cases without comment upon them. The court then concluded: *"The determination of that question here, however, would not finally dispose of this controversy; and, moreover, under our view of the case, the result would be the same regardless of whether or not the grievance procedure constituted either a valid arbitration or a valid appraisement or appraisal."*

It is difficult to understand the intent of these statements. In the first place, if the award as to the violation of seniority rights were to be recognized as having been rendered in a valid arbitration or a valid appraisal, it is not clear why, nor upon what ground, the court should disregard it and proceed to its own decision of the same issue that had been submitted to arbitration. The court assigned no reason for disregarding the award; no cause to vacate it was stated nor even mentioned generally. Both parties apparently considered that the arbitrator had full jurisdiction to hear and determine the issue involving the construction of the provisions relating to seniority in the general agreement and their application in the given case. Both had acted in accord with and in reliance upon the award as rendered. Under these circumstances it must lie in considerable mystery why the award in the case as to plaintiff's seniority rights was by-passed and avoided so readily.[41]

[40] *See* Peterson v. Granger Irr. Dist., 137 Wash. 668, 243 Pac. 847 (1926).

[41] In addition to the *Gord* and *Hegberg* cases, *see, e.g.,* School Dist. v. Sage, 13 Wash. 352, 43 Pac. 341 (1896); McKivor v. Savage, 60 Wash. 135, 110 Pac. 811 (1910); Sound Const. & Eng. Co. v. Green, 89 Wash. 459, 154 Pac. 791 (1916).

In the second place, if the arbitration provision in the general agreement were "valid" (as either an arbitration or appraisal provision), the court should have held that the plaintiff's action to recover the lost wages was barred because the plaintiff had not sought arbitration of the claim. This is true regardless of whether or not the parties had duly stipulated their agreement into the statute under the original second paragraph of the first section of the statute. (The arbitration agreement had been concluded after the effective date of the arbitration act in 1943 but before the 1947 amendment. It does not appear whether or not the parties had stipulated that the arbitration provisions should be subject to the act.) Even if the agreement were not governed by the statute, it should have been held irrevocable, unless the court intended to deny the applicability of its earlier decisions holding future disputes provisions in general commercial contracts irrevocable, to arbitration provisions in collective agreements between employees and employers.[42]

The draftsman of the 1947 amendment of the second paragraph has advised the authors that the amendment was prompted by, and intended to overcome, the blanket invalidation, as declared by the trial judge, of grievance procedures and arbitral provisions which are in current use in collective bargaining agreements between labor unions and employers.

As heretofore pointed out, the amendment provides that "any method and procedure for the settlement of existing or future disputes" set forth in an arbitration agreement shall be "valid, enforceable and irrevocable save upon such grounds as exist in law or equity for the revocation of any agreement." These are the same words as are used in the first paragraph of the section with respect to agreements for arbitration which do qualify directly and fully under the act. The general declaration making such agreements "valid, enforceable and irrevocable" takes on precise meaning under the statute when these words are read in the light of the procedures and remedies which are accorded by the act actually to assert their validity, enforceability and irrevocability.[43] It seems reasonable, therefore, to construe the intent of the foregoing amendment as being to invoke the remedies and procedures of the act, insofar as they are adaptable in the given case, to assure and assert the declared validity, enforceability and

[42] See note 7 *supra*; *also* Martin v. Vansant, 99 Wash. 106, 168 Pac. 990 (1917), Ann. Cas. 1918D 1147; Wagner v. Peshastin Lumber Co., 149 Wash. 328, 270 Pac. 1032 (1928) (holding appraisal clauses irrevocable).

[43] REM. REV. STAT. §§ 430-3, 4, 5, 6 (Supp. 1943) [P.P.C. §§ 8-35, 37, 39. 411.

irrevocability of methods and procedures agreed upon by employees (or their unions) and employers, for the settlement of existing or future disputes and controversies arising between them.

It remains to note, however, that the status of the foregoing suggested construction of the amendment is not free from further doubt. As heretofore noted, on appeal in the *Sullivan* case, the company sought the reversal of the ruling of the trial judge invalidating the arbitration agreement. Furthermore, although the original paragraph of the section and the foregoing amendment thereof were brought to the attention of the supreme court, it declined to pass upon the question as to the revocability of the arbitration provision. The collective bargaining agreement between the parties with its provisions for handling grievances and for arbitration was entered into while the original paragraph of the section was in effect. As stated above, it does not appear whether or not the parties had stipulated that the act should apply. The supreme court gave no consideration, however, to the point whether the original or amended paragraph of the section was applicable. It proceeded directly to review and decide the whole case as upon appeal from trial of a case involving breach of the general agreement. If the court intended to condone the declaration and ruling of the trial judge that the grievance and arbitral provisions were revocable, it may be that the same ruling will go against an arbitral provision which qualifies under the foregoing suggested construction of the amendment. To do so, however, would seem to make light of the view voiced by the supreme court in *Hegeberg v. New England Fish Co.* that "A sound and well recognized public policy strongly supports arbitration of disputes between employers and employees." The amendment, though somewhat awkward and ambiguous, seems to have been intended to implement that policy.

It may be surmised that the supreme court in the *Sullivan* case was most immediately concerned with what may have appeared to it as inequities in the plaintiff's claim and that it did not intend necessarily to confirm the blanket invalidation of arbitral provisions as voiced by the trial judge. The court may, it seems, readily restore the validity, irrevocability and enforceability of arbitral provisions qualifying under the suggested construction of the amendment by reading it into the rest of the statute with its several remedies as outlined above.

It seems doubtful that the court would be warranted in repudiating

an award or in holding revocable an arbitration provision or submission which qualifies under the suggested construction of the amendment of the second paragraph of the first section of the present arbitration statute as it seems to have done in the *Sullivan* case. That paragraph is specific that parties to an arbitration agreement "may provide for *any method and procedure* for the settlement of existing or future disputes or controversies" and that such procedure *shall be* valid, enforceable and irrevocable." The latter part of this text sounds in legislative mandate that *the courts shall make such agreements valid, enforceable and irrevocable.* To accord the remedies of the statute, as indicated above, seems to point the way to carry out the mandate. And certainly the constitutional competence of legislation in making mandatory upon the courts the according of such remedies seems fully assured.[44]

[44] Berkovitz v. Arbib & Houlberg, 230 N.Y. 261, 130 N.E. 288 (1921).