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Contracts - Arbitration Agreement Held Enforceable - Local 525, United Ass'n of Journeymen & Apprentices of Plumbing v. Stine, 651 P.2d 965 (Nev. 1960)

DePaul College of Law

nature as to cause a basic unfairness of trial, the dissent stated: ". . . reversal. All they indicate, as the Court frankly points out, is that care must be exercised to avoid 'undue prejudice.' "[35] Dwelling further upon the co-defendant's plea to the jury, Justices Clark and Whittaker point out that although the trial court's instruction to the jury indicated the presence of violence, intimidation and putting the victim in fear, the jury did not find petitioner guilty of the common-law offense of robbery but found him guilty of a lesser offense.[36] As stated by the dissent: "As I apraise the jury's verdict, it would be much more realistic to say that [co-defendant's] plea of guilty influenced the jury not to find petitioner guilty of the greater offense."[37]

The facts in the *Hudson* case seem to indicate that there is little to support the view that the denial of counsel to petitioner operated to cause a basic unfairness of trial. This seems particularly true in light of the fact that the Court based its decision solely upon the potential prejudice that might have accrued against petitioner as a result of his co-defendant's plea to the jury. However, in rendering their decision in the *Hudson* case, the Supreme Court cites their holding in *Spano v. New York*[38] wherein it stated; "Because of the delicate nature of the constitutional determination which we must make, we cannot escape the responsibility of making *our own* examination of the record."[39] The decision in the *Hudson* case appears to point out what the Court considers to be its responsibility and may be the harbinger of a relaxation of the "special circumstances" test.

[34] State v. Kerley, 246 N.C. 157, 97 S.E.2d 876 (1957); State v. Bryant, 236 N.C. 745, 73 S.E.2d 791 (1953); State v. Hunter, 94 N.C. 829 (1886).

[35] Hudson v. North Carolina, 363 U.S. 705, 706 (1960).

[36] *Id.* at 705.

[37] *Ibid.*

[38] 360 U.S. 315 (1959).

[39] *Id.* at 316. (Emphasis added.)

CONTRACTS–ARBITRATION AGREEMENT HELD ENFORCEABLE

The plaintiff, doing business as A-1 Plumbing Supply Co., entered into a contract with the defendant union. The contract provided, in essence, that if the parties could not agree voluntarily to extend an agreement as to hours, wages, working conditions, or any other contingency that might arise, the dispute would be submitted to an arbitration board composed of representatives formerly agreed upon. A dispute did arise and the defendant, without first presenting its grievance to the arbitration board, called a strike. The plaintiff brought action for damages for breach of contract, but the defendant contended that the arbitration agreement

in the contract was unenforceable in view of the fact that Nevada had adopted by statute the common-law rule providing that such agreements could not be enforced. The Supreme Court of Nevada overruled the defendant's contentions and held, *inter alia*, that the provision in their contract requiring submission of future controversies to arbitration was enforceable, and that the plaintiff was entitled to maintain an action for damages for breach of contract against the defendant for injuries sustained by reason of the defendant's violation of the arbitration agreement. *Local 525, United Ass'n of Journeymen & Apprentices of Plumbing v. Stine*, 351 P. 2d 965 (Nev. 1960).

At the outset, it should be noted that commercial arbitration agreements antedate the common-law by many years. The Greeks had a court of reconcilement to settle disputes without formal court action, and it was common among the Romans to put an end to litigation by means of arbitration.[1] The starting point, however, for every examination of the development of arbitration agreements is *Vynior's Case*,[2] decided in 1609. In *Vynior's Case*, the plaintiff brought an action against defendant on a bond under seal, and demanded damages in addition for violation of the bond. The bond had been given by the defendant to insure his compliance with an arbitration agreement which had been made to cover disputes between the parties regarding the amount due for certain repair work on plaintiff's buildings. The plaintiff, Vynior, recovered on the grounds that the bond was under seal and enforceable when any of the conditions endorsed on it were revoked. The significance of the case, however, lies not in the decision, but rather in the dictum. Lord Coke expressed the notion that even when a party submits to arbitration he may revoke his consent. This became the basis for the common-law rule that submission to arbitration is revocable and the agreement is unenforceable. After the *Vynior* ruling, the question of arbitration agreements remained at a veritable standstill. Few principles of the modern law have continued without change for 350 years, and yet the *Vynior* decision has had such extraordinary vitality that its doctrine has been the primary single factor which has limited the development of arbitration in commercial disputes in all common-law countries.[3]

Although the common-law rule has remained the same since *Vynior* was adjudicated, the rationale of this doctrine has undergone complete re-

[1] BUCKLAND, TEXTBOOK ON ROMAN LAW 527 (1921).

[2] Vynior's Case, 77 Eng. Rep. 597 (1609).

[3] Local 525, United Ass'n of Journeymen & Apprentices of Plumbing v. Stine, 351 P.2d 965 (Nev. 1960).

vision. Lord Campbell, in *Scott v. Avery*[4] (1856), asserted that the doctrine of hostility towards enforcing arbitration agreements at common-law originated in the contests of the courts of early times for expansion of jurisdiction. The salaries of the judges at early common-law depended almost entirely upon fees, and therefore they took an extremely disdainful view of arbitration agreements that would settle the dispute outside of the court, thereby causing the judges substantial emolumental loss. The justification for the common-law rule now promulgated by the courts is, in essence, that a man may not barter away rights by an agreement to arbitrate future disputes. The judicial feeling today is that every citizen may resort to the courts regardless of any prior agreements.[5] This far more sophisticated rationale for the rule has probably emerged due to the fact that judges no longer receive compensation according to the number of cases they try. In considering the evolution of the rationale for the common-law rule, it becomes obvious at once that the early courts had justified their decisions on a blunt, but forgiveable, stand of self preservation, while many modern courts have proceeded to accept the rule and to give it no valid basis.[6]

The present status of the case law in regard to arbitration clauses is poorly reasoned and confused in theory, and this factor alone should supply the impetus needed for a careful study of the problem.[7] It is of the utmost importance, therefore, to analyze the common-law rule and attempt to gain some insight as to its merits and faults. The object of an arbitration agreement is to settle any ensuing controversy without necessitating resort to the courts.[8] Why then, should an overwhelming majority of the states hold that these agreements are unenforceable? Perhaps the strongest argument for retaining the common-law rule lies in the fact that an arbitration agreement contemplates the settlement of questions of law and fact, and thus would infringe upon an area reserved exclusively for the courts.[9] The fallacy of this argument is recognized if one considers the fact that to hold any agreement unenforceable "before" any

[4] 25 L.J.H.L. (n.s.) 308, 10 Eng. Rep. 1121 (1856).

[5] Insurance Co. v. Morse, 87 U.S. (20 Wall.) 445 (1874); Cocalis v. Nazlides, 308 Ill. 152, 139 N.E. 95 (1923).

[6] Park Constr. Co. v. Ind. School District., 209 Minn. 182, 296 N.W. 475 (1941).

[7] In McCullough v. Clinch-Mitchell Constr. Co., 71 F. 2d 17 (8th Cir. 1934) Circuit Judge Stone stated: "It can hardly be said that the decisions as to the validity of provisions in contracts for arbitration of disputes between the parties thereto are in a very satisfactory condition." *Id.* at 20.

[8] Baldwin v. Moses, 319 Mass. 401, 66 N.E. 2d 24 (1946).

[9] Western Assur. Co. v. Hall, 112 Ala. 318, 20 So. 447 (1896); Lakube v. Cohen, 304 Mass. 156, 23 N.E. 2d 144 (1939).

award has been rendered by the arbitrators, or "before" any rule of law has been decided upon, is inconsistent with rational reasoning.[10] Anticipating that one will err is not a valid reason for condemning him before he does make an actual mistake. The second argument used by present day courts is the so-called "ouster of jurisdiction" contention. It is stated, in effect, that a stipulation to arbitrate all future disputed questions excludes resort to the courts for the determination of controversies. This concept also is subject to criticism, for ordinarily the enforcement of an arbitration award must be accomplished through an appeal to the courts, who then have an opportunity to examine the facts and determine the good faith and regularity of the proceeding.[12]

"Violation of public policy" is the most widely accepted argument in favor of the common-law rule.[13] But, even if the courts have rightly interpreted public policy, why then have they held agreements to arbitrate existing legal questions valid, and agreements to arbitrate future questions of the same sort invalid, when there is no ground for distinguishing between the two in point of public policy?[14]

With the evolution of powerful labor unions and the ever increasing amount of litigation, it has become incumbent upon the courts to re-examine arbitration law. The common-law rule in regard to the enforceability of arbitration agreements is specifically under review, for the very nature of modern arbitration is to avoid formality, delay, and the vexation of ordinary litigation.[15]

There is, in its broadest sense, what appears to be the formulation of a trend towards abrogating the strict application of the common-law rule in arbitration. *Scott v. Avery*[16] was the first attempt by the English courts towards abrogating the common-law rule, and it was decided in this case that an arbitration case should be considered in light of the circumstances of the times and not upon a blind acceptance of the rule as it had remained since the *Vynior* decision in 1609. The *Scott* case revolved about an insurance policy which provided that before a claim could be entered,

[10] Local 525, United Ass'n of Journeymen & Apprentices of Plumbing v. Stine, 351 P.2d 965 (Nev. 1960).

[11] W. H. Blodgett Co. v. Bebe Co., 190 Cal. 665, 214 Pac. 38 (1923).

[12] 9 U.S.C.A. § 9 (Supp. 1959).

[13] White Eagle Laundry Co. v. Slawek, 296 Ill. 240, 129 N.E. 753 (1921).

[14] In Latter v. Holsum Bread Co., 108 Utah 364, 160 P.2d 421 (1945), Judge Wolfe discusses the public policy argument, and intimates that as a matter of public policy the courts are not ousted of jurisdiction in arbitration agreements.

[15] Local 63, Textile Workers Union v. Cheney Bros., 141 Conn. 606, 109 A.2d 240 (1954).

[16] 25 L.J.H.L. (n.s.) 308, 10 Eng. Rep. 1121 (1856).

the insured must prove his loss before an arbitration committee, who were to decide upon the merits of the claim and to settle the amount. The defendant refused to adhere to this condition, relying upon the common-law rule, but the court held that this condition was enforceable and did not oust the jurisdiction of the court nor violate public policy. Unfortunately, however, the merits of this decision were buried for almost a century under the overwhelming decisions in favor of the common-law rule. The *Scott* case does, however, represent the first major step towards changing the common-law rule. The need for enforcing arbitration agreements, as evidenced in the case, was becoming prevalent, especially in the major commercial and industrial states of the late nineteenth century. Statutes enforcing submission agreements were passed in the English Arbitration Act of 1889,[17] but significantly, prior to 1920 in the United States, no state statute made agreements to arbitrate future disputes irrevocable.[18] In 1920, New York became the first state to provide by statute that agreements to arbitrate future disputes are valid and enforceable.[19] Since the enactment of the New York statute, industrial and commercial giants such as Massachusetts, Michigan, New Jersey, Ohio, and Pennsylvania, have seen fit to follow suit and have enacted statutes allowing for the arbitration of future disputes of their own.[20]

In *Park Constr. Co. v. Ind. School Dist.*,[21] the Minnesota Supreme Court overruled five previous decisions adhering to the common-law rationale. In overruling these cases, the Minnesota court specifically held that general agreements to arbitrate do not oust the court's jurisdiction, and are not considered illegal as opposed to public policy. In the *Park* case, a contract required that all questions arising under the contract were to be submitted to arbitration. The contract further provided that the decision of the arbitrators was to be a condition precedent to any legal action. In considering the question of the validity of these arbitration provisions, the court elected to follow the *Scott* ruling, and found the provisions to be enforceable. The court stated: "For this departure from a doctrine of long standing we make no apology. To us, the reasons assigned

[17] Arbitration Act, 52 & 53 Vict., ch. 49 (1889).

[18] For an inclusive study of state arbitration statutes see 83 U. PA. L. REV. 160, at 165–176 (1934).

[19] N.Y. CPA § 1448. This section states: "Parties . . . may contract to settle by arbitration a controversy thereafter arising between them and such submissions or contract shall be valid enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract."

[20] MASS. ANN. LAWS ch. 251, § 14 (1933); MICH. ANN. LAWS § 645.1 (1948); N.J. REV. STAT. tit. 2, ch. 40, § 10 (1937); OHIO CODE ANN. §§ 12148-1 to -17 (1949); PA. STAT. ANN. tit. 5, § 161 (1930).

[21] 209 Minn. 182, 296 N.W. 478 (1941).

are so compelling as to allow no other course."[22] Due to this decision, the Minnesota courts represented the most formidable support for the modern trend in respect to case law until Nevada's recent decision in the *Stine* case.

The foregoing discussion, if it has achieved its purpose, has provided the background for a better appreciation of the significance of the *Stine* decision in regard to enforcing labor arbitration agreements. This case held that a provision to arbitrate in a labor contract was enforceable, notwithstanding the fact that Nevada was committed to the common-law rule. Accepting the decisions of *Scott* and *Park* as the better view, the Nevada court chose to align itself with courts cognizant of existing conditions and ready to make necessary changes. This decision in a comparatively non-industrial state such as Nevada, is further proof of the merit of the modern trend in all states, and in regard to all types of arbitration agreements. Special consideration must be given to the fact that in rendering this decision, the Nevada court went contrary to the common-law rule, when by statute, Nevada had adopted the English common-law in regard to the enforcing of arbitration agreements.[23] It appears that the Nevada Supreme Court felt so strongly in favor of abrogating the common-law rule that they exceeded their judicial prerogative, and, in effect, entered into a legislative area. In justification of this contrary stand the court stated: "[W]e should be gravely at fault if we felt that our hands were tied by a common-law rule enunciated 350 years ago, of doubtful justification even then and of confused and uncertain interpretation ever since."[24]

[22] *Id.* at 187.

[23] NEV. REV. STAT. § 1.030 (1957), provides: "The common law of England, so far as it is not repugnant to or in conflict with the constitution and laws of the United States or the constitution and laws of this state, shall be the rule and decision in all the courts of this state."

[24] Local 525, United Ass'n of Journeyman & Apprentices of Plumbing v. Stine, 351 P.2d 965, 978 (Nev. 1960).

CONTRACTS–BENEFICIARY OF LAND TRUST DOES NOT HAVE POWER TO ACCEPT OFFER MADE TO TRUSTEE

Schneider filed a complaint to recover the sum of $2,000 which had been paid to defendant Harmon to be deposited in escrow with the defendant, Pioneer Trust and Savings Bank. The deposit was made with a written offer, addressed to the Pioneer Trust and Savings Bank, to purchase certain real estate held by it as trustee for the benefit of Harmon.