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District Court Digests

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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.

REAL PROPERTY—RIGHT OF RECOVERY

PARK BOARD *v.* SCHUMACHER, District Court of Williams County, North Dakota, Eugene A. Burdick, Judge. Plaintiffs were presented by Arley R. Bjella. Dean Winkjer and Walter O. Burk appeared for the defendants.

The Park Board of the City of Williston brought this action to quiet title to certain land. Defendant answered alleging that he is the sole heir of Virginia S. Wittmeier and that she donated the land in question to the City of Williston with the intention that it should revert to the donor or her heirs in the event that it ceased to be used as a Park. The other answering defendants made similar allegations.

The court found that Virginia S. Wittmeier owned the land in question in 1907, that she subsequently conveyed the land to the Park Board free and clear from all encumbrances except as of record.

In North Dakota a completed dedication of land to public use requires an acceptance of the dedication. The evidence indicates no such acceptance on the part of the City of Williston either through the use to which the land was put or through a formal resolution of the City Commission. The court also found that the plat submitted by Virginia Wittmeier which included the land in question did not show a clear intent to dedicate the land as a park and further, the certificate by which she expressly dedicated to public use the "Boulevards, Avenues, Streets and Alleys" shown on the plat omitted references to the land involved here.

Since there was no dedication of the land to the public use, the interest acquired by the city must be measured by the deed. The evidence indicates that the price the city paid for the land, including certain back taxes, was \$420.24. Since this is clearly a substantial consideration and since by definition a gift is a voluntary transfer with consideration, defendant's contention that the transfer to the city was by way of gift must be rejected. Also, though the provisions of the North Dakota Code authorizing a Board of Park Commissioners to acquire and convey the land permit it to be acquired for park purposes, it would be a strained construction to hold that they require it to be held for only such purpose.

Though there was testimony that Virginia S. Wittmeier intended the land to be used for a park, and though the minutes of the City Commission in 1916 referred to the purchase of the land "for use as a park", the deed conveying the land to the city contained no indication of the purpose for which the land was to be used, no restrictions on its use, and no provision for reversion or a right of re-entry. In the absence of a reverter clause, a mere statement of purpose for which the land is intended, even if incorporated in the deed, does not limit the interest conveyed.

Thus, contrary to the claim of defendants, the plaintiff Park Board did not forfeit the land by contracting to convey it to the Carter Oil Co.

TAX TITLES

HIGGINS v. STROMME, Civil No. 7940, District Court of Williams County, North Dakota, Eugene A. Burdick, Judge. Plaintiffs were represented by Milton K. Higgins. Frank F. Jestrab and Harold A. Pollman appeared for the respective defendants.

This was an action to quiet title to two 80 acre tracts of real estate, the result turning upon the validity and effect of certain tax title proceedings. The court first reviewed in detail the procedures followed in the course of these proceedings and found that there were no significant defects. However, prior to the assessment and levy of certain of the taxes on which tax title proceedings were based the respective owners of the adjoining 80 acre tracts had each granted to the other a 6% royalty interest in gas and oil produced on the tract of the grantor.

The court observed: "This presents the question, which is one of first impression in this state, as to whether the assessment and levy of the real estate tax and the otherwise proper service of the notice of expiration of the period of redemption and the other related tax title proceedings, operates to extinguish a royalty interest which is carved out of the fee simple prior to the assessment and levy of the tax which serves as the foundation for the tax title proceedings." The court approved the majority view "that only the interest of the taxpayer is assessed and that where an estate is carved out of the fee simple title prior to the making of the assessment of the tax that only the interest of the taxpayer is presumed to be included in the assessment." It rejected the minority view that tax title proceedings are in rem against the land itself rather than against the interests of the several owners therein. See Crum, *A Commentary On North Dakota Tax Titles*, 29 N. Dak. L. Rev. 225 (1953). Thus it was presumed that the tax assessments made after the granting of the royalty interests attached only to the residuary interests retained by the owners of the surface. The title derived through these tax title proceedings will be subject to the outstanding 6% royalty interests.

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