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DISTRICT COURT DIGESTS

The following are digests of opinions selected by the judges of the District Courts of North Dakota as dealing with interesting or significant points of law. In view of the fact that these opinions are not regularly published, the North Dakota Law Review presents these digests in the hope that they will be of value to the bar.

APPEALS FROM POLICE MAGISTRATE'S COURT

CITY OF MINOT v. KITZMAN, District Court for the fifth judicial district of North Dakota, Eugene A. Burdick, Judge. Paul Campbell appeared as attorney for plaintiff-appellant; Joseph P. Stevens represented defendant-respondent.

Defendant had entered a plea of guilty before the police magistrate of Minot, but was allowed a new trial by the magistrate and was found innocent. An appeal by the city to the District Court was dismissed on the ground that the city had no right of appeal from the final decision of the police magistrate.

The court cited North Dakota Constitution section 113 which provides for the creation and jurisdiction (all cases arising under ordinances of a city) of police magistrates. Section 114 provides that appeals shall lie from final decisions of police magistrates ". . . as may be prescribed by law." Sections 103 and 113 limit the District Court to exercise of appellate jurisdiction with respect to the final decisions of police magistrates.

Section 40-1819, N. D. Rev. Code (1943), relating to police magistrates, provides in part: "An appeal may be taken to the district court from any judgment in a police magistrate's court . . . in the same manner as is provided for the taking of an appeal from a justice's court generally . . ." Section 33-1240 relating to justice courts, specifies that "An appeal in a criminal action duly perfected transfers the action to the district court for trial anew regardless of any ruling or decision of the justice . . . " However, the court pointed out that the District Court has only appellate jurisdiction of final decisions of police magistrates. Thus it appears that Section 40-1819 was ineffective as an attempt to provide for appeals from decisions of police magistrates, and that such appeals are not now possible.

At any rate, Section 40-1819 provides for appeals only by defendants, thus precluding plaintiff-city from taking an appeal. The court stated that ". . . . the right of review of the decision of the inferior tribunal must be exercised by writ of certiorari".

FRAUD IN INCEPTION OF DEED

SIGGERUD v. BRACKSIECK, Civil No. 3025, District Court for the fifth judicial district of North Dakota, Eugene A. Burdick, Judge. R. H. Points and Higgins and Donahue appeared for plaintiffs. F. Leslie Forsgren represented defendants.

Action to quiet title. Defendant claims as a bona fide purchaser for value of a mineral deed of an undivided one half interest in the minerals under the

land involved. Plaintiff contends that the mineral deed involved was executed as a result of fraud in its inception and is therefore void for all purposes.

The testimony indicated that Carl Siggerud was the owner of one half the mineral estate under 680 acres of land. He is a farmer, 58 years old. His education ended with the 8th grade and he has had little business experience. One McKee, the husband of a cousin of Siggerud and a long time resident of the same community, asked to purchase an oil and gas lease of Siggerud's mineral rights. All negotiations dealt only with the execution of such a lease. The price paid was 10 cents per acre.

McKee actually presented for Siggerud's signature both an oil and gas lease and a mineral deed, covering the top of the latter to conceal its nature. At the time of the signing Siggerud was without his glasses and so unable to read the documents, and he signed them relying entirely on the integrity of McKee. He did not discover the fraud until much later when it was pointed out to him that the record showed he had in fact executed a mineral deed. The deed was subsequently transferred to defendants, bona fide purchasers for value.

The court found there was clear and convincing evidence that the execution of the mineral deed was the result of deliberate fraud, and that Siggerud had not failed to exercise reasonable care in the course of the transaction in view of the relationship between him and McKee. "The fraud in this case having gone to the execution of the instrument rather than the inducement, and proof of the fraud being clear and unequivocal and its force undiminished by negligence on the part of the Plaintiff Siggerud, this Court, sitting as a court of equity, must declare the deed void in the hands of the Defendants as innocent purchasers."

FRAUD – MISREPRESENTATION OF STATE OF MIND

SMITH v. WATSON, Civil No. 7970, District Court for the fifth judicial district of North Dakota, Eugene A. Burdick, Judge. C. A. Waldron appeared as attorney for plaintiff. John F. Unwin represented defendant.

Plaintiff executed an oil and gas lease to defendant in exchange for a draft for $7,200 drawn by defendant on the Merchant's Bank of Rugby, North Dakota. Though defendant promised to pay the draft within thirty days after its issuance, the draft was not paid and defendant ignored plaintiff's repeated requests for return of the lease. No efforts to pay the draft were made until more than four months after the date upon which defendant promised payment would be made. The court found that there was no substantial justification for this delay in making payment for the lease.

Defendant recorded the lease the day after its execution. As a result, the land covered by the lease was removed from the market for oil and gas lease prospects during the period the lease was on record. Defendant eventually sold the lease to an innocent purchaser for value for $14,000.

The court found that though the defendant had promised unconditionally to pay the draft given for the lease within thirty days after its execution, he had no funds in the bank upon which the draft was drawn, and intended to pay it within thirty days only in the event that he located a buyer for the lease within

that period. At the time of the execution of the lease, the defendant had no contemplated purchaser. N.D. Rev. Code § 9-0308 (1943) provides in part:

"Actual Fraud Defined. Actual fraud within the meaning of this title consists of any of the following acts committed by a party to the contract, or with his connivance, with intent to deceive another party thereto or to induce him to enter into the contract:

"4. A promise made without any intention of performing it; or

"5. Any other act fitted to deceive."

"Under the view taken by this court, the conduct of the defendant Watson in making an unconditional promise to pay the draft within thirty days, when performance of such promise was dedendent upon contingencies known to him and unknown to the plaintiff, constitutes an act fitted to deceive the plaintiff which act was material in inducing the execution and delivery of the oil and gas lease and without which the oil and gas lease might never have been executed."

It has long been recognized that fraud may be predicated on nonperformance of a promise when, at the time the promise is made the promisor has no intention to perform, but intends by such promise to deceive the promsee and induce him to act otherwise than he would have acted but for such promise. (citing cases). "The instant case calls for an extension of this principle in a case where the promisor while not without any intention of performing, entertains the mental reservation that the promise will be performed upon the happening of certain contingencies known to him and not known to the promisee."

N. D. Rev. Code § 59-0106 (1943) provides in part:

"Implied Trust; How Created. An implied trust arises in the following cases:

"2. One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an implied trustee of the thing gained for the benefit of the person who would otherwise have had it;"

"Thus in the case at bar, defendant Watson by receiving the sum of $14,000 as consideration for the assignment of the oil and gas lease executed by the plaintiff must hold such sum of money as an implied trustee in favor of the plaintiff."

LABOR LAW – JURISDICTION OF STATE COURTS

MINOR v. BUILDING AND CONSTRUCTION TRADES COUNCIL, District Court for the fifth judicial district of North Dakota, Eugene A. Burdick, Judge.

Plaintiffs, two partners doing business as Oil Field Service Company, ask that defendants be permanently enjoined from interfering with, molesting or damaging the business of plaintiffs by picketing or otherwise. Plaintiffs are contractors engaged in constructing a natural gas processing plant for the Signal Oil and Gas Company. Defendants are the Building and Construction Trades Council in affiliation with the American Federation of Labor, several allied labor unions, and the respective officers and agents of these organizations.

Construction of the plant began in the spring of 1953. Plaintiffs employed

from 35 to 90 employees during the summer and fall, none of whom were union members. Applicants who were affiliated with unions were refused employment. A contractor who had been participating in the job prior to this action had taken a vote among his employees who voted not "to go union", and later had discharged one of its men for violation of an order not to discuss with other employees the matter of joining a union. In July representatives of the defendant labor organizations conferred with representatives of plaintiffs in an unsuccessful effort to negotiate union security contracts with the respective unions. Later these representatives of defendants also attempted, without success, to persuade the Signal Oil and Gas Company to influence plaintiffs to make the project a union job or to replace plaintiffs with a union contractor. Thereupon, on August 21, 1953 defendants placed pickets at the entrances to the plant site where they displayed placards stating, "This project unfair to organized labor". "In one group one of the pickets held a camera and seemingly took photographs of persons and vehicles entering the plant site, while another picket seemingly wrote down the license numbers or other data on persons entering the plant site. The pickets consisted of several representatives of the defendant labor organizations. Picketing was carried on by walking back and forth in a rotating manner directly across and in front of the plant entrances. In no instances, however, was actual force used to prevent persons or vehicles from entering the plant site." As a result of the refusals of members of other unions to cross the picket lines, the arrival at the plant site of one truckload of supplies and one carload of cement was delayed. None of the pickets were employees of plaintiffs and none of plaintiffs' employees ceased work.

It was stipulated that the construction was work affecting interstate commerce, and within the jurisdictional policies of the Natoinal Labor Relations Board. The testimony indicates that defendants' objective in picketing was to secure union security contracts for the construction projects, and that failing to achieve this by negotiation, defendants sought their objective through coërcive picketing. Defendants also sought to require Signal Oil and Gas Company to cease doing business with plaintiffs, thus violating Section 8(b) of the Labor Management Relations Act of 1947. In these circumstances, the National Labor Relations Board has exclusive jurisdiction over the activities constituting unfair labor practices. "However, the state is not excluded from exercising its police power if the unfair labor practice is attended by conduct coërcive in nature."

The legislative policy of the State of North Dakota is indicated by the following statute, as well as by a number of similar related provisions.

> N. D. Rev. Code § 34-0913 (Supp. 1953). "Boycotting, Secondary Boycotting, and Sympathy Strikes Against Public Policy. Boycotting, secondary boycotting and sympathy strikes are hereby declared to be against the public policy and against the peace and dignity of the state of North Dakota and shall be subject to restraint by the district courts of the state of North Dakota as well as suits for damages therein."

"Clearly, coërcive picketing, as distinguished from persuasive picketing limited to the display of a banner or the utterance of words not unlawful in nature, which effectively created a secondary boycott is a vice condemned by the law of the State of North Dakota." . . . . "The use of pencil and pad and the pretended if not actual use of a camera, coupled with the formation of a

picket line rotating in front of the entrance to the plant site, are activities which, unless restrained, are likely to precipitate violence and are in excess of the right of free speech."

Though plaintiffs' refusal to hire union members is an unfair labor practice under the Labor Management Relations Act of 1947, such conduct is *malum prohibitum*, not *malum in se.* Plaintiffs therefore are not precluded from receiving the aid of a court of equity, in view of the fact that in disputes of this nature not only the immediate parties, but society as a whole, has an interest.

In the exercise of the police power, this court will grant a permanent injunction, but it will prohibit defendants only from use of "coërcive measures calculated or likely to intimidate or threaten retaliation to persons engaging in business intercourse with the plaintiff Oil Field Service Company." Thus, "the use of cameras and the taking of notes with pencil and paper and the maintenance of a rotating picket line as an obstruction" will be forbidden. Peaceful picketing may not be enjoined since it is a form of free speech protected by the Constitution of the United States, and since such activity falls within the exclusive jurisdiction of the National Labor Relations Board.

OIL AND GAS LEASES – DELAY RENTALS

SELLE v. STANOLIND OIL & GAS CO., Civil No. 2975, District Court for the fifth judicial district of North Dakota, Eugene A. Burdick, Judge. Milton K. Higgins appeared for plaintiff, while William R. Pearce and John C. Gunness represented defendant.

This is an action to quiet title in which plaintiff asks that an oil and gas lease which he gave to defendant be declared terminated, so as to remove it as a cloud on the title.

The lease provided that if drilling operations were not begun it would terminate after one year unless upon the anniversary date of the lease the lessee paid $400 to the lessor's agent in the manner prescribed. Such payment permitted deferring of drilling operations for 12 months, and further payments could similarly extend the period within the primary term of the lease. The lease provided that rental payments could be diminished in the event that the interest of the lessor were discovered to be less than the full undivided fee.

It was stipulated that defendant was informed by the Bank of North Dakota that it was the owner of one half the minerals under part of the land involved. Accordingly, defendant deposited only $240 with the plaintiff's agent to cover delay rentals for the 12 months period from April 15, 1952. It was further agreed that plaintiff is in fact the sole owner in fee of the land involved.

The court held that the lease terminated *ipso facto* April 15, 1952 upon the failure of defendant to make the proper delay rental payment. It is elementary that plaintiff cannot be held responsible for the inaccurate information transmitted to defendant by the Bank of North Dakota. The fact that plaintiff accepted and retained for about a year the insufficient rental payments before notifying defendant of the termination of the lease does not estop plaintiff from asserting that the termination resulted. Certain decisions have held that acceptance of delay rentals after the date upon which they were due created an estoppel against the lessor, but each of these cases involved a change in position of the lessee (typically, beginning to drill) in reliance upon the ac-

ceptance of the late rental payment. The stipulated facts show no change in position on the part of defendant.

The lease provided that no change in ownership of the land should be binding on the lessee until he was furnished with certified copies of the instruments involved in the change. The defendant-lessee, having chosen not to rely on this protection, must suffer the consequences of that choice.

RESIDUARY STATUTE OF LIMITATIONS

WITTROCK v. WEISS, District Court for the fifth judicial district of North Dakota, A. J. Gronna, Judge.

Plaintiff brought action to quiet title to certain land located in Williams County, claiming as heir of the holder of the fee simple interest who died in 1916. Defendant pleads the statute of limitations. N. D. Rev. Code § 28-0122 (1943) provides:

> "Limitations on Actions Not Specifically Provided for. An action for relief not otherwise provided for must be commenced within ten years after the cause of action shall have accrued."

This is primarily an equitable action to remove a cloud on the title in the form of a tax deed issued to defendant in 1947 by Williams County, and is therefore governed by the residuary statute of limitations quoted above.

One in possession of land has a continuing right to have a cloud on his title removed. This right is analogous to that created by a continuing trespass; thus, as long as the possession is maintained a cause of action for removal of a cloud on the title continues to accrue and is not barred by the statute of limitations. Therefore, plaintiff's action is barred only if he has been continuously out of possession for ten years prior to this action.

Williams County took a tax deed to the land involved on March 1, 1940. From 1940 till 1943 it leased the land for grazing purposes, and it had summer fallowed eighteen and one half acres of the land in 1943. The court found that this constituted adverse possession of the land by the county or its agent at least for 1943. In November, 1943 defendant entered into a contract for deed to the land with Williams County and he has been in actual possession since that time. The possession of the County under a tax deed is not necesasrily sufficiently adverse during the persistence of the former owner's statutory right to repurchase to initiate the running of the ten year statute which vests a new title in one who has been in adverse possession under color of title and who has paid the taxes assessed against the land during that ten year period. N. D. Rev. Code § 47-0603 (1943). Such possession, however, is sufficient to support a finding that plaintiff has been out of possession so as to permit the running of the ten year residuary statute of limitations. Since there was privity between the County and defendant, its grantee, "tacking" is permitted; or, more accurately, legal possession did not revert to plaintiff when actual possession was transferred from the County to defendant. Therefore, plaintiff has been continuously out of possession for ten years beginning with 1943, and his action is barred by the ten year residuary statute of limitations.

SALE OF PUBLIC LANDS

STATE OF NORTH DAKOTA v. AMERADA PETROLEUM CORPORATION, *et al*, Civil No. 8301, District Court for the fifth judicial district of North Dakota, Eugene A. Burdick, Judge.

The State of North Dakota and another brought this action to quiet title to certain land in Williams County. In 1929 the land was mortgaged to the State of North Dakota by Ernest Bylin, owner in fee simple, and his wife, to secure a loan made by the Board of University and School lands from trust funds held for the hospital for the insane. Foreclosure resulted, Bylin failed to redeem, and a sheriff's deed was issued to the State of North Daokta and recorded September 25, 1941. September 28, 1944 the Board of University and School Lands executed a contract for sale of the land to Bylin on the theory that though the period for redemption from the mortgage had expired, he was authorized to repurchase by N. D. Laws 1943 c. 231 for the total amount owed the state when it took possession of the land. Later this contract was assigned to one Kvam who paid the balance of the purchase price and received a quit claim deed from the Board of University and School Lands. The claims of all defendants who appeared depend upon the validity of these transactions with Bylin and Kvam since those claims are derived from the title of Kvam.

N. D. Laws 1941, c. 252 provides in part:

> "§ 1. The Board of University and School Lands is hereby authorized to sell to bona fide farmers only, any of the lands within its control and belonging to any of the permanent school or institutional funds exclusive of Federal Grant Lands in the manner and upon the terms herein provided:
> "(1) Manner of Sale:
> "All such lands shall be appraised by the Commissioner of University and School Lands or his deputy or representatives such appraisal to be approved by the Board of University and School Lands and shall be sold for not less than the appraised value and not less than the amount of permanent school funds invested therein to the highest bidder at public sale conducted at the front door of the Court House in the county seat of the county wherein the lands to be sold lie between the hours of nine o'clock in the forenoon and four o'clock in the afternoon."

N. D. Laws 1943, c. 231 amended subsection (1) by adding the following paragraph:

> "(b) If the mortgagor or former owner from whom the lands were acquired or his widow or one or more of his lineal descendants, who in all cases must be a bona fide farmer residing upon the land, not less than three days prior to a public sale of such land, shall make a bona fide offer to repurchase such lands at a price not less than the combined amounts of the original unpaid loan plus costs paid by the state and interest unpaid at the time the state acquired title to such lands, the Board of University and School Lands shall resell any such lands to any such bona fide applicant at such sale upon the terms and conditions provided for in this chapter except that upon such private sale the cash payment shall be not less than twenty per cent of the sale price."

The court noted that the 1943 amendment did not take effect until nearly two years after the mortgage loan to Bylin, and that the amendment "was not within the contemplation of the parties nor within the scope of the mortgage contract". Further, it was stipulated that Bylin at no time resided upon the land and that Kvam is not related by blood or affinity to Bylin.

The court rejected the contention that the 1943 amendment was intended to constitute an extension of the right of redemption. The act is couched in such terms as "repurchase", "resell" and "sale" and makes no mention of redemption. The 1941 act also does not deal with the right of redemption; rather, it is devoted entirely to the method of sale of the lands involved.

If it were conceded that the 1943 amendment creates an extension of the right of redemption the act would be unreasonably discriminatory since the right is accorded only to a "bona fide farmer *residing upon the land.*" (emphasis by the court). Were the class restricted only to "bona fide farmers" or their lineal descendants it could be considered a plausible effort to foster the basic industry of agriculture. As the class is now defined, the right to the benefits of the act may depend upon the coincidence of the location of the residence buildings on the land involved, or in some cases upon whether the person seeking to repurchase has been successful in an effort to become a tenant of the State, so as to be "residing upon the land." "Proper classification is permitted, but arbitrary and unreasonable discrimination is forbidden." Viewing the 1943 amendment as conferring a right to repurchase the land under the conditions prescribed, the definition of the class of person permitted to repurchase remains fatally discriminatory.

The provision for private sale contained in the 1943 amendment also violates section 185 of the North Dakota Constitution in that it makes a donation to a privileged buyer by enabling him to buy for less than the price that probably would have been realized at a public sale. That provision also conflicts with section 160 of the North Dakota Constitution which provides by reference that such lands shall be sold at public auction to the highest bidder. See *Herr v. Rudolph,* 75 N. D. 91, 26 N.W. 2d 916 (1947).

Since the statute under which the deed was issued to Kvam is unconstitutional, it is as if the law had never existed, rights cannot be built up under it, and the attempted transfer of the land was ineffectual. The court therefore, has equitable jurisdiction to cancel the deed as a cloud on the record title, even though the rights of bona fide purchasers from the supposed grantee will be destroyed. The state may not be estopped by the issuance of a deed without compliance with statutory or constitutional requirements, such a deed being void from its inception, and its issuance beyond the authority of the officers who executed it. The deed to Kvam will be cancelled, and the consideration he paid will be refunded.

TAX TITLES

ANDERSON v. RUSSELL, District Court for the fifth judicial district of North Dakota, Eugene A. Burdick, Judge.

Plaintiff brought action to quiet title to certain land. Two defendants appeared, alleging ownership of the land in fee simple and asking that title be quieted in them. Plaintiff's reply alleged in part that since defendants had not been seized or possessed of the land within twenty years prior to this action, their defense and counterclaim was barred by the statute of limitations.

Plaintiff claimed title to the lands in controversy through two tax title proceedings. Defendants contended that the notices of expiration of the periods of redemption in these proceedings were fatally defective since they stated a

single amount necessary to redeem which included delinquent taxes for 1925 and subsequent delinquent taxes for 1926, 1927 and 1928. Defendants further contended that the 1926, 1927 and 1928 taxes had not been sold more than three years prior to the giving of the notices, as required by the allegedly applicable statutes. The notices were dated January 4, 1930 and served during 1930. The District Court held that these alleged defects did not render the proceedings invalid since the proceedings transpired prior to the enactment of Laws of 1931 c. 298 and Laws of 1939 c. 235, the effect of which was to relieve the redemptioner of the duty to pay any taxes other than those due at a tax sale had three years prior to the notices of expiration of the period of redemption. Kelsch v. Miller, 73 N. D. 405, 15 N.W. 2d 433 (1944). Also, in 1930 the law did not require the County Auditor to state separately the amount of tax, penalty and interest for each year properly included in the notice of expiration of the period of redemption.

Defendants also contended that plaintiff, purchaser of the tax title, holds that title in trust for defendants on the theory that plaintiff had mortgaged the land to defendants and as mortgagor had a duty to pay the taxes which were the basis for the tax title proceedings, and so cannot be permitted to profit by the violation of that duty. The court concluded, however, that the foreclosure of the mortgage for the full amount of the indebtedness had operated as complete discharge of the obligations of the mortgagor with respect to the land and had terminated the duty of the mortgagor to pay the taxes out of which the tax title arose. The relationship of mortgagor and mortgagee had thus been terminated prior to the purchase of the tax title by the mortgagor.

The court also found merit in plaintiff's allegation that defendants had not been seized or possessed of the land within twenty years prior to this action.

Judgment quieting title in plaintiffs against all defendantts.

FOR SALE:—U. S. Supreme Court Digest; Modern Legal Forms; Words and Phrases; All complete and up to date. Write or call Paul Campbell, Attorney at Law, Room 2-A Jacobson Block, Minot, North Dakota.

PUBLICATION NO. 1 OF AMERICAN BAR RESEARCH CENTER NOW AVAILABLE*

The first publication of the American Bar Research Center containing a list of unpublished legal theses and of current legal research projects in American law schools is now available at the publication cost of $1.50. Until the opening of the Research Center, copies of this valuable publication will be available by writing to John C. Cooper, Administrator of the American Bar Research Center, 240 Nassau Street, Princeton, New Jersey.

Part of the work of the Research Center has been designated as the "Research Clearing House." The purpose of the Clearing House is to obtain information as to unpublished legal theses in the libraries and files of

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the accredited law schools of the United States, and also current legal research projects in such law schools. This information as received is catalogued and classified by appropriate subjects so that the Research Center may be in position to furnish information readily to those interested. From time to time lists of such theses and research projects will be published. The present publication is the first of such lists. Supplements will be issued periodically.

Part I of this publication includes a list of unpublished legal theses showing the name of author, title of paper, date and the library where the thesis is on file. If any other library or any person interested desires to have access to any of these theses, arrangements must be made in each case with the depository library.

Part II, the list of current legal research projects, includes the name of the person engaged in each project, the subject matter and the place where the research is being carried on.