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## The 1943 Washington Arbitration Act

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holder within the meaning of the irrigation district statutes.<sup>30</sup> We are again presented with the familiar post-*Ashford* pattern of inconsistency: a purchaser has no "interest" but is a property holder! Another recent case found that a purchaser has certain rights "annexed to and exercisable with reference to" land which are sufficient to permit him to defend, and possibly even to maintain, an action to quiet title.<sup>31</sup> The first question that comes to mind is how one can defend a title which the *Ashford* case specifically says he doesn't have! Yet the court goes on to reiterate that the *Ashford* case is still good law in this state.

So we have a picture of the manner in which our court has tacitly slipped out from under the *Ashford* case and in a large number of subsequent decisions has endowed the purchaser with all the attributes of title which are conferred by the doctrine of equitable ownership. As we have indicated before, the doctrine of equitable ownership is simply a convenient expression for explaining the protection of the purchaser's obvious equities in the land.<sup>32</sup> It is the writer's contention that the court has recognized these equities to an extent that is entirely incompatible with a denial of the doctrine.

It was suggested in a concurring decision to the *Ashford* case that the decision therein reached, while out of line and without sound analytic basis, was yet so woven into the fabric of our real property law even at that time that it must be affirmed for the sake of stability. If this was true at that time, it is certainly so no longer, for the court has made so many exceptions that the principal rule exists now only in name. A forthright repudiation of the language of *Ashford v. Reese*, insofar as it rejected the doctrine of equitable ownership, would not only remove numerous inconsistencies in the court's present position but would also clear the atmosphere of our property law.

<sup>30</sup> *In re Horse Heaven Irrigation District*, 11 Wn. (2d) 218, 118 P (2d) 972 (1941). The particular statute considered was REM. REV. STAT. (1932) § 7528, which provides for irrigation district elections by such voters as "hold title or evidence of title to land" in the district.

<sup>31</sup> *Turpen v. Johnson*, 126 Wash. Dec. 674 (1946).

<sup>32</sup> *Stone, Equitable Conversion by Contract* (1913) 13 COL. L. REV. 369.

## THE 1943 WASHINGTON ARBITRATION ACT

JOHN C. BRAMAN

### I.

#### INTRODUCTION

Changes in the arbitration laws of the State of Washington effected by the 1943 Act, can be expected to increase the effectiveness of written

arbitration agreements as a means of settling controversies.<sup>1</sup> The new act is patterned after the old Washington act of 1881,<sup>2</sup> which was repealed *in toto*, but its scope is larger and it is more specific in providing legal machinery for the conduct of arbitration.

Because of World War II and the use of government agencies as mediators of disputes, instead of private arbitration agreements, the new act to date has not been the subject of litigation in the Supreme Court of Washington. It is, however, similar to legislation which has been enacted in several states within the past few years,<sup>3</sup> and which has proved effective in settling both commercial and labor controversies.

Major departures from the old act are the provisions (1) that future as well as present controversies may be the subject of written arbitration agreements,<sup>4</sup> (2) that labor controversies may be the subject of arbitration under the act but are not within the act unless specifically so stated,<sup>5</sup> and (3) that disputes involving title to real estate are not excepted from the act.<sup>6</sup> Courts are also given more explicit power to enforce the arbitration of controversies, and to enforce, modify, or vacate an award.<sup>7</sup>

The act provides for voluntary, not compulsory, arbitration agreements. The purpose of such arbitration agreements is to provide an inexpensive, speedy, private, and effective method of deciding controversies out of court.<sup>8</sup> This method is advantageous both to clients and to attorneys. Immediate settlement of controversies by arbitration removes the necessity of waiting-out a crowded court docket, of main-

<sup>1</sup> Wash. Laws 1943, c. 13, §§ 1-23; REM. REV. STAT. § 430; PIERCE'S CODE § 8.

<sup>2</sup> REM. REV. STAT. §§ 420-430; PIERCE'S CODE §§ 7339-7349.

<sup>3</sup> Calif., C. C. P. §§ 1280-1293 (1927); Conn., Title 58, c. 302 §§ 5840-5856 (1929), N. Y., C. P. A. §§ 1448-1466 (1937), Ore. CIVIL PROCEDURE, c. 6, §§ 11-601 to 11-613 (1925)

<sup>4</sup> REM. REV. STAT. § 430-1.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

<sup>7</sup> REM. REV. STAT. § 430-2 reads: "The term 'court' when used in this act means any superior court of the State of Washington or the Supreme Court of the State of Washington."

<sup>8</sup> See *Martin v. Vasant*, 99 Wash. 106, 108, 163 Pac. 990, 991 (1917), where the court said, in *dictum*, "The very decided tendency of modern times, however, is away from the artificial common law doctrine and in the direction of the more intelligent view that arbitration, as an inexpensive, speedy, and amicable method of settling disputes, should receive every encouragement from the courts, so long as it may be extended without contravening sound public policy or settled law."

taining contact with witnesses for several months, and virtually eliminates, where the arbitration is well conducted, the expense and delay of appeals, as they are seldom taken.<sup>9</sup> The controversy is heard by an arbitrator or arbitrators chosen, in most cases, by the parties themselves, thus assuring an arbitrator who is familiar with the problems involved in and peculiar to the immediate controversy—a benefit to all parties.

At common law the effectiveness of arbitration agreements was seriously weakened by the doctrine that unless mutually agreed to, the award was not binding.<sup>10</sup> It was also believed that arbitration of future disputes usurped the authority and power of the courts.<sup>11</sup> This doctrine has been repudiated. According to the present doctrine, parties may bind themselves by contract; and such a contract is enforceable and irrevocable, in the absence of fraud and duress and is subject only to defenses that are good against contracts generally.<sup>12</sup> Recent statutes for voluntary arbitration have been held constitutional in most states, including Washington, and the awards of arbitrators are binding and enforceable through the courts.<sup>13</sup>

## II.

### SCOPE OF ACT

The new act provides that two or more parties may agree in writing to submit to arbitration any existing controversy which may be the subject of an action; or that they may include in a written agreement a provision to arbitrate any controversy thereafter arising between them, out of or in relation to such agreement, and that this agreement shall be valid, enforceable, and irrevocable save upon such grounds as exist in law or equity for the revocation of any agreement. Unless the

<sup>9</sup> J. Raymond Tiffany, *Talk It Out*, THE ROTARIAN, Jan. 1944, reports: "of some 14,000 cases the American Arbitration Association has decided only six had been appealed to the courts, and in no case had any of these decisions been reversed."

<sup>10</sup> *Dickie Mfg. Co. v. Sound Const. & Eng. Co.*, 92 Wash. 316, 319, 159 Pac. 129, 131 (1916).

<sup>11</sup> *State ex rel. Fancher v. Everett*, 144 Wash. 592, 594, 258 Pac. 486, 487 (1927).

<sup>12</sup> *Tacoma Ry. & Motor Co. v. Cummings*, 5 Wash. 206, 31 Pac. 747, 33 Pac. 507 (1892); *McElroy v. Hooper*, 70 Wash. 347, 126 Pac. 925 (1912); *Dickie Mfg. Co. v. Sound Const. Co.*, 92 Wash. 316, 159 Pac. 129 (1916), cited *supra* note 10; *Red Cross Line v. Atlantic Fruit Co.*, 264 U. S. 109, 68 L. ed. 582, 44 Sup. Ct. 274 (1924); 69 A. L. R. 816; *Pacific Indemnity Co. v. Insurance Co. of North America*, 25 F. (2d) 930 (C. C. A. 9th, 1928)

<sup>13</sup> *Ibid.* See 17 CALIF. L. REV. 643. For strict construction of New York statute, see *In re Kelley*, 240 N. Y. 74, 147 N. E. 363 (1925); *In re S. M. Goldbery Enterprises Inc.*, 130 Misc. 887, 225 N. Y. Supp. 513 (1927)

agreement specifically provides, the provisions of the act shall not apply to any arbitration agreement between employers and employees or between employers and associations of employees.<sup>14</sup>

Whether or not an arbitration agreement comprehends a dispute depends upon the contract and the intent of the parties. Washington cases for the past several years have favored and upheld enforcement of arbitration agreements.<sup>15</sup> It is therefore probable that disputes arising from ambiguous agreements will be resolved in favor of the party desiring to arbitrate, in the absence of clear and convincing evidence that the dispute was not within the scope of the agreement or that there was fraud or some other defense to the contract.

Under the old act, the court distinguished between statutory arbitration and common law appraisal. The former was generally a method of settling existing disputes between parties, where as the latter was generally a method of settling the question of value, price, amount of damage, or other incidents of a contract before a dispute had arisen.<sup>16</sup> While the cases held that these agreements for future appraisals did not come within the old arbitration act, they did hold them to be specifically enforceable contracts, and the awards were given effect.<sup>17</sup>

Whether a contract for future appraisal comes within the new act as a "controversy arising in the future" is not clear from a reading of the act. In the light of past decisions in Washington, where there is no dispute but only a question of value, price, and so forth, to be found, there is no controversy, and therefore the contract would not come within the act. However, the court may well see fit to enlarge its previous interpretations of controversy to include future appraisals, and thus bring such contracts within the act.

It will be noted that the act permits arbitration of "any controversy which may be the subject of an action."<sup>18</sup> This embraces arbitration of tort or negligence claims, property settlements in divorce actions (though not divorce decrees) property disputes, industrial and labor

<sup>14</sup> REM. REV. STAT. § 430-1.

<sup>15</sup> *Dickie Mfg. Co. v. Sound Const. & Eng. Co.*, 92 Wash. 316, 159 Pac. 129 (1926), cited *supra* note 10; *In re Arbitration etc. v. Lake Washington etc.*, 1 Wn.(2d) 401, 96 P (2d) 929 (1939)

<sup>16</sup> *Martin v. Vasant*, 99 Wash. 106, 116, 168 Pac. 990, 994 (1917), *Gord v. Harmon*, 188 Wash. 134, 139, 61 P (2d) 1294, 1297 (1936)

<sup>17</sup> *Id.* at 142; *Hegeberg v. New England Fish Co.*, 7 Wn.(2d) 509, 521, 110 P (2d) 182, 186 (1941)

<sup>18</sup> REM. REV. STAT. § 430-1.

controversies, price disputes, and other controversies too numerous to mention.

The act provides that the court shall confirm an award made by an arbitrator unless the award should be vacated, modified, or corrected in accordance with the provisions in the act.<sup>19</sup> Such a confirmation is a judgment, and may be enforced and appealed from as an order of judgment in any civil action.<sup>20</sup>

An award may be vacated upon application to the court by a party (a) where it was procured by corruption, fraud, or other undue means, (b) where the arbitrators were partial or corrupt, (c) where the arbitrators were guilty of misconduct which was prejudicial to the rights of any party, (d) where the arbitrators exceeded their powers or where the award was imperfect, or (e) where there were irregularities in the procedure. However, an award may not be vacated upon any ground from (a) to (d) inclusive unless the court is satisfied that substantial rights of the parties were prejudiced thereby. When an award is vacated, the court is required to direct a rehearing before the same or different arbitrators, according to its discretion.<sup>21</sup>

Cases decided under a similar section of the old law have consistently held that an arbitrator decides both the facts and the law,<sup>22</sup> that the error must appear upon the face of the award to be considered,<sup>23</sup> and that the court will not try a case *de novo*, but in event of error will return it for another hearing by an arbitrator.<sup>24</sup>

The court may modify or correct an award, upon the application of any party, (a) where there was evident miscalculation of figures or an evident mistake, (b) where the matter was not submitted to arbitration, or (c) where the award is imperfect in form or does not affect the merits of the controversy.<sup>25</sup> This section, though wider in scope, is similar to REM. REV. STAT. § 464, providing for vacation and modification of judgments.

### III.

#### ARBITRATION MANDATORY UNDER VALID AGREEMENT

Parties to a written agreement to arbitrate must submit a contro-

<sup>19</sup> REM. REV. STAT. § 430-15.

<sup>20</sup> *Id.* § 430-21, 22.

<sup>21</sup> *Id.* § 430-16.

<sup>22</sup> *Hatch v. Cole*, 128 Wash. 107, 113, 222 Pac. 463, 464 (1924)

<sup>23</sup> *Puget Sound Bridge & Dredge Co. v. Frye*, 142 Wash. 166, 177, 252 Pac. 546, 550 (1927)

<sup>24</sup> *Hatch v. Cole*, 128 Wash. 107, 114, 222 Pac. 463, 465 (1924)

<sup>25</sup> REM. REV. STAT. § 430-16; *Carey v. Kerrick*, 148 Wash. 283, 263 Pac. 190 (1928)

versy arising thereunder to arbitration, as provided by the act and by their agreement. Should a party refuse to arbitrate, and commence an action, the other party may appeal to the court; and if the action is referable to arbitration under the agreement, the court will stay the action or proceeding until an arbitration has been had in accordance with the agreement.<sup>26</sup> This provision is a codification of previous decisions.<sup>27</sup>

Under the act, should a party neglect or refuse to arbitrate, the other party may make application to the court for an order directing the parties to proceed with the arbitration in accordance with the agreement. The court will conduct a hearing, and if it is satisfied that no substantial issue exists as to the validity or existence of the agreement or the failure to comply therewith, it will issue the order. Should the court find that a substantial issue is raised, the issue will be tried, and if there was no written agreement providing for arbitration or there has been no default in proceedings thereunder, the motion to compel arbitration will be denied.<sup>28</sup> This also is a codification of the existing rule.<sup>29</sup>

The act further provides that any party has the right to demand the immediate trial by jury of any issue concerning the validity or existence of the agreement or the failure to comply therewith. In order to raise an issue, a party must set forth evidentiary facts raising such issue and must either (a) make a motion for a stay of the arbitration, or (b) contest a motion to compel arbitration.<sup>30</sup> This section has no counterpart in the old act. It appears that its purpose is to satisfy the right to jury trial as provided by the constitution.<sup>31</sup>

When the agreement contains no provisions for the appointment of arbitrators, the act provides that application may be made to the court for their appointment, and that upon application the court may appoint arbitrators when for various reasons none have been appointed by the parties.<sup>32</sup> This section also has no counterpart in the old act.

<sup>26</sup> REM. REV. STAT. § 430-3.

<sup>27</sup> State *ex rel.* Fancher v. Everett, 144 Wash. 592, 595, 258 Pac. 486-487 (1927)

<sup>28</sup> REM. REV. STAT. § 430-4.

<sup>29</sup> State *ex rel.* Fancher v. Everett, 144 Wash. 592, 258 Pac. 486 (1927), cited *supra* note 27, and see cases cited therein.

<sup>30</sup> REM. REV. STAT. § 430-4(3)

<sup>31</sup> WASH. CONST. ART. I, § 21.

<sup>32</sup> REM. REV. STAT. § 430-5.

Its manifest intention is to prevent failure of an arbitration agreement for want of an arbitrator.

The act provides for service upon other parties to the arbitration agreement when a controversy arises and is to be arbitrated. It further provides that this notice shall state that unless within twenty (20) days the party served shall serve a motion to stay arbitration, he shall thereafter be barred from putting in issue the existence or validity of the agreement or the failure to comply therewith.<sup>33</sup> Under the old act, which had no such provision, the arbitration agreement was often contested long after the notice to arbitrate was given. This new section should hasten arbitration and reduce litigation.

In conducting a hearing, arbitrators generally have the same powers as a court. They determine the time and place of hearing, may require by subpoenae (which it is provided the courts shall enforce) the attendance of witnesses, and may require books, records, documents or other evidence to be brought in.<sup>34</sup>

Should arbitrators fail to call a timely hearing, they may be directed by the court, upon application of a party, to proceed promptly with the hearing and determination of the controversy.<sup>35</sup> Unlike the old act, the new act contains no provisions for punishing arbitrators by contempt.<sup>36</sup> Compensation for arbitrators is not specified or made mandatory.<sup>37</sup>

Under the act, a party may be represented by an attorney at a hearing.<sup>38</sup> A party may also apply to the court for the preservation of the property or for securing satisfaction of the award prior to the final determination of the arbitration.<sup>39</sup> This provision in effect seems to allow attachment of property prior to final award.

The award shall be in writing and signed by at least a majority of the arbitrators—the number necessary to the rendition of an award.<sup>40</sup> Upon its rendition, a true copy of the arbitrator's decision shall be delivered to each of the parties or their attorneys.<sup>41</sup>

<sup>33</sup> *Id.* § 430-6.

<sup>34</sup> *Id.* § 430-7, 11.

<sup>35</sup> *Id.* § 430-7.

<sup>36</sup> *Id.* § 428.

<sup>37</sup> *Id.* § 423.

<sup>38</sup> *Id.* § 430-10.

<sup>39</sup> *Id.* § 430-13.

<sup>40</sup> *Id.* § 430-7.

<sup>41</sup> *Id.* § 430-14.

The legislature by this act has provided parties with a method of settling their present or future controversies by arbitration under their own written agreements. With thoughtful and clear drafting, and a sincere intention by all parties to avoid litigation and to solve their controversies amicably, this act can be expected to greatly reduce litigation in civil controversies; to facilitate settlement of disputes involving only nominal amounts; and to obviate much of the delay, worry, expense and hard feelings which so often accompany litigation.<sup>42</sup>

<sup>42</sup>In Washington, the services of the American Arbitration Association are available to parties desiring to arbitrate. It is a non-partisan, non-political, non-profit-making organization, which will furnish upon request and for a nominal sum a panel of arbitrators composed of local professional and business men who volunteer their services. It has also established a set of rules governing the mechanics of arbitration which parties may include in their written contracts.

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## INJURY BY ACCIDENTAL MEANS AND THE EFFECT OF DISEASE IN ACCIDENT INSURANCE POLICIES

JENNINGS P FELIX

### I.

#### INTRODUCTION

A troublesome problem in the field of accident insurance is the interpretation of the phrase "by accidental means" and the effect of pre-existing disease upon a case involving this interpretation. The decisions vary, not only from state to state but often within the same jurisdiction. This confused state<sup>1</sup> of case law results from the innumerable variety of fact patterns considered; and is due, in part, to the well-recognized sympathy of jurors toward widows and orphans who comprise the largest class of beneficiaries. The cases exemplify two main views, each supported by considerable authority.<sup>2</sup> Excluding the factor of disease, the principal rules deducible from the cases are:

(1) The apparent majority view,<sup>3</sup> that if the injury or death is the result of the voluntary act of the insured, done in the manner intended and unaccompanied by any unforeseen accidental cause, the injury or death is not by accidental means;<sup>4</sup> and

<sup>1</sup> VANCE, *INSURANCE* (2d ed. 1930) 868, § 257.

<sup>2</sup> 5 COUCH, *CYCLOPEDIA OF INSURANCE LAW* (1929) 868, § 1145.

<sup>3</sup> *Id.* at 4022.

<sup>4</sup> VANCE, *op. cit. supra* note 1, at 871.