Washington Law Review

Volume 30
Number 2 *Washington Case Law-1954*

5-1-1955

Labor Law

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significant that Professor Wigmore was the Chief Consultant in the drafting of the Code and the Code contains Section 529 entitled "Learned Treatises." Even our court has refused to treat the mortality tables as final determination of life expectancy, but only as some evidence to which may be added the state of health, occupation, etc., of the person whose expectancy is being determined.[26] It would seem then, that if the Bulletin were admissible at all, it would be limited in effect to some indication of the depreciation rate, and considering the caveat therein, not enough to finally determine that rate.

While there is a division of opinion on whether it is proper for an appellate court to take judicial notice of a fact overlooked by the trial judge[27] it is universally held that new evidence may not be introduced at that level. By introducing the Internal Revenue Bulletin of their own motion, it is submitted that the court not only took judicial notice, without apprising the parties, of an item not the proper subject thereof, but in effect introduced evidence into the appeal.

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LABOR LAW

Effect of Arbitration Agreements. The uncertainty created by the 1947 amendment to § 1 of the Washington Arbitration Act of 1943[1] was partially dispelled by the case of *Greyhound Corporation v. Amalgamated Association of Street, etc., Employees.*[2]

The action arose under a non-statutory arbitration provision contained in a collective bargaining agreement between Greyhound and the Union. The Union had objected to changes in the duties of certain of the bus drivers in the employ of Greyhound and demanded that the ensuing dispute be submitted to arbitration. Greyhound declined to arbitrate, sought a declaratory judgment to the effect that no arbitrable issue existed between the parties. The Union demurred to Greyhound's

[26] In Roalsen v. Oregon Stevedoring Co., note 8 *supra* at 675, 267 Pac. at 436, the court said, "It is true that the effect of such (mortality) tables is for the trier of facts, and true also that such triers, in determining life expectancy of any person, may take into consideration his vocation, occupation, and condition of health, both mentally and bodily, and may find that these considerations destroy the value of the tables as evidence; they are not inadmissible for that reason." It is notable that this is one of the cases the court relied upon as authority for the judicial notice taken in the Heroux Case.

[27] The Model Code of Evidence supports the proposition, see Rule 806; some authorities hold to the contrary. See Line v. Line, 119 Md. 403, 86 Atl. 1032 (1926). At any rate the assumption of a fact should not be treated as preventing opposing counsel from attacking the assumption. See 9 WIGMORE, EVIDENCE § 2567 (3d ed. 1940).

[1] Laws 1947 c. 209 § 1; RCW 7.04.010.

[2] 44 Wn.2d 808, 271 P.2d 689 (1954).

complaint on the ground that the matter was arbitrable and interposed a motion for a stay of proceedings and an order that the matter be submitted to arbitration. The Union's motion was *"apparently based upon provisions of the state arbitration act."*[3] The trial court sustained the Union's demurrer and dismissed Greyhound's complaint with prejudice, but denied the Union's motion. The Supreme Court affirmed the result, but on different grounds.

Declaring that it was the purpose of the 1947 amendment to remove the doubts as to the enforcibility and effect of arbitration agreements between employees and employers which were raised by the trial court in the case of *Sullivan v. Boeing Aircraft Company*,[4] the Supreme Court held that arbitration agreements are now valid and enforcible. In the words of the court, the parties:

> have an option to provide by specific agreement that the procedures of the act of 1943 shall be applicable and available to them in applying or enforcing the provisions of arbitration clauses; or they may agree upon arbitration procedures other than those under the act. But, irrespective of election by agreement to use or not to use the procedures provided in the act, arbitration clauses agreed upon by the parties and inserted in collective bargaining contracts are not subject to the common-law rule permitting revocation at the will of the parties. Arbitration clauses are valid, binding and enforcible by appropriate action of the parties in our state courts.[5]

The court then proceeded to affirm the lower court's denial of the Union's motion for a stay and an order to submit to arbitration. This action was grounded upon the finding that the motion of the Union was based upon provisions of the arbitration act, and the court reasoned

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[3] 44 Wn.2d 808, 811, 271 P.2d 689, 691. The court's conclusion as to this point is probably based on the fact that in its appeal brief the Union assigns error to the dismissal of its motion by the trial court and bases its argument solely on the provisions of the arbitration statute. RCW 7.04.030 provides: "If any action for legal or equitable relief or other proceeding is brought by any party to a written agreement to arbitrate, the court in which such action or proceeding is pending upon being satisfied that any issue involved in such action or proceeding is referable to arbitration under such agreement, shall, on motion of any party to the arbitration agreement, stay the action or proceeding until an arbitration has been had in accordance with the agreement." RCW 7.04.040 provides, *inter alia*, that the court, upon being satisfied that there is no issue as to the validity of the arbitration agreement, or the failure to arbitrate, shall make an order directing the parties to arbitrate.

[4] 29 Wn.2d 397, 187 P.2d 312 (1947). In the Sullivan case, the trial court held a non-statutory arbitration clause in a collective bargaining agreement void, but gave no reasons for so holding. Between the time of the judgment of the trial court and the argument in the Supreme Court, the legislature passed the 1947 amendment. The Supreme Court reversed the trial court on another ground, and did not comment on the validity of the arbitration clause.

[5] 44 Wn.2d 808, 812, 813, 271 P.2d 689, 692.

that neither party could rely on the provisions of the act because the agreement contained no language which could make available to them the statutory remedies.

This treatment of the Union's motion raises a serious question as to the extent to which arbitration agreements in labor contracts can be enforced. It is now clear that without specific reference to the statute in the agreement the remedies provided by the statute are not available to either party. What, then, *is* available? While the *Greyhound* case holds that either party may obtain a declaratory judgment in such a case, the broad language of the court leaves open the question whether specific performance can be obtained. On the one hand there is the fact that the only appropriate judicial action to enforce these agreements is specific performance, and there is the suggestion that the language of the court indicates a willingness to grant it where the parties have so agreed. On the other hand, equity courts have been historically reluctant to grant specific performance of arbitration agreements and it may be suggested that this case, despite its language, does not change the common-law rule limiting the remedy to damages in the event of a refusal to arbitrate.

An interesting question of procedure was raised by the lower court's sustaining the Union's demurrer and dismissing Greyhound's complaint with prejudice. This action was held to be improper because in a declaratory judgment proceeding the test for sufficiency of the complaint is not whether the plaintiff is entitled to the relief requested, but whether he makes out a case of actual controversy within the jurisdiction of the court. The judgment of the trial court was therefore modified so as to constitute a declaration of rights in favor of the Union.

In declaring in favor of the Union that the matter was arbitrable, the Supreme Court declined to adopt the *Cutler-Hammer* doctrine,[6] despite the urgings of Greyhound. By way of dictum the court disapproved the practice of putting the burden on the parties of showing in court that a dispute is bona fide as a condition to the right of either party to submit the matter to arbitration. By way of holding, the court said that "the language of the arbitration clause in this case is sufficiently broad to require the submission of all disputes involving

[6] Int'l. Ass'n. of Machinists v. Cutler-Hammer, Inc., 271 App.Div. 917, 67 N.Y.S.2d 317 (1947), *affirmed* 297 N.Y. 519, 74 N.E.2d 464 (1947). The Cutler-Hammer case is responsible for the doctrine that frivolous and trivial disputes need not be submitted to arbitration. This "doctrine" is of dubious strength even in New York and has been only directly followed once. Courts usually cite the ruling, then avoid it.

an interpretation or application of the collective bargaining contract to arbitration."[7]

ROBERT M. WESTBERG

State Power to Regulate Labor Regulations. Plaintiff, who was wrongfully expelled from a labor union, brought an action in the state court for reinstatement and for damages measured by loss of wages. A judgment for the plaintiff was rendered in *Mahoney v. S.U.P.*, 43 Wn.2d 874, 264 P.2d 1095 (1953). On rehearing [145 Wash. Dec. 422, 275 P.2d 440 (1954)], the court held that the Taft-Hartley Act [61 Stat. 136 *et seq.*, 29 U.S.C. ed., § 141 *et seq.*] has precluded the state from granting such compensatory and injunctive relief based on unfair labor activities. The court further held, however, that the state does have jurisdiction to order reinstatement as a means of protecting the employee's property and contract rights as a member of the union. The case is more fully discussed in Wollett, *Taft-Hartley and State Power to Regulate Labor Relations*, 30 WASH. L. REV. 1, 9-14 (1955).

MUNICIPAL CORPORATIONS

Zoning. During the past year, two decisions were handed down by the Washington court, both of which reversed the trial court findings of fact and resulting conclusions of law on problems involving local zoning ordinances. In *Coleman v. Walla Walla*,[1] the plaintiff owned a large house near the Whitman College campus in a zone designated as "Residential Single Family District" by city ordinances. The ordinance contained the usual and necessary constitutional provision that pre-existing nonconforming uses could be continued.[2] Plaintiff proposed to sell the building, which she had previously used as a rooming house, for use as a fraternity house.[3] On her suit for declaratory relief, the trial court sitting without a jury found the proposed use of the building was merely a permissible continuation of a pre-existing nonconforming use. This conclusion was primarily substantiated by two of the findings of fact: "V. no major alterations were proposed or are needed to utilize the building as a fraternity house."[4] "VI. no change in the use of said premises is contemplated except a change in the denomination. . . ."[5]

On appeal by the city, the Supreme Court extensively reviewed these and other findings of fact along with the conclusions of law which were predicated upon them, and the majority of the court concluded the

[7] 44 Wn.2d 808, 821, 271 P.2d 689, 696.
[1] 44 Wn.2d 296, 266 P.2d 1034 (1954).
[2] U. S. CONST. AMEND. XIV, § 1; WASH. CONST. ART. I, § 3.
[3] At the time of the suit, plaintiff rented rooms to thirteen students all of whom were members of the same fraternity.
[4] 44 Wn.2d at 298, 266 P.2d at 1035.
[5] *Ibid.*