Washington Law Review

Volume 12 | Issue 4

11-1-1937

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RECENT CASES

EASEMENTS—SERVITUDES—TAX SALE OF SERVIENT ESTATE. Plaintiff made a grant of the land in question, inserting as a condition that no liquor should ever be sold on the premises. Subsequently the land was sold at a tax sale. The defendant is the grantee of the purchaser at the tax sale and is now using the premises for a beer tavern. Plaintiff owns property appurtenant to the defendant and now seeks to enjoin him from so using the land. *Held:* The defendant will be enjoined, since the restriction on the use of the land constitutes a negative easement which was not extinguished by the tax sale. *Northwestern Improvement Co. v. Lowry*, 66 P. (2d) 792 (Mont., 1937).

The prevailing opinion seems to be that a tax-title is a new title, and not merely the sum of old titles and hence it is generally held that a sale and conveyance in due form for taxes divests all interest in the land sold and vests in the grantee an independent and paramount title. *Bassett v. City of Spokane*, 98 Wash. 654, 168 Pac. 478 (1917); 3 COOLEY, TAXATION (4th ed.) § 1494. Thus where the whole title is sold it cuts off and divests estates in remainder or reversion, rent charges, trust estates, homestead interests, inchoate rights of dower, mortgages, and judgment liens. *Tide Water Pipe Co. v. Bell*, 280 Pa. 104, 124 Atl. 351; note (1924) 40 A. L. R. 1516. However, most of the courts do not extend the doctrine to include easements, and while the cases are not all agreed upon the question the prevailing view seems to be that a sale of land for taxes does not extinguish easements to which the land is subject. *Tax Lien Co. v. Schultze*, 213 N. Y. 9, 106 N. E. 751, Ann. Cas. 1916C, 636 (1914); 3 COOLEY, TAXATION (4th ed.) § 1494. No distinction is made in the cases between negative and affirmative easements and the courts protect easements of light and air equally as well as rights of access over the adjoining lands of another. The basis of the rule in most of the courts that recognize the doctrine is that taxes are levied merely on the servient estate and that the sale of the land for taxes passes title to only the servient estate; that is, the land subject to the easement. *Tax Lien Co. v. Schultze, supra.* Cases from other jurisdictions disregard the nature of the tax levy and merely say that the person taxed had no title to the easement which could be divested. *Stansell v. American Radiator Co.*, 163 Mich. 528, 128 N. W. 789 (1910).

Even where statutes relating to tax sales provide that the purchaser at such sales obtains an absolute title free from all incumbrances most of the courts have said that this goes no further than to invest the purchaser with the title that the owner of the property had, free from liens by the way of incumbrances placed thereon and does not divest easements acquired prior to the levying of the tax under which the sale was made. *Blenis v. Utica Knitting Co.*, 210 N. Y. 561, 104 N. E. 1127 (1914).

In a minority of jurisdictions the view is taken that a valid sale of land for taxes extinguishes a private easement to which the land is subject on the ground that the purchaser at a tax sale is clothed with a new and complete title in the land. Such has been the result in Washington under the statute, REM. REV. STAT. § 11260, which provides that a tax lien shall have priority to and be fully paid and satisfied before any recognizance, mortgage, judgment, debt, obligation or re-

sponsibility to or with which the land may become charged. In construing this statute the court held that when foreclosure of such a lien is made, and real estate is sold thereunder, the fee passes to the purchaser, and all grants made by the owner of the fee fall with the foreclosure. *Hanson v. Carr*, 66 Wash. 81, 118 Pac. 927 (1911). While the court observed in that case that the defendants, prior to the foreclosure proceedings, might have had the land upon which their easement was located segregated, and a *pro tanto* reduction of the tax made under the statute, nevertheless the decision rests upon the principle that the tax is a paramount lien, and its foreclosure cuts off all charges upon the real estate. Similar results have been obtained in other states, but without the benefit of such a sweeping statute as in Washington. *Smith v. Griffin*, 14 Colo. 429, 23 Pac. 905 (1890); *Hill v. Williams*, 104 Md. 595, 65 Atl. 413 (1906); *Nedderman v. City of Des Moines*, 268 N. W. 36 (Iowa, 1936).

It seems that in the instant case the Montana court has reached the right result, for in making the assessment, a deduction was made for easements, which properly was taxable against the plaintiff, the owner of the easement, and not against the servient estate. Hence, when the tax sale was held title to the servient estate alone passed to the purchaser and not the easement.

W. G.

SALES—TRUST RECEIPTS—RECORDING. An automobile dealer finances the purchases of automobiles as follows: the dealer orders the cars and pays the manufacturer 10 per cent; the automobiles are shipped; the dealer signs a trust receipt in favor of the finance company and gets the bill of lading; the finance company pays the balance due to the manufacturer and gets the bill of sale to the automobiles running directly to it, together with a promissory note signed by the dealer running directly to the finance company; the dealer presents the bill of lading, gets the automobiles and places them on his sales floor. The trust receipt, in typical form, provides that the automobiles belong to the finance company and will be returned to it upon demand, that risk of loss is upon the dealer, and that the automobiles will not be sold or encumbered without the prior release of the finance company. The trust receipt was not recorded or filed. In a contest between the finance company and the dealer's assignee for benefit of creditors, *held* that the trust receipt was either a chattel mortgage or conditional sale (without deciding which) and as it was neither recorded nor filed, the assignee prevails. *General Motors Acceptance Corp. v. Seattle Association of Credit Men*, 90 Wash. Dec. 257, — P. (2d) — (1937).

The trust receipt is not a conditional sales contract. Upon breach of a conditional sales contract, the vendor can either retake the goods, or sue for the balance due, but he cannot both repossess and seek judgment for any deficiency. *Jones Short Motor Co. v. Bolin*, 153 Wash. 198, 279 Pac. 395 (1929). The trust receipt transaction, however, allows the financing house to retake the goods, resell, and sue the dealer for any balance due. *Charavay & Bodin v. York Silk Mfg. Co.*, 170 Fed. 819 (1909). Further, under a conditional sale, so long as the vendee is not in default, the vendor has no right to the goods; whereas the trust receipt itself provides that the financing party may retake the goods at

any time, and the courts will evidently respect the agreement of the parties. *Ivy v. Commercial Credit Co.*, 173 Wash. 360, 23 P. (2d) 19 (1933). Finally, looking at the problem functionally, the trust receipt transaction is not a conditional sale because the finance company is merely lending credit. It is not in the business of selling goods. The actual sale is between the manufacturer and the dealer, rather than between the finance company and the dealer, and the Washington court has held that the only function of the conditional sale is to permit the owner of personal property to make a bona fide sale on credit and not merely to secure the extension of credit by one other than the vendor. *Lahn & Simmons v. Matzen Woolen Mills*, 147 Wash. 560, 266 Pac. 697 (1928).

Nor is the trust receipt transaction a chattel mortgage. In the latter, title originally must have been in the mortgagor, and by virtue of the mortgage, the borrower conveys a property interest in the goods to the lender. Not so in the trust receipt. Here the lender's property interest is conveyed to him not by the borrower but by a third party. Further, under a trust receipt, upon the dealer's failure to return the goods after demand by the financer, the proper remedy would be replevin, whereas property under a chattel mortgage can only be obtained by foreclosure proceedings. *Ward v. Warner*, 91 Wash. Dec. 501, — P. (2d) — (1937).

In *Ivy v. Commercial Credit Co., supra*, a similar case, the court took the position that there was no need for recording or filing a trust receipt, distinguishing the instant case from that holding by stressing the fact that in the earlier case there was no showing that the dealer made any down payment or gave a negotiable note for the balance to the finance company. These distinctions would not appear to be so operative as to require an opposite holding in the case now under consideration.

While it may be desirable in some manner to make trust receipt arrangements a matter of public record in order to avoid secret liens, it is submitted that such a transaction should be recognized as distinct from other credit devices, and that the proper method of requiring filing or recording is by legislation rather than by trying to fit a distinguishable legal concept into the old form of either conditional sale or chattel mortgage. It may be easy enough to call it one or the other for the purpose of requiring recording, but in determining the rights of the parties to a trust receipt transaction, any attempt to draw an analogy to either a chattel mortgage or conditional sale will lead to illogical conclusions and results absolutely inconsistent with the intent of the parties to such an instrument.

In view of the fact that the cases in this state are in conflict, it might be advisable for the legislature to consider the adoption of the Uniform Trust Receipts Act which provides a satisfactory solution to the problem. It recognizes the trust receipt as a distinct species, and provides for filing with the Secretary of State a statement by the trustor to the effect that the two parties are engaging in credit dealings of this type. This is all the notice that is required, and is sufficient to protect the parties in all transactions of the same type for the ensuing year.

C. P.

BILLS AND NOTES—INTERPRETATION: PAYABLE TO BEARER. An agent by means of checks which he was empowered to draw on his principal's account obtained in return from plaintiff bank cashier's checks drawn on plaintiff and payable to certain persons whom the agent designated. Although such persons did exist, the agent neither delivered nor intended to deliver the checks to them, but instead indorsed them first in the name of the payees and then in his own name and deposited them to his credit in defendant bank, which, after stamping the clearing house indorsement on the back— "all prior indorsements guaranteed", received a credit on the plaintiff bank through the clearing house. Upon discovering the employee's defalcations plaintiff voluntarily paid its depositor the amount of the agent's misappropriation and took an assignment of its rights. *Held:* Plaintiff cannot recover from the defendant since the checks were bearer paper and consequently there was no need of indorsements which defendant could be held as guaranteeing. *Union Bank & Trust Co. of Los Angeles v. Security First Nat. Bank of Los Angeles*, —Cal.—, 65 P. (2d) 355 (1937).

The case involves an interpretation of section 9 (3) of the N. I. L., providing that an instrument is payable to bearer "when it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable." CAL. CIV. CODE (Deering, 1933) 3090 (3). This is substantially a codification of the rule of the law merchant, *Minet v. Gibson*, 1 H. Bl. 569, 126 Eng. Rep. 366 (1791) and it is now well settled that a "fictitious payee" as used by the statute was intended by the framers to include as bearer paper a bill drawn payable to an actual person, but never intended by the drawer to be paid to him, *Snyder v. Corn Exchange National Bank*, 221 Pa. 599, 70 Atl. 876, 128 Am. St. Rep. 780 (1908). Generally cases arising under this section which involve the problem of a procuring party inducing a nominal drawer to make checks payable to designated payees occur when the procuring party is an agent of the nominal drawer. If the principal is found to be negligent in these cases, many jurisdictions cast the loss upon him, *Defiance Lbr. Co. v. Bank of California*, 180 Wash. 533, 41 P. (2d) 135 (1935); Note (1935) 99 A. L. R. 439. However where the principal acts without such negligence there is a diversity of opinion as to whether the loss should fall upon the principal or the accepting bank. Some courts, following the reasoning of *United States Cold Storage Co. v. Central Mfg. Dist. Bank*, 343 Ill. 503, 175 N. E. 825, 74 A. L. R. 811 (1931), hold the intention of the agent is not imputable to the employer so as to render applicable the rule of *Snyder v. Corn Exchange Bank, supra.* A majority of the courts come to a contrary conclusion on two lines of reasoning: either the agent's knowledge of the fictitious payee is imputed to the principal, *American Sash & Door Co. v. Commerce Trust Co.*, 332 Mo. 98, 56 S. W. (2d) 1034 (1932); or "person making it so payable" is construed to refer not to the nominal maker, but the agent who drew the instrument, *Mueller and Martin v. Liberty Ins. Bank*, 187 Ky. 44, 218 S. W. 465 (1920); *Goodyear Tire & Rubber Co. v. Wells Fargo Bank & Union Trust Co.*, 1 Cal. App. (2d) 694, 37 P. (2d) 483 (1934), Note (1931) 74 A. L. R. 822.

Although instant case differs from the usual situation in that the procuring party was not the agent of the ostensible drawer, the California court in holding the nominal drawer liable relied chiefly on the case of

Goodyear Tire & Rubber Co. v. Wells, supra, and cases cited therein. As an explanation of the present case, obviously the majority theory of imputation cannot be carried over. The second theory has been limited by most jurisdictions to actual signers and such courts have held that an agent who merely prepares a list of payees is not "the person making it so payable", *City of St. Paul v. Merchants' Nat. Bank,* 151 Minn. 485, 187 N. W. 516 (1922). However the California court did not expressly adopt either rationalization, but significantly stated, "While it is true that the maker of the cashier's checks in question was the (plaintiff), still it was the faithless employee's intent that must govern, because the bank made the cashier's checks payable to the parties designated by (him). The (plaintiff's) intent was to make the cashier's checks payable to the parties that (the employee) intended them to be payable to. (The employee), therefore, was the real drawer and 'the person making it so payable' as to each cashier's check."

In a case involving this problem it is manifest that arguments of policy are as pertinent as the conclusions drawn from legal logic. The California court states: "otherwise those who put checks and drafts into circulation would have it in their power by collusive understandings incapable of proof to conduct illegitimate transactions and hold the depository liable upon proof of the forgery of the name of the payee never intended in fact to be a payee."

W. M. L.

TRADE UNIONS—REVOCATION OF CHARTER—RESORT TO COURTS. A member of the executive board of the United Brotherhood of Carpenters and Joiners of America, purportedly acting on behalf of that body, revoked the charter of the Lumber and Sawmill Workers of Kelso-Longview No. 2504 without notice or a hearing and without preferring any charges against the local or against any of its officers. The Brotherhood then issued charters to other locals and threatened to seize and turn over to these locals the money and property of Local 2504, which it would have been justified in doing if the expulsion of 2504 were lawful. Plaintiff local prayed for a judgment declaring the charter issued to it to be a valid and subsisting charter. The Brotherhood argued that plaintiff local had no right to invoke the jurisdiction of the court without first attempting to assert some remedy within the Brotherhood. *Held:* The charter of plaintiff union was never validly revoked and the local still existed as a union. *James Cox v. United Brotherhood of Carpenters and Joiners of America,* 90 Wash. Dec. 459, — P. (2d) — (1937).

The constitution and the by-laws of a labor union or other voluntary association express the terms of a contract which defines the privileges secured and the duties assumed by those who become members. The individual's rights of membership are founded on this contract, which, if accepted at all, must be accepted *in toto.* For this reason the constitution and by-laws constitute the sole rule which governs the relations between the association and its members. *Flynn v. Brotherhood of Railroad Trainmen,* 111 Kan. 415, 207 Pac. 829 (1922); *Polin v. Koplon,* 257 N. Y. 277, 177 N. E. 833 (1931). It follows that before applying to a court of equity for reinstatement, a disfranchised member or local must as a rule exhaust all remedies available under the laws of the association. *Shapiro v. Geblman,* 152 Misc. 13, 272 N. Y. S. 624 (1934); *Austin v. Dutcher,* 56 App. Div. 393, 67 N. Y. S. 819; *Greenwood v. Building*

Trades Council of Sacramento, et al., 71 Cal. App. 159, 233 Pac. 823 (1925). But this rule does not apply where the expelled member or local has, in effect, been denied due process of law. Thus, where as in the instant case, the expulsion takes place without notice to the accused or without an opportunity to be heard, the courts may be resorted to in the first instance. *Rueb v. Rehder et al.*, 24 N. M. 532, 174 Pac. 992 (1918); *Neal v. Hutcheson et al.*, 160 N. Y. S. 1007 (1916). The same is true if the procedure is irregular or in violation of any of the rules of the constitution or by-laws. *Carey et al. v. International Brotherhood of Paper Makers et al.*, 123 Misc. 680, 206 N. Y. S. 73 (1924); *Rueb v. Rehder, supra.* Likewise, where the remedy provided by the law of the society is not available to the member, as where the appellate body would not convene until about one and a half years after the expulsion, out of the state, and at a great distance. *Fritz v. Knaub*, 57 Misc. 405, 103 N. Y. S. 1003. Or where there is an extremely remote possibility of the remedy being effective, as when the appeal within the organization was before a board so constituted as to afford no likelihood of an impartial hearing. *Rodier et al. v. Huddell et al.*, 232 App. Div. 531, 250 N. Y. S. 336 (1931). Or where no remedy is provided by the laws of the association or the procedure outlined is so expensive, slow, and complicated as to amount to a denial of justice. *Local Lodge No. 104 of International Brotherhood of Boiler Makers, Iron Ship Builders, and Helpers of America et al. v. International Brotherhood of Boiler Makers, Iron Ship Builders and Helpers of America et al.*, 158 Wash. 480, 291 Pac. 328 (1930). Any rules or by-laws providing for the expulsion of a member without notice and preferment of charges and trial is invalid and all proceedings taken under it null and void. *Gilmore v. Palmer*, 109 Misc. 552, 179 N. Y. S. 1 (1919).

The court will not determine the merits of the controversy. It will search the record to see whether the member has had fair notice and opportunity to be heard and whether the association has properly administered its own rules, and if so, it will not go into the facts, to the end that it may substitute its judgment for that of the organization. *Gilmore v. Palmer, supra.* The property interest mentioned in the cases as a prerequisite to equitable jurisdiction is amply met under the facts of the instant case.

W. G. D.

APPEAL AND ERROR—OBJECTIONS—EFFECT OF FAILURE TO MAKE. The state's attorney in opening a prosecution for murder stated, "in view of other burglaries and the records that will show from the evidence, the state is going to ask you to hang these two men." No objection was made at the time by defendant to the statement. The defendants were convicted. *Held:* The statement constituted reversible error in that it placed defendants' character in issue in advance of their taking the stand, sought conviction on other grounds than the offense charged, and compelled defendants to testify; and, although the defense raised no objection, to do so would have been futile, for an instruction could not have cleared the mind of the jury; and, even though the defendants were admittedly guilty so that the error were not prejudicial to them, if it were allowed to stand it would be a precedent for other errors of the same nature. Two justices dissented. *State v. O'Donnell*, 91 Wash. Dec. 447, — P. (2d) — (1937).

This question of the necessity of a timely objection in the lower court to save an error for appeal has been repeatedly passed upon. In state jurisdictions the overwhelming weight of authority holds the general rule to be that "Though improper language of counsel for the state may constitute a sufficient ground for reversal, it cannot be considered on appeal unless the proper preliminary steps have been taken." Note 46 L. R. A. 642. There are several exceptions to this general rule. In the case of infants a majority of the courts hold an objection in the lower court is not necessary on the theory that infants are wards of the court, and the court is bound to protect their interests notwithstanding the failure of their attorney to do so. Note Ann. Cas. 1913B 443. But a minority hold the infant to the same rules as an adult especially where counsel acted in entire good faith without fraud. *Byrnes v. Butte Brewing Co.*, 44 Mont. 328, 119 Pac. 788, Ann. Cas. 1913B 440, and note 445 (1911). Also a majority have taken cognizance of an error improperly brought up if a failure to have done so would have resulted in a gross miscarriage of justice. *Klink v. People*, 16 Colo. 467, 27 Pac. 1062 (1891). But in order to justify the court in setting aside a verdict of the jury, it is necessary that the jury have been influenced by the erroneous remarks, and that they contributed to the verdict found. *State v. Johnson*, 48 La. Ann. 87, 19 So. 213 (1896). Some state legislatures have given the appellate courts power by statute to order a new trial, though no exception was taken, where it is clear defendant has been prejudiced by improper language of the district attorney, N. Y. CODE CRIM. PROC. §§ 527, 528; *People v. Greenwall*, 115 N. Y. 520, 22 N. E. 180 (1889). In Oregon the defendant has a remedy in such a case under OREGON CIVIL CODE § 232, subd. 1; *State v. Abrams*, 11 Ore. 172, 8 Pac. 327 (1883).

In the federal courts the general rule has been modified by Rule 11 of the rules of procedure giving the courts power to notice errors not properly preserved, but this rule has been construed to be only an exception with definite bounds. Thus in *Borderland Coal Sales Co. v. Imperial Coal Sales Co.*, 7 F. (2d) 116 (1925), the court stated, "An appellate court can consider only errors to which objections have been made and exceptions taken in the trial court. The only exception to this general rule is in criminal cases where federal courts of review may sometimes, in the exercise of sound judicial discretion, and to prevent miscarriage of justice, notice error in the trial to which no exceptions or objections have been taken."

The rule in Washington until the case in hand was well in line with the majority, the court stating in *State v. Vogel*, 183 Wash. 664, 49 P. (2d) 473 (1935), "It could at most be nothing more than misconduct on the part of the attorney, and we have repeatedly held this not ground for setting aside the verdict, unless the court was asked to correct it and the request was disregarded by the court." *State v. Stevens*, 135 Wash. 361, 237 Pac. 723 (1925). The majority exception to avoid a miscarriage of justice found support also in *State v. Navone*, 186 Wash. 532, 58 P. (2d) 1208 (1936), for although this case was cited in support of the *O'Donnell* decision it must be differentiated—in the *Navone* case the court found the evidence "nicely balanced" while in the *O'Donnell* case the court was free to admit that the evidence without question supported the judgment. It would seem that the court in the *O'Donnell* case,

by announcing the rule that if an error occurred in the trial which might be prejudicial, the conviction cannot be affirmed although the error was not objected to at the time it was made, has abandoned the general rule in regard to making objections and has overruled such decisions as *State v. Regan*, 8 Wash. 506, 36 Pac. 472 (1894), where the court in referring to an improper argument of the prosecutor in a murder trial stated, "counsel for defendant excepted to it, but it does not appear that he moved to strike it or asked the court to instruct the jury to disregard it. Consequently there is no foundation for any error in the premises. Furthermore, it does not appear that such statement could have been prejudicial to defendant in any manner."

W. M. L.

CONTEMPT—AFFIDAVIT BASED ON INFORMATION AND BELIEF. An affidavit was filed in the trial court in which the defendant was charged with having committed a constructive contempt of court for publishing a contemptuous article on the activities and motives of the grand jury investigating county officials. The affidavit contained allegations made only on information and belief of the affiant. *Held*: Constructive contempt allegation in an affidavit need not be made on personal knowledge. *Ex parte Reilly*, 61 P. (2d) 469 (Cal. App., 1936).

The courts are divided on the question of whether an allegation in a constructive contempt affidavit must be based on personal knowledge or merely on information and belief. The better decided cases, however, deny that information and belief is sufficient. *Robinson v. State*, 20 Ala. App. 514, 104 So. 561 (1904); *Herdman v. State*, 31 Neb. 429, 48 N. W. 61 (1898). See also L. R. A. 1917C, 854. Contempt proceedings are summary in their character and in the case of indirect or constructive contempts they are commenced similar to ordinary criminal prosecutions. However, the law does not proceed as cautiously nor show such solicitude for a contemnor as it does for others charged with crime. The defendant has no right to trial by jury and no appeal in many jurisdictions may be taken from the judgment rendered, which, under the law is final and conclusive on the facts, and may be reviewed only under the limited process of *certiorari* or *habeas corpus* where the appellate court can only consider if the trial court had proper jurisdiction and whether the alleged contemptuous conduct constituted contempt at law. *Gompers v. U. S.*, 233 U. S. 604, 34 Sup. Ct. 693, 58 L. ed. 1115 (1913). Also the courts have never recognized that many of the customary constitutional guarantees of an accused are applicable to contempt proceedings. *In re Debs*, 158 U. S. 594, 15 Sup. Ct. 900, 39 L. ed. 1092 (1895) (no right of trial by jury); *Merchants Stock, etc. Co. v. Board of Trade*, 201 Fed. 20 (1912) (defendant cannot assert double jeopardy); *U. S. v. Toledo News-Paper Co.*, 247 U. S. 402, 38 Sup. Ct. 560, 62 L. ed. 1186 (1918) (right of freedom of speech and of press no defense). See generally THOMAS, PROBLEMS OF CONTEMPT OF COURT, 9.

When a contemnor is stripped of so many of his rights and the procedure is so summary the least that should be required is that the affidavit be sworn to by one who has personal knowledge of the alleged contempt and that information and belief merely is not enough. In *Ex parte Landry*, 65 Tex. Cr. R. 440, 144 S. W. 964 (1912) the court held the latter device insufficient because such affidavits are mere hearsay

in so far as they attempt to convey any proof of the facts therein stated and may amount to no more than mere recitation of public rumor or common gossip. Such an affidavit is not a statement of any positive fact, except the information and belief of the party making it. The charge must be specific and direct and not based on hearsay, since no one should be required to face an essential criminal charge based only upon the belief of a private prosecutor. *State v. Conn*, 37 Ore. 596, 62 Pac. 289 (1900). In view of the holding of the Washington Supreme Court in *State v. Cannut*, 26 Wash. 68, 66 Pac. 130 (1900), where it was said, "Before the court can assume jurisdiction of such a proceeding, it must receive its information through the affidavit of some one who is prepared to state the facts without referring to a third party as his informant", it would seem that this jurisdiction would likewise disapprove of the result reached in the instant case.

W. G.