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RECENT CASES

Probate — Award in Lieu of Homestead — Fractional Award. *P's* husband died intestate in 1944 leaving *P* and an adult daughter as his only heirs. His estate at death contained a house appraised at $4,000, household goods at $250, and other property at $1,600. *P's* petition for $3,000 as an award in lieu of homestead under REM. REV. STAT. § 1473 [P P C. § 205] was opposed by *D*, the daughter. The trial court awarded the house and household goods to *P*, charging the property with a lien of $1,250 in favor of the estate. *D* appeals. *Held*. Reversed. It was error (1) to award property of greater value than the statutory amount ($3,000) even though subject to a lien, and (2) the property should have been evaluated as of the date the petition was filed rather than the date of the death. *In re Small's Estate*, 127 Wn.(2d) 677, 179 P.(2d) 505 (1947).

The noteworthy problem presented by the first ground of reversal is whether the surviving spouse is entitled to have an award in lieu of homestead satisfied by the creation of an interest in the home when its value exceeds the amount of the statutory award and when the value of the household goods and other property of the estate, which the court in its discretion might award, is not great enough to make up the authorized amount.

It has been the practice in Washington to use the award in lieu of homestead in settling small estates when decedent has died intestate with no minor heirs. *Griesemer v. Boyer and Rex*, 13 Wash. 171, 194 Pac. 834 (1895). The statute authorizes the award to be made from either community or separate property of the estate "not exceeding the value of three thousand dollars which property so set off shall include the home and household goods, if any. " REM. REV. STAT. § 1473 [P P C. § 205-1]. The purpose of the statute is to prevent the dependency of the surviving spouse by providing a home and household goods. *In re Lavenberg's Estate*, 104 Wash. 515, 177 Pac. 328 (1918), *In re Welch's Estate*, 200 Wash. 686, 94 P.(2d) 758 (1939). The surviving spouse may not select other property in preference to the house and household goods. If the full value is not reached by an award of the house and furniture, the court may award other property at its discretion. *In re Jones' Estate*, 11 Wn.(2d) 254, 118 P.(2d) 951 (1941). The statutory amount may have been adequate when the statute was enacted, but recent inflation has raised the value of most homes above the amount which may be set aside. The statute was revised in 1945 to provide for an award of $4,000. WASH. LAWS 1945, c. 197, § 1. [P P C. § 205-1 (1945 Supp.)].

In discussing the related problem of probate homesteads some courts have held that if there is no limitation of value and the property of the estate is indivisible, the whole of such premises should be set aside. *In re Levy's Estate*, 141 Cal. 646, 75 Pac. 301 (1904). Or if there is a limitation and the property is not capable of proper division, the court may order the property sold and an exemption awarded to the widow from the proceeds. *Hamilton v. Wilcox*, 167 Mich. 551, 133 N. W 615 (1911). Kentucky provides by statute for a payment in money if the property is of excess value and is not divisible. *Warren's Adm'r v. Warren*, 126 Ky. 692, 104 S. W 754 (1907). Substantially the same result has been reached in Vermont. *Chaplin v. Sawyer*, 35 Vt. 286 (1862). However, this will not ordinarily be done without a specific statute as the legislative intent is normally construed as an attempt

to make the premises available for occupancy by the surviving spouse. This purpose is essentially defeated by the substitution of money, *Richardson v. Trubey,* 250 Ill. 577, 95 N. E. 971 (1911). A logical solution might be the creation of a tenancy in common in the estate, awarding the petitioner an interest equal to the value designated by the statute; or the property might be sold and the proceeds invested in a trust for the benefit of the widow. *Compare Wardell v. Wardell,* 71 Nebr. 774, 99 N. W. 674 (1904).

The trial court in the *Small* case attempted to make a fractional award of the house and furniture, holding that the creation of an interest in property is as much an award of *value* as setting off property of the exact statutory amount. The Supreme Court denied the validity of this award but did not suggest what procedure the trial court should follow in disposing of the petition. The court may intend (1) that the property is to be sold and a cash award set aside, or (2) that a proportional interest be created by tenancy in common, or (3) that some sort of partition and distribution is to be made when the property is, if ever, divisible. Or possibly (4) under facts similar to those in the present case, the surviving spouse is simply to be precluded from the benefits provided by the statute.

Prior to this decision the fractional award was probably recognized as the normal and logical solution. Of the remaining alternatives, none of which appear entirely satisfactory, the substitution of a cash award seems most widely used. While adoption of this procedure would have the virtue of clarifying our law, it nonetheless fails to give the petitioner the use of the home.

L. V. R.

Administrative Law—Delegation of Legislative Powers—Requirement of a Standard. In order to prevent a strike being called against the Olympia Public Port by the longshoremen's union, the manager of the Port had to promise to pay any wage increase ultimately established in negotiations to be conducted by the longshoremen's union and the waterfront employer's association. The public port was not a party to the negotiations. Many months later an agreement calling for wage increases was reached, and the port moved to pay the amount due. This test suit was brought by a taxpayer to restrain the payment. The court found that a contract had been formed at the time of the making of the manager's promise if the port commission had the power to obligate itself to pay a wage increase to be determined by negotiations to which the port was not a party. *Held:* The legislative grant of power to the port commission, REM. REV. STAT. § 9692 [P P C. § 777-19], amounts to a general power to employ, and from that is implied the power to contract for labor in the same manner as do the public port's private competitors. The order of the trial court issuing an injunction was reversed. *Christie v. Port of Olympia,* 127 Wash. Dec. 500, 179 P.(2d) 949 (1947).

It is unconstitutional for the legislature to delegate its legislative powers, but it may determine what is to be done, who is to do it, and what is the scope of his authority. A delegation of power is not improper when a reasonably clear governing standard is prescribed. *Yakus vs. U. S.,* 321 U. S. 414 (1944), *Unden Inc. v. Greenough,* 181 Wash. 412, 43 P.(2d) 982 (1935), *State ex rel. Washington Toll Bridge Authority v. Yelle,* 195 Wash. 636, 82 P.(2d) 120 (1938). An exception to the requirement of a standard exists in delegations to municipal corporations because of the constitutionally recognized necessity of giving broad law-making powers to local governments. The exception does not apply to the proprietary as distinct from the governmental aspects of municipal corporations. *Lunne v. Bredes,* 43 Wash.

540, 86 Pac. 835 (1906). The statutes authorizing the operation of public port commissions contain grants of power within the proprietary aspect of a municipal corporation. What is the standard accompanying the grant? Apparently the court in holding that the public ports could act in the same manner as their private competitors in contracting for labor is denominating the customs of the private ports as the legislative standard. In effect, the private ports are given the power to alter or adjust the manner in which the public ports are to use the power granted to them by the legislature.

On the other hand, perhaps the court felt that prevailing business custom is an adequate standard, such a standard would not be controlled by private discretion but would be the product of economic forces beyond the control of any person or group. *See* Jaffe, *Law Making by Private Groups,* 51 HARV. L. REV. 201 (1937). A case closely in point, *Wagner v. Milwaukee,* 177 Wis. 410, 188 N. W 487 (1922), probably would have come out differently had this point been recognized.

What is the effect of the case on Washington law? There are at least two previous Washington cases wherein a dubious standard similar to that of the *Christie* case is to be found. In *State v. Bonham,* 93 Wash. 489, 116 Pac. 377 (1916), the court held that there was no unconstitutional delegation to the American Medical Association in a statute directing an official to be guided by the Association's list of approved medical schools. This list was periodically revised by that association acting under criteria determined by itself, thus, in effect, the legislature gave to the Association the uncontrolled power to determine who could practice medicine in Washington. The case of *Morgan v. Department of Social Security,* 14 Wn.(2d) 156, 127 P.(2d) 686 (1942), presented the somewhat different situation of whether it was constitutional to delegate the power to a governmental agency to alter a statute to make it conform with the federal social security program. Without much discussion of the requirement of a standard, the court found no objection to having the department's decision guided by the rules and regulations of the federal Social Security Board. The *Bonham* case, the *Morgan* case, and the *Christie* case are instances of an extremely liberal standard, each illustrates a standard subject to nonlegislative alteration, in effect, no standard at all.

The court's solution of the problem in the *Christie* case did not develop the administrative law angle; accordingly, the case is of doubtful value as an administrative law precedent.

D. G. A.

Procedure — Withdrawal of Moot Opinion — Dismissal of Appeal. *P* was denied workman's compensation by the Department of Labor and Industries. The superior court reversed and allowed the claim. Appeal, reversal *en banc* with directions to enter judgment disallowing the claim. While rehearing was pending, the parties stipulated to dismiss the appeal and joined in moving the court to withdraw its prior opinion. *Held.* motion to dismiss the appeal granted, but motion to withdraw prior opinion denied. The court ordered the prior opinion published although stating that it was no longer authoritative. *Leschner v. The Department of Labor and Industries,* 129 Wash. Dec. 90, 185 P.(2d) 113 (1947).

In publishing the prior opinion, the court followed precedent. *Dishman v. Whitney,* 124 Wash. 697, 215 Pac. 71 (1923), *Hutchings v. Fanshier,* 134 Wash. 704, 236 Pac. 119 (1925), *In re Brown,* 6 Wn.(2d) 215, 107 P.(2d) 1104 (1940). However, on analysis this holding poses some interesting problems. REM. REV. STAT. § 10 [P P C. § 110-9] provides that the filing of a petition for rehearing suspends, and

the granting of the petition vacates, the prior opinion of the court. As stated in the dissent, the cause was then before the court as if it were an original hearing. When the court dismissed the appeal, nothing remained upon which a judgment could operate. The entire appeal became, in legal effect, void *ab initio*. Why, then, did the court insist on leaving the opinion in the reports? The answer seems to be found in *In re Brown, supra,* where the court refused to withdraw the prior opinion because "The filing of an opinion constitutes a step in the orderly procedure of this court, leading up to final disposition of the cause. The record as made should stand as this court's action in the course of the accomplishment of its judicial functions." But the only important reason for publishing a record of any court's action is that it may serve as a guide to the bar in future cases.

This is normally accomplished through the doctrine of *stare decises,* but because such an opinion is not authoritative, it stands "in that rather anomalous situation, as the opinion, not of the court, but of the judges who signed the same." *Nettleship v. Shipman,* 161 Wash. 292, 296 Pac. 1056 (1931), *Mitchell v. Maytag-Pacific-Intermountain Co.,* 184 Wash. 342, 51 P.(2d) 313 (1935). Although this Supreme Court text can not be cited as authority, it will undoubtedly carry great weight as an indication of the court's future position on the same issues. Thus, to this extent, the Supreme Court publishes a species of advisory opinions. *Caveat:* Since the court ordered the present per curiam opinion published immediately after the prior moot opinion, the careful attorney will be advised of its non-authoritative character. But take note. this was done in neither *Dishman v. Whitney, supra,* nor in *Hutchings v. Fanshier, supra.*

The court also dismissed the appeal. In Washington it is discretionary with the court whether it will dismiss an appeal which has become moot. *In re Brown, supra.* But the court has consistently done so, *Dishman v. Whitney, supra, Hutchings v. Fanshier, supra; In re Brown, supra,* as have the large majority of courts in other jurisdictions. However, in the instant case the court might well have deemed it inadvisable to dismiss because of resultant difficulties suggested in the dissent. When the appeal is dismissed, the judgment of the superior court becomes final and the claim must be paid. Private litigants are commonly allowed to dismiss on settling their controversy because the law favors settlements, and presumably each party will guard its own interest. However, here a department of the state government is requesting the dismissal after both the department itself and the Supreme Court have held the claim to be improper and there was no reason to believe that the same result would not be reached on the pending rehearing. Thus the department is, in effect, agreeing to pay a claim from state funds when it has every reason to believe it need not so do. Arguably the payment is illegal under a correct interpretation of the statute. The dissenting opinion even states that the department binds itself by the rule laid down in the superior court as to which claims it may pay in the future (p. 91). Allowing the department to dismiss the appeal after the litigation had been so nearly completed in its favor would seem to be an undesirable exercise of the Supreme Court's discretionary power.

But are these the only alternatives. to dismiss or not to dismiss the appeal? If the cause became moot due to a settlement, then it is suggested that the difficulty might have been avoided had the court held the entire cause, rather than just the appeal, moot and set aside the judgment of the lower court with directions to dismiss the action on the basis of a new agreement between the parties. *Hutchings v. Fanshier, supra.* Similar results were reached in *Cullen et al. v. Ellis County Levee Improvement District No. 3* (Tex. Civ. App.), 77 S. W.(2d) 310 (1934), and *Alejandrino v. Quezon,* 271 U. S. 528 (1925), although under somewhat different

facts. Had this been done, the departmental decision denying the claim, rather than the superior court judgment allowing the claim, would have become final, leaving it at least legally disallowed and obviating some of the above difficulties.

M. C. T.

Bills and Notes — Holder in Due Course — Notice and Burden of Proof. *P* in Spokane purchased a carload of secondhand furniture from *D* in New York. Part of the price was paid in advance, and *D* shipped the goods under a bill of lading, drawing a sight draft upon *P* for the balance. *G* company, a discounting firm, agreed to purchase *P's* account and *D* endorsed the draft to *G* in blank. *G* advanced eighty per cent of the draft to *D*, the remainder to be paid upon collection, then stamped the number "8160" upon the back of the draft "for bank identification" and deposited it and the bill of lading with its New York bank, which forwarded it to a Spokane bank for collection. *P* paid the draft, but upon finding the furniture not as represented garnished the Spokane bank, which admitted having funds of *D* to the amount of the draft. *G* intervened, claiming the money as holder in due course. Concluding that *G* was not a bona fide holder without notice of the fraud, the trial court entered judgment for *P* Appeal. *Held*. Affirmed. *G* failed to sustain the burden of proving due course holding under REM. REV. STAT. § 3450 [P P C. § 758-17] [N. I. L. § 59] "apparently" because of the lack of a sufficient indorsement on *G's* part, *G's* failure to investigate the transaction and the use of a deceptive indorsement, since *D* was a stranger to *G*, were circumstances showing bad faith. *Bowles v. Billik*, 27 Wn.(2d) 629, 178 P.(2d) 954 (1947).

The N. I. L. § 59 states, in part:

> but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course.

And REM. REV. STAT. § 3446 [P P C. § 758-9] [N. I. L. § 55] states

> The title of a person who negotiates an instrument is defective within the meaning of the act *when he obtained the instrument*, or any signature thereto, *by* fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud. (Italics ours.)

When *D* negotiated the draft to *G*, there had been no acceptance by *P* who was not, therefore, bound on the instrument. The general thought expressed by the N. I. L. is that title is defective when the promise to pay on the instrument was wrongfully obtained. At the time of the negotiation to *G*, *D's* name was the only one on the draft, and *P's* promise to pay had not been obtained. Under these circumstances *D's* title was not defective in the usual N. I. L. sense, and *G*, the holder, should still be entitled to the presumption of due course holding. Although the question is not clearly presented in the opinion, the court may have felt that as distinct from the fraud inherent in the purchase and sale transaction itself the negotiation by *D* with knowledge of his own fraud and in anticipation of *P's* acceptance was "under such circumstances as amount to a fraud." N. I. L. § 55, *supra*. It would seem fraudulent for a person in possession of a negotiable instrument subject to a defense to attempt to cut off the defense by negotiation. If this is the proper interpretation, the result may be justifiable since some protection is thus afforded to buyers in similar positions, and the negotiation of this type instrument is not seriously impaired.

Statements of the court to the effect that the number "8160" is not sufficient indorsement to constitute *G* a holder in due course can only be unfortunate language. It is inconceivable that a holder in due course could by improper indorsement deprive himself of due course status. Thus the only reasonable construction is that such indorsement, under these circumstances, is evidence of the alleged bad faith with which *G* company took the instrument. It is undoubtedly true that an indorsement must include a signature sufficient to identify the indorser so as not to require parol evidence to prove that identity, but the point is not in issue here. The draft was indorsed in blank and thus payable to bearer, *i.e.*, negotiable by delivery without further indorsement, *Broadway Bank of Kansas City v. Whittaker*, 177 Wash. 62, 30 P.(2d) 993 (1934), REM. REV. STAT. § 3425 [P P. C. § 760-9] [N. I. L. § 34], and no further indorsement would be necessary for intervenors to assert their rights upon the draft.

The decision at first glance appears to be a return to the "suspicious circumstances" rule of *Gill v. Cubit*, 3 B. & C. 466 (1824) as *G's* failure to fully investigate the business of *D*, a stranger to *G* until two days previous to the negotiations, seems to have been accepted as an indication of bad faith. This view was abrogated by the adoption of the N. I. L. (enacted in Washington 1899) in favor of the rule that bad faith is to be tested by actual knowledge or knowledge of such facts that his action in taking the instrument amounted to bad faith. N. I. L. § 56. BRITTON, BILLS AND NOTES, 410 § 101 (1943). *See* Rightmire, *The Bad Faith Doctrine of Negotiable Instruments*, 18 MICH. L. R. 355 (1920), *McNamara v. Jose*, 28 Wash. 461, 60 Pac. 903 (1902), *Banner Meat Co. v. Rieger*, 125 Wash. 142, 215 Pac. 334 (1925). However, the fact that *G* took the draft after *D* had requested him to indorse only by number would apparently be such bad faith as to be within the purview of N. I. L. § 56. This and other facts disclosed upon examination of the briefs could have justified the finding of bad faith by the trial court. Thus, while the opinion should be criticized for not clearly stating the grounds for the conclusion on this point, it is submitted that it probably does not herald a return to the less favored doctrine of the minority.

D. E. R.

Tax Foreclosure—Way of Necessity—Easement of Access. *P* is grantee in fee of one half of all the minerals, including oil, gas, and coal, lying in a defined tract. The deed also granted an easement of ingress and egress and the right to use such part of the surface as should be necessary to produce, store, refine, mill, and remove the minerals. The owner of the surface estate neglected to pay the taxes and the county foreclosed the tax lien. *D* is the purchaser under the foreclosure sale. *P* brings action to quiet title to the minerals and appurtenances in himself. Judgment for *P* *D* appeals. *Held:* Reversed in part. The foreclosure sale did not affect *P's* estate in the minerals or his easement of ingress and egress which was "so much appurtenant to the estate conveyed that it may be said to be a part thereof," but it did cut off all right to put any structures on the surface or make any other use of it. *Magnolia Petroleum Co. v. Moyle*, 162 Kan. 133, 175 P.(2d) 133 (1946).

Two problems are presented by this fact pattern. One, the effect of a tax foreclosure sale on an ordinary easement will not be considered. For discussion of this problem see King, *The Assessment and Taxation of Easements*, 16 WASH. L. REV. 36 (1941), and Kloek, *Effect of Tax Deeds on Easements and Rights of Way*, 16 CHI-KENT REV. 328 (1937). The additional problem of the effect of a tax foreclosure sale upon an "easement of necessity" is presented where, as in Washington,

an ordinary easement is cut off by the sale. *Note:* 40 A. L. R. 523, 4 SUMMERS, OIL AND GAS (2d ed.) § 652; 3 TIFFANY ON REAL PROPERTY (3d ed.) § 772. The Kansas courts, under the mandate of a strongly worded statute, have consistently vested clear title in the tax deed grantee. *Board of Regents of the Kansas State Agricultural College v. Linscott,* 30 Kan. 240, 1 Pac. 81 (1883), *Girard Trust Co. v. Jones,* 81 Kan. 753, 106 Pac. 1052 (1910) and cases there cited. The Washington cases hold similarly. *Harmon v. Gould,* 1 Wn.(2d) 1, 94 P.(2d) 749 (1939), *Wilson v. Korte,* 91 Wash. 30, 157 Pac. 47 (1916), *Hanson v. Carr,* 66 Wash. 81, 118 Pac. 927 (1911). The problem of "extraordinary" easements raises considerations different than those involved in ordinary easements.

The Kansas court preserved the easement of ingress and egress in the principal case apparently because it was felt to be inseparable from the dominant estate, *i.e.,* as long as the estate in the minerals existed, the easement must necessarily co-exist. The court reached this result despite a statute providing that the grantee in a tax foreclosure sale must take clear title. It may be that the same result is suggested by the very nature of an estate. Ownership is technically defined as a set of rights the total of which equals a fee. BIGELOW, INTRODUCTION TO THE LAW OF REAL PROPERTY, c. 2, § 2. It is at least arguable that the right of access is really one of those rights inherent in the estate itself, rather than an easement in another's land. Thus a tax foreclosure which did not touch the mineral estate could not by definition touch the right of access. Regardless of the theory, however, the undeniable hardships caused by a refusal to provide access to an otherwise inaccessible estate in the minerals not cut off by the foreclosure sale would seem to make the result almost inevitable. The Washington statute is much less strict. It provides merely that the lien of general taxes is superior to all other liens and claims on property. REM. REV. STAT. § 11260 [P P C. § 979-491]. Considering this, the Washington court should have little trouble in reaching the same result.

E. R. F

Trusts — Administration — Deviation from Terms of Trust Instrument. *T* died in 1940. His 1939 will directed *D,* trustee, to pay his grandson *P* $750 per year for support and education, such payments to continue as long as *P* was a student in good standing at some recognized college "but in no event beyond December 31, 1945." *P* was ordered to active military duty in 1942, having then completed one year of work in law school. After his discharge in 1946, *P* continued his legal studies and brought this action to compel *D* to resume payments to him under the trust. *D* contended that such payments were contrary to the clear terms of the will. Judgment for *P* *D* appealed. *Held.* Affirmed, *D* required to make payments to *P* for an additional period of three years. *Donnelly v. National Bank of Washington,* 27 Wn.(2d) 622, 179 P.(2d) 333 (1947).

While the managerial powers and duties of a trustee are circumscribed by the trust instrument, a court of equity with inherent jurisdiction to control the administration of trusts may not only define the extent of those powers and duties but may within limits modify them or confer others. *In re New,* 2 Ch. 534 (1901), Scott, *Deviation from the Terms of a Trust,* 44 HARV. L. REV. 1025 (1931). When intervening circumstances not contemplated by the settlor would render the directed course of conduct inadvisable for the welfare of beneficiaries and defeat or substantially impair accomplishment of the settlor's purposes, the court will direct or permit the trustee to deviate from a term of the trust. RESTATEMENT, TRUSTS § 167 (1935), 3 BOGERT, TRUSTS AND TRUSTEES § 561 (1946). In such event the court must

as far as possible occupy the place of the settlor and do what it conceives he would have dictated had he anticipated the exigency. *Curtiss v. Brown,* 29 Ill. 201 (1862), 2 SCOTT, TRUSTS § 167 (1939). Deviation may involve the performance of acts not authorized, omission to perform acts directed, or performance of acts forbidden by terms of the trust. Examples of authorization to do specifically prohibited acts, clearly the most drastic form of deviation, include the granting of power to sell trust assets, *Price v. Long,* 87 N. J. Eq. 578, 101 Atl. 195 (1917), *Young v. Young,* 255 Mich. 173, 237 N. W. 535 (1931), *Kelly v. Marr,* 299 Ky. 447, 185 S. W.(2d) 945 (1945), *see* annotation, 168 A. L. R. 1018 (1947), to execute long-term lease, *Marsh v. Reed,* 184 Ill. 263, 56 N. E. 306 (1900), to sell at higher price, *Adams v. Cook,* 15 Cal.(2d) 352, 101 P.(2d) 484 (1940), and to make other investments, *Cutter v. American Trust Co.,* 213 N. C. 686, 197 S. E. 542 (1938). In the majority of cases examined the deviation was necessary to prevent serious impairment or destruction of, or to gain some financial improvement for, the trust estate.

In the instant case the court concluded from the language of *T's* will that *T* had not foreseen the contingency of world conflict interrupting *P's* schooling, that his dominant purpose was to provide *P* with the specified funds with which to complete his legal education, and that this purpose plainly overrode the time limitation. Relying upon the rule of the RESTATEMENT, *supra,* the court ordered the trustee to act in contravention of a term of the trust instrument (*viz.,* the time limit upon payments) to avoid frustration of the settlor's purpose. While this result is commendable, the application of the deviation doctrine here appears to go beyond the authority of the cases in which strict adherence to the terms of the trust would have resulted in loss to the estate. Of all such cases it can be reasoned that the settlor would have directed such an alternative procedure rather than allow his trust estate to suffer unnecessary loss; hence the justification for judicial intervention is great. Where no such emergency threatens the administration of the trust, exercise of this equitable power should be tempered by the realization that any deviation may defeat the expectations of the testator.

R. E. B.

Evidence—Confessions and Admissions. *D* was charged with first degree murder. At the trial there was admitted in evidence, over objection, a complete stenographic transcript of an interview in the prosecutor's office in which *D* had not confessed guilt of the crime but had made several damaging statements. This transcript had been *signed* and *sworn* to by *D.* Conviction and appeal. *Held:* Reversed. Since the transcript did not admit guilt of the crime, it was not a confession and should have been excluded as hearsay. *State v. Gregory,* 25 Wn.(2d) 773, 171 P.(2d) 1021 (1946).

The transcript was admittedly hearsay. The basis of its admission by the trial court apparently was that it constituted a *confession* and thus fell under a well-recognized exception to the hearsay rule. The Supreme Court ruled correctly that the transcript was not admissible as a confession since *D* did not admit the truth of the guilty fact charged. 3 WIGMORE, EVIDENCE § 821 (3rd ed. 1940).

It is submitted, however, that the transcript was properly admissible as an *admission.* Anything ever said by a party opponent may be used against him, provided it exhibits inconsistency with the facts now asserted by him in the pleadings. 4 WIGMORE, EVIDENCE § 1048 (3rd ed. 1940). Since the transcript in the instant case was signed and sworn to, it could be used not only for the purpose of refreshing the witness' memory, but was, like any relevant written sttaement of the accused, *itself*

admissible in evidence as an *admission. State v. Dersiy,* 121 Wash. 455, 209 Pac. 837 (1922).

If the lower court committed any error it was in allowing the stenographer who transcribed the transcript to *read* it in court. The only permissible use of the transcript by her was to refresh her recollection. *See Seattle v. Erickson,* 99 Wash. 543, 169 Pac. 985 (1918).

J. M. T.

Prudent Man Trust Investment Statute. Effective June 12, 1947, the Washington legislature enacted the "prudent man" or Massachusetts rule of investment of trust funds by fiduciaries. WASH. LAWS 1947, c. 100. Sections 2, 4, 5, and 7 of the act constitute an almost verbatim enactment of the Model Prudent Man Statute prepared by a committee of the Trust Division of the American Bankers Association. The complete Washington act was formulated and strongly advocated in a pamphlet issued by the Corporate Trustees Association of Washington entitled *Proposed Prudent Man Trust Investment Statute for Washington.* The act repeals a group of statutes which constituted a "legal list" or itemized specification of investments which would be permissible for corporate trustees. REM. REV. STAT. § 3255-1 *et seq.* (P P C. § 313-1 *et seq.*).

This switch from the legal list to the prudent man rule brings Washington into the rapidly growing group of eighteen states which has either legislatively (thirteen states) or judicially (five states) determined that the interests of trust administration can best be served by allowing fiduciaries in their investments to be governed by the exercise of such

judgment and care under the circumstances then prevailing, which men of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital (Sec. 2)

rather than by forcing them to adhere to an inflexible list of permitted investments. A total of nine states, including Oregon and California, have now enacted the Model Prudent Man Statute in whole or in part. 1 CCH TRUST & EST. LAW SERV. ¶ 9005 (1947). The relative merits of the two rules have been widely argued, with a large majority of the commentators advocating the prudent man rule. In practical operation the prudent man rule has apparently proved more satisfactory. Several states have abandoned the legal list in favor of the prudent man rule; the reverse has never occurred.

The most important changes effected by the new statute are. (1) the act applies to individual as well as corporate trustees, whereas the legal list applied only to the latter; (2) the act greatly liberalizes the scope of permitted investment to include corporate bonds and common stock, while the legal list allowed investments involving no greater risk than public utility and industrial bonds.

Section 2 of the act, quoted above, incorporates the exact words of Mr. Justice Putnam in the widely cited case of *Harvard College v. Amory,* 9 Pick. 446 (Mass. 1830), where the prudent man rule was first enunciated. A fair inference from this is that the legislature intended to make available for the guidance of Washington courts the large body of case law that has developed in Massachusetts under the rule. Quick access to this case law is available in an article written by the draftsman of the Model Statute, Mayo A. Shattuck, entitled, *The Massachusetts Prudent Man*

in Trust Investments, 25 B. U. L. REV. 307 (1945). The article was prepared especially for assistance to the bench and bar in states adopting the Model Statute.

A study of the literature on the subject indicates that the recent growth in the number of states adopting the Model Prudent Man Statute may in large measure be attributed to agitation in its favor by corporate trustees. Unbiased authorities agree that a rule which allows investment practices to remain freely adaptable to changing economic conditions is superior to one which rigidly limits permitted investments.

H.P

Mining—Definition. In 1917 state school land was leased by *P,* State of Washington, to the assignor of *D* for the purpose of developing magnesite deposits. In providing for payment of four per cent royalties on gross income less certain specified costs, the leasing agreement followed the language of REM. REV. STAT. § 8024, relating to leasing of state mineral lands. In 1943 action was instituted to recover certain royalties due under this agreement. *D* claimed that the original agreement had been modified as to royalty payments in 1934 by the commissioner of public lands and urged that this modification was within the commissioner's authority because *D* was not conducting *mining* operations as provided by statute but rather was *quarrying,* and that *D* has made all payments under the modification. Judgment for *D* in the trial court. Appeal. *Held.* Reversed, three judges dissenting. Although *D* was in a technical sense *quarrying* magnesite, the commissioner had no power to modify the agreement. This is because *mining* is a very broad term; it includes dredging, placer mining, and any means by which mineral is extracted from its resting place. As such it includes *quarrying. State v. Northwest Magnesite Co.,* 127 Wash. Dec. 900, 182 P.(2d) 643 (1947).

This is the first Washington case interpreting the meaning and scope of the term *mining.* As originally used, the words *mine* and *mining* were exclusively connected with underground workings. *Bell v. Wilson,* L. R. 1 Ch. 303, 35 L. J. Ch. 337 (1866), *Murray v. Allard,* 100 Tenn. 100, 43 S. W. 355 (1897), *Brady v. Smith,* 181 N. Y. 178, 73 N. E. 963 (1905). However, in later times these terms have received broader interpretation. Under modern construction they are not limited to underground excavations, but include minerals and material reached by open workings and workable only by open cuts. *Nephi Plaster & Mfg. Co. v. Juab County,* 33 Utah 114, 93 Pac. 53 (1907), *Certain-Teed Products Corp. v. Comly,* 54 Wyo. 79, 87 P.(2d) 21 (1939), *People v. Silver,* 16 Cal.(2d) 714, 108 P.(2d) 4 (1940), 36 AM. JUR., MINES & MINERALS, 281, § 2.

Although the dissent is correct if the lay definition of this term is used (*see* WEBSTER'S NEW INTERNATIONAL DICTIONARY), it seems desirable that this particular statute receive a broad interpretation since it relates to a means whereby the state can profitably utilize public lands containing mineral deposits. It is believed that in view of the unrestricted wording of the authority relied upon, principally AMERICAN JURISPRUDENCE, this case will be determinative of the meaning given to the term *mining* as used in other Washington statutes unless it clearly appears in such statute that the legislature intended otherwise.

Nothing is found in the following statutes which precludes this approach; *see* REM. REV. STAT. § 8608 *et seq.* (P P C. § 29-1) Mining Corporations; REM. REV. STAT. § 8614-1 *et seq.* (P P C. § 739-1) State Development of the Mining Industry; REM. REV. STAT. § 8615 *et seq.* (P P C. § 738-1) Location and Possession of Mining Loads; and REM. REV. STAT. § 7797-155 *et seq.* (P P C. § 940-279) Leasing of

State Mineral Lands. (This last section concerns leases made after 1927.) REM. REV. STAT. § 8857 *et seq.* (P P C. § 738-43) Protection Against Open Shafts is so broad in language that it would not be necessary to determine whether *mining* comprehended *quarrying*. On the other hand, as to REM. REV. STAT. § 8636 *et seq.* (P P C. § 742-3) Coal Mining Code, although REM. REV. STAT. § 8636 (P P C. § 742-3) defines a mine simply as "all excavations penetrating coal or other strata," the qualification in REM. REV. STAT. § 8856 (P P C. § 742-5) stating that "no coal mine shall be considered a mine for the purpose of this act unless five or more men are employed *underground*" would seem to prevent utilization of the broad definition. Finally REM. REV. STAT. § 7675 (P P C. § 709-1) Workman's Compensation Act, by specifically distinguishing between the two terms, precludes the applicability of the instant case as to definition.

R. A. C.