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Arbitration and Award—Appraisalment—Labor Disputes: *Gord v. F. S. Harmon & Co.*, 88 Wash. Dec. 93, 61 P. (2d) 1294 (1936);  
Contracts—Inducing Breach—Privilege: *Porter v. King County Medical Society*, 186 Wash. 410, 58 P. (2d) 367 (1936); Crimes—Pardons—Municipal Ordinance: *City of Clovis v. Hamilton*, 62 P. (2d) 1151 (New Mexico 1936);  
Injunction—Violation—Modification—Contempt: *Warder v. Shufeldt*, 62 P. (2d) 812 (N. M. 1936);  
Master and Servant—Special Police—Injury of Third Party: *St. John v. Reid et al*, 61 P. (2d) 363 (Cal. App., 1936)

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# RECENT CASES

ARBITRATION AND AWARD—APPRAISEMENT—LABOR DISPUTES. Plaintiff and his assignors, employees of the defendant, engaged in a strike to obtain higher wages, among other things. At the suggestion of the Department of Labor, the parties agreed to arbitrate, and appointed the Pacific Northwest Labor Board to settle their differences. They agreed that plaintiff and his assignors should go back to work, temporarily at the old wage, and that the decision of the "arbitrators" as to wages should be retroactive from the time of the decision to the time of returning to work. After the board had determined the wage, which was more than the old wage, defendant refused to pay plaintiff the increase for the intermediate period. Plaintiff thereupon brought suit to collect the difference between the old wage and the wage determined by the Board for that period. It was admitted that the arbitration did not conform to the provisions of REM. REV. STAT. § 420 *et seq.*, providing for the settlement of disputes by arbitration. *Held*: Plaintiff is entitled to the stipulated increment, as the action of the Board was not arbitration but appraisal, and, hence, compliance with REM. REV. STAT. § 420 *et seq.* is not required. *Gord v. F. S. Harmon & Co.*, 88 Wash. Dec. 93, 61 P. (2d) 1294 (1936).

The Washington court has held that common law arbitration no longer exists in this state, and that an arbitration, to be valid, must comply with REM. REV. STAT. § 420 *et seq.* *Dickie Manufacturing Co. v. Sound Construction & Engineering Co.*, 92 Wash. 316, 159 Pac. 129 (1916). Hence, to enforce the decision of the Board, it was necessary to find that the action of the Board was not arbitration, but appraisal.

Generally, the courts have found it desirable to distinguish between arbitration and appraisal. The basis of this distinction lies in the fact that arbitration presupposes a controversy between the parties in a judicial sense, and seeks to settle that dispute by reference to third parties without recourse to the courts; whereas an appraisal does not presuppose a dispute, but simply an indefiniteness in a term of the contract which it seeks to define, leaving open the question of ultimate liability. *Omaha v. Omaha Water Co.*, 218 U. S. 180, 54 L. ed. 891, 30 Sup. Ct. 615, 48 L. R. A. (N. S.) 1084 (1910). Thus, if the terms of a contract at the time of its formation are considered definite by the parties, and if the parties propose to have any disputes arising from the contract settled by a third party, the situation is one of arbitration. But if a term or terms of a contract are deliberately left indefinite, and the parties propose to have them made definite by the determination of a third party, the situation is one of appraisal. *Flint v. Pearce*, 11 R. I. 576 (1877); *Martin v. Vansant*, 99 Wash. 106, 168 Pac. 990, Ann. Cas. 1918D, 1147 (1917); *Stevenson v. Hazard*, 152 Wash. 104, 277 Pac. 450 (1929).

From this factual difference between arbitration and appraisal flow certain differences in legal attributes, among which are these: At common law the authority of an appraiser, or a clause for appraisal, could not be revoked without cause, *Stevenson v. Hazard, supra*; while the authority of an arbiter, or a clause for arbitration, could be revoked, *California Annual Conference of the M. E. Church v. Seitz*, 74 Cal. 287, 15 Pac. 839 (1887). This difference seems to be based on the notion that arbitration ousted the courts of their jurisdiction, was against public pol-

icy, and hence should not be enforced, *Insurance Co. v. Morse*, 20 Wall. 445, 22 L. ed. 365 (1874); Heuston, *The Settlement of Disputes by Arbitration* (1926) 1 WASH. L. REV. 243; whereas an appraisalment, in defining the terms of the contract, aids the court in that respect, and does not oust it of its jurisdiction. *Church v. Seitz*, *supra*; *Flint v. Pearce*, *supra*; *Martin v. Vansant*, *supra*. Since the appraisalment does not run afoul of public policy, its contract feature is given full effect. See 1 WILLISTON, CONTRACTS § 47. At common law, furthermore, the award of arbitrators was not binding upon the parties, Heuston, *loc. cit. supra*; whereas an appraisalment was binding upon them. *Wagner v. Peshastin Lumber Co.*, 149 Wash. 328, 270 Pac. 1032 (1928). An arbiter, at common law, must receive and consider evidence offered by the parties. *Van Cortlandt v. Underhill*, 17 Johns. 405 (N. Y., 1819); *Brown's Ex'rs v. Farnandis*, 27 Wash. 232, 67 Pac. 574 (1902). But an appraiser can make his own investigation, and can use his own knowledge and skill in reaching a decision. *Wagner v. Peshastin Lumber Co.*, *supra*. In Washington, appraisalment, being distinct from arbitration, need not comply with REM. REV. STAT. § 420 *et seq.*, for the statute speaks only of arbitration. See Washington cases cited, and *State ex rel. Fancher v. Everett*, 144 Wash. 592, 258 Pac. 486 (1927).

In the instant case, the parties entered a contract of labor deliberately leaving indefinite the wage term. This indefiniteness was to be resolved by the decision of the Board. Clearly, then, the action of the Board was appraisalment.

K. C. H.

CONTRACTS—INDUCING BREACH—PRIVILEGE. Two physicians, members of the King County Medical Society, were engaged in contract practice as The Associated Physicians' Clinic. Plaintiff was employed by them as a solicitor. Defendant King County Medical Association enacted a by-law whereunder members engaged in such contract practice would be liable to expulsion from the Medical Association. Thereupon, the Medical Association threatened plaintiff's employers with expulsion from the Association unless they gave up their "contract practice". The employers chose to give up such practice. Plaintiff brings action against the King County Medical Association for procuring breach of contract. Defendant demurred to plaintiff's complaint on the ground that it failed to state a cause of action, and upon plaintiff's refusal to plead further, the action was dismissed. Judgment affirmed. *Held*: Considering defendant association as engaged in promoting the interests of its membership, the enforcement of solidarity by threat of expulsion of one of its own members creates no cause of action for the incidental damage resulting to an employee of that member who has a contract of employment "for an unlimited term." *Porter v. King County Medical Society*, 186 Wash. 410, 58 P. (2d) 367 (1936).

An employee has ordinarily a right of action against a third person who without legal justification procures his discharge or the termination or breach of his contract of employment, if damage results to him therefrom. *Max v. Kahn*, 94 N. J. Law 347, 102 Atl. 737 (1917); *Woody v. Brush*, 178 App. Div. 698, 165 N. Y. S. 867 (1917); *Carmen v. Fox Film Corp.*, 204 App. Div. 776, 198 N. Y. S. 766 (1923); *Jones v. Leslie*, 61 Wash. 107, 112 Pac. 81 (1910). And the fact that the term of service interrupted is not for a fixed period is not a bar to an action against a third per-

son who has without legal justification procured the termination of his employment. *Truax v. Raich*, 239 U. S. 33, 36 Sup. Ct. 7, 60 L. ed. 131 (1915); *London Guarantee Co. v. Horn*, 206 Ill. 493, 69 N. E. 526 (1903); *Gibson v. Fed. and Cas. Co.*, 232 Ill. 49, 83 N. E. 539 (1907); *Jones v. Leslie*, 61 Wash. 107, 112 Pac. 81 (1910). But legal justification seems to exist when the discharge is brought about in the exercise of a lawful right, i. e., in protecting a contract or property right; in interfering to protect life, reputation, or health; in giving disinterested advice; in case of disciplinary measures; in refusing to deal; in the course of competition. CARPENTER, INTERFERENCE WITH CONTRACT RELATIONS (1928); 41 HARV. L. REV. 728; *Passaic Print Works v. Ely & Walker Dry Goods Co.*, 105 Fed. 163 (1900); *Kemp v. Division 241*, 255 Ill. 213, 99 N. E. 389 (1912); *Boulier Bros. v. McCauley*, 91 Ky. 135, 15 S. W. 60 (1891). On the other hand, where the discharge is brought about by merely malicious motives, and not in pursuance of a lawful right, the defendant is liable. *Jones v. Leslie*, 61 Wash. 107, 112 Pac. 81 (1910); *Askins, Inc. v. Sparks*, 56 S. W. (2d) 279 (Tex. Civ. App., 1932); *Carnes v. St. Paul Union Stockyards*, 164 Minn. 457, 205 N. W. 630 (1925).

In the instant case enforcement of solidarity among the members of the association, relied upon by the court, gave the defendant a lawful right to interfere with the plaintiff's contract of employment.

J. L. V.

CRIMES—PARDONS—MUNICIPAL ORDINANCE. Defendant was found guilty of a violation of a municipal ordinance. He appealed from the justice of the peace court to the district court where he was again convicted and from that judgment was granted an appeal to the Supreme Court. He later filed a pardon duly executed by the governor of the state. *Held*: Under a constitutional provision giving the governor power to grant pardons for all offenses, the power extends only to offenses for violation of state laws and not to those which constitute a violation of city ordinances. *City of Clovis v. Hamilton*, 62 P. (2d) 1151 (New Mexico 1936).

The power to pardon, except as limited by constitutions, extends to every offense against the government known to the law, but is limited to offenses against the state as such. At common law, and independent of statutory enactments, punishments for violation of municipal ordinances were treated as civil actions, the imprisonment, after the non-compliance with the orders of the court enforcing the payment of a fine, being looked upon not in the light of punishment, but as a means of compelling a compliance with the order of the court and of enforcing the payment. This is still the general rule. *Floyd v. Eatonton*, 14 Ga. 354, 58 Am. Dec. 559 (1853); *State v. Boneil*, 42 La. Ann. 1110, 8 So. 298 (1890); *Helena v. Kent*, 32 Mont. 279, 80 Pac. 258 (1905). Hence, even though considered as quasi criminal, the violation of a municipal ordinance is not an infraction of a state law. *St. Louis v. St. Louis R. Co.*, 89 Mo. 44, 1 S. W. 305 (1886); *State v. Robitshek*, 60 Minn. 123, 61 N. W. 1023 (1895).

Many offenses against the state are triable in a police court. To preclude the governor from exercising his power it must appear that the offense charged was distinctly and solely a violation of a municipal ordinance. If such offenses are made crimes or misdemeanors by the general law of the state, the proceedings must be considered as criminal in their nature. *Litchville v. Hansen*, 19 N. D. 672, 124 N. W. 1119

(1910); *Ogden v. Madison*, 111 Wis. 413, 78 N. W. 568 (1899); *Koch v. State*, 126 Wis. 470, 106 N. W. 531 (1906). The legislature can give the governor the power to pardon violations of municipal ordinances, but the governor has no such power under a constitution granting a general pardoning power. *State v. Alexander*, 76 N. C. 231, 22 Am. Rep. 675 (1877); *Allen v. McGuire*, 100 Miss. 781, 57 So. 217 (1912); *Campion v. Gillon*, 79 Neb. 364, 112 N. W. 585 (1907).

W. G. D.

**INJUNCTION—VIOLATION—MODIFICATION—CONTEMPT.** Appellant was diverting the entire flow of a stream. An injunction was secured ordering him to divert only one-half of the flow, allowing the remainder to go its natural course. The appellant violated this order. Subsequently it was modified by providing that he could divert the entire flow but must return one-half to the stream-bed by means of his sluice gate. In contempt proceedings based on the original order, the court held that the modification changed every rule of conduct prescribed in the first order, hence there was nothing on which to base the proceedings. *Warder v. Shufeldt*, 62 P. (2d) 812 (N. M. 1936).

The general rule is that contempt proceedings will not lie on the original order after it has been dissolved. *Canavan v. Canavan*, 13 N. M. 640, 139 Pac. 154 (1914); *Taber v. Manhattan Ry. Co.*, 14 Misc. 189, 35 N. Y. S. 465 (1895); *Moat v. Holbein*, 2 Edw. Ch. 188 (N. Y. 1834); *Old Dominion Telegraph Co. v. Powers*, 140 Ala. 220, 37 So. 195 (1904). The same rule applies when a modification changes every rule of conduct. *Peck v. Yorks*, 32 How. Pr. 408 (N. Y. 1867); *State v. King*, 47 La. Ann. 696, 17 So. 254 (1895); *Fremont v. Merced Mining Co.*, 9 Cal. 19 (1858).

A number of courts have not accepted this general rule, but have held that a dismissal of an injunction does not preclude punishment for its violation while it was in force, on the ground that it is not for the defendant to determine whether an injunction is properly or improperly issued. *Smith v. Reno*, 6 How. Pr. 124 (N. Y. 1851); *Wireless Specialty Apparatus Co. v. Priess*, 246 Mass. 274, 140 N. E. 793 (1923); *Shuler v. Raton Waterworks Co.*, 247 Fed. 634 (C. C. A. 8th, 1917); *Orook v. People*, 16 Ill. 534 (1855); *Weidner v. Friedman*, 126 Tenn. 677, 151 S. W. 56 (1912).

Washington is in accord with the general rule, *Jones v. Jones*, 75 Wash. 50, 134 Pac. 528 (1913). A preliminary injunction was issued in a divorce proceeding but was not included in the final decree. The defendant violated the injunction before the final decree by leaving the state. The court held that to have binding force the order had to be carried into the final judgment.

L. W. S.

**MASTER AND SERVANT—SPECIAL POLICE—INJURY OF THIRD PARTY.** The defendant, manager of several restaurants acting under a Los Angeles ordinance providing for the appointment of special police, procured an officer to accompany his messenger who nightly collected the receipts from defendant's establishments. The officer was paid by defendant. While thus employed, the officer, when alighting from a car, accidentally dropped his shotgun which discharged and injured a pedestrian. *Held:* Defendant not liable for the acts of the special police officer since the officer derives all his power from the appointment by the city authori-

ties. *St. John v. Reid et al*, 61 P. (2d) 363 (Cal. App., 1936).

Although the rules of agency here involved are well defined, their application is made difficult by the factual situation relative to control. The control of the special police officer emanates from two sources—the state and the private person or corporation, hereafter called the entrepreneur, whom he is engaged in protecting. Generally the officer is appointed by state authorities at the request of the entrepreneur and discharged by the latter. The method of preventing illegal encroachments upon property is prescribed by the state. The thing to be protected is designated by the entrepreneur, who also outlines the method to be employed by the officer insofar as it is not set forth by the state. In determining liability for the officer's negligent acts this dual relationship has led to a distinction between the officer when actively and affirmatively engaged as a protector and when acting as a passive or potential protector. The former situation embraces the actions of the officer in warding off some illegal attack of violence on the entrepreneur's possessions; the latter, the actions of the officer passively attendant and accompanying the property to be protected, that is, when he is at work but not actively preventing wrongful intrusion.

As to the entrepreneur's liability when the act complained of is performed by the officer when actively engaged as a protector, the courts are in accord holding that the officer is the agent of the state and the entrepreneur is not liable. *Hershey v. O'Neill*, 36 Fed. 168 (1888); *St. Louis, I. M. & S. Ry. Co. v. Morrow*, 88 Ark. 583, 115 S. W. 173 (1909); *Zygmuntowica v. American Steel & Wire Co.*, 240 Mass. 421, 134 N. E. 385 (1922). Unless it is otherwise provided by statute, as in Massachusetts. *Armstrong v. Stair*, 217 Mass. 534, 105 N. E. 442 (1914).

However, as to the entrepreneur's liability when the act complained of resulted from the negligence of the officer while acting as a passive protector only the cases are in conflict. The instant decision, based upon *Redgate v. Southern Pacific Company*, 24 Cal. App. 573, 141 Pac. 191 (1914), is an expression of the minority view. The majority, on simple agency principle (*respondeat superior*), find the entrepreneur liable even though the act resulting in the injury is a misjudged and wrongful act in excess of the employee's authority. *St. Louis I. M. & S. Ry. Co. v. Harkett*, 58 Ark. 381, 24 S. W. 881 (1894); *Texas I. N. O. R. Co. v. Parsons*, 102 Tex. 157, 113 S. W. 914 (1908); *Rand v. Butte Electric R. Co.*, 40 Mont. 398, 107 P. 87 (1910). Many of the courts, as the Mississippi court in *King v. Illinois Cent. R. Co.*, 69 Miss. 245, 10 So. 42 (1891), state that each case must be determined on its own facts and lay down no general rules. It is submitted, however, that these courts adopt the majority's reasoning; at least this is indicated by the opinions from such jurisdictions.

The majority view of giving the police officer a dual personality—servant and public officer—admits of ready rationalization under the ordinary conditions, for it is the state that prescribes regulations for the officer actively warding off a trespass while it is the entrepreneur who largely controls the passive officer.

W. M. L.