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Our Supreme Court Holds

war made it necessary to dispense with our annual meeting, and that was true of the district meetings. With the restrictions removed we should be able to resume these county and district meetings at fairly frequent intervals. The ideas and suggestions developed there may be channeled to the State Association where they may be sorted and form the basis of activities that will reflect the thinking of the Bar as a whole, and result in a more unified and articulate body.

During the past few Annual State meetings, the concensus was that the Sectional Assemblies were the highlights of the meetings. Some very fine outlines and briefs were prepared by the leaders of the assemblies and printed in the brochure distributed at the Valley City meeting. These can serve as a nucleus for county and district meetings. The one hour discussion of each topic alloted at the annual meeting is necessarily too short. Some of the topics were too important to be disposed of in such short time. Because several topics were discussed at different assemblies during the same hour, some members missed attending other sectional meetings of equal interest to them. Then there are members who were unable to attend the meeting at all. The county and district meetings would afford the membership an opportunity for further study and a more thorough discussion of some of these topics. The six topics covered in the brochure published this year, could very easily furnish the basis for at least three or four county and district meetings. Why not try this experiment?

May I also add that I shall truly welcome suggestions from the members of the Bar for the betterment of our Association.

Sincerely yours,
H. A. MACKOFF
President.

OUR SUPREME COURT HOLDS

In Otto Werner, Pltf. and Applt. vs. Carolina Werner, Cass County, North Dakota, a public corporation, and all other persons unknown claiming any estate or interest in or lien or incumbrance upon the property described in the complaint, Defts. and Gustave Werner, Intr. and Respt.

That where on May 15, 1940, a county instituted proceedings to terminate the owner's right of redemption to land sold to the county for failure to pay taxes for the years 1934 and 1935 the procedure to be followed was that prescribed by Ch. 235, Sess. Laws N. D. 1939.

That where a county seeks to acquire title to land sold to the county at tax sale the statutory notice of expiration of the period of redemption is jurisdictional. Until it is served upon all of the parties prescribed by the statute in the manner provided therein and the period of redemption has expired, the right to redeem remains as to all.

That an essential element of equitable estoppel is a representation which may consist of words, acts or silence, believed and relied upon by the party claiming the benefit of the estoppel which induced him to act or refrain from acting, to his prejudice.

From a judgment of the District Court of Cass County, Hon. P. G. Swenson, Judge. Plaintiff appeals.

AFFIRMED. Opinion of the Court by Morris, J.

In Cora P. Black, individually and as executrix of the Will of Norman D. Black, Deceased, Resp., vs John Gray, as State Tax Commissioner, App.

That the avails of a life insurance policy payable to a beneficiary are not a part of the estate of the insured, and the fact that the insured had reserved the right to change the beneficiary makes no difference in this regard where the right was not exercised.

That the avails of a life insurance policy paid to the beneficiary named in the policy, are not subject to the estate tax under chapter 57-37, Rev. Codes 1943, providing for a tax upon the transfer of the net estate of every decedent.

That where the legislative intent of a statute is plain and clear upon its face, there is no need for construction and the court will give effect to the intent as thus expressed regardless of the construction that may have been put upon it by the officers charged with the duty of executing and applying it. Appeal from a judgment of the district court of Cass County, Holt, J. AFFIRMED. Opinion of the court by Nuessle, J.

In George Olivier, Pl. and App., vs. Carl Uleberg, Def. and Resp.

That in the absence of contract (express or implied) to the contrary, a partner is not entitled to receive compensation for services rendered in the prosecution of the partnership business merely because the services rendered by him are greater in amount and value than services rendered by the other members of the partnership.

That the relationship of partners is fiduciary and imposes upon them an obligation of the utmost good faith and integrity in their dealings with one another with respect to partnership affairs.

That a partner who neglects and refuses, without reasonable cause, to perform personal services which he has stipulated in the partnership agreement that he will render the partnership, is liable to account to the firm for the value of the services in the settlement of the parnership accounts.

That the mere fact that strained relations have grown up between the partners does not relieve a partner from his obligations under the parnership agreement.

From a judgment of the district court of Ward County, Gronna, J. plaintiff appeals. AFFIRMED. Opinion of the court by Christianson, Ch. J.

In J. J. Federer, App., vs. Northern Pacific Railway Co., a corporation, Resp.

That N.D.R.C. 1943, sec. 28-1419, which provides that where information regarding any point of law arising in a case is given to a jury after they have retired for deliberation, such information "must be given in the presence of or after notice to the parties or counsel", is mandatory.

That generally the failure to comply with the provisions of a mandatory statute in relation to instructions to the jury and communications between the trial judge and the jury constitutes error **oer se** and must be deemed to be prejudicial, either as a matter of law, or unless and until it is shown that no prejudice resulted or could have resulted from the noncompliance.

That where the trial judge enters the room to which the jury has retired to deliberate upon their verdict, and gives additional oral instructions in the absence of the court reporter, and in the absence and without the consent of or notice to the parties or their attorneys, error is committed, which requires that a new trial be granted.

Appeal from the district court of Morton County, Miller J. Plaintiff appeals from the judgment and from an order denying his motion for a new trial. REVERSED. Opinion of the Court by Christianson, Ch. J.

In O. O. Ulledalen, Pltf. and Resp., vs. The United States Fire Insurance Company, a foreign insurance corporation, Deft. and App.

That oral contracts to insure against loss or damage by fire covering the time elapsing between the placing of the insurance and the issuance of a policy are valid.

That under N.D.R.C. 1943, Sec. 26-0702 a legal resident of North Dakota who is licensed by the Commissioner of Insurance as the agent of a foreign fire insurance company, and who solicits insurance on behalf of such company, takes applications for policies of insurance, receives policies prepared pursuant to such applications, countersigns such policies, delivers them, and collects premiums thereon is the agent of such company to all intents and purposes,—(unless it is shown that he received no compensation for such services)—and he has authority as such agent to enter into an oral agreement insuring one who has made application for insurance against loss of or damage to the property by fire during the time elapsing between the placing of the insurance and the issuing of the policy.

That the powers of such agent cannot be narrowed by limitations not communicated to the person with whom he deals.

That a contract of fire insurance consists generally of two pre-requisites, an offer or application and its acceptance. The acceptance of the offer or application completes the contract and binds the insurer although the policy has not yet been issued or delivered.

That in the absence of a statute or an agreement to the contrary the validity and operative effect of a fire insurance contract or policy is not dependent upon the prepayment of the premium.

That a contract of insurance may be consummated without the actual or manual delivery of the policy, unless delivery is required by agreement of the parties.

That where a fire insurance policy provides that it shall not be valid unless countersigned by the local agent of the insurer, the absence of such countersignature does not render the policy ineffective where the intention to issue the policy, and the intention that it shall be effective and cover the risk is otherwise sufficiently plain.

That where a fire insurance policy provides that it shall be countersigned by the local agent of the insurer the countersigning is a matter for the insurer, and the failure to do so cannot be made the basis for denial of liability on the part of the insurer.

That in this case the defendant contends that the evidence clearly shows that the plaintiff set the fire which destroyed the insured property; and that the trial court should have ordered judgment in favor of the defendant nothwithstanding the verdict, or in any event should have ordered a new trial. For reasons stated in the opinion, it is **held**, that the evidence did not establish as a matter of law that the plaintiff burned the property; nor can it be said that the finding of the jury that the plaintiff did not burn the property is against the evidence.

That the rule against splitting causes of action exists mainly for the protection of the defendant, and the rule against partial assignments was established for the benefit of the debtor. Where in an action brought by the original owner of a claim the defendant interposes object by answer that a plaintiff has made partial assignments of the claim, and that as a consequence there is a defect of parties plaintiff because the holders of such partial assignments have not been made parties to the action, the objection is fully met where such assignees cancel the partial assignments and release the debtor from all liability and claim under such assignments and thus reinvest the plaintiff with all interest in and ownership of the claim so that the entire claim may be litigated in one action and the debtor is afforded opportunity to pay the debt,—(if one is established)—, in a single transaction.

Appeal from the District Court of Williams County, Jacobson, J. The defendant appeals from an order denying its alternative motion for judgment notwithstanding the verdict or for a new trial.

AFFIRMED. Opinion of the Court by Christianson, Ch. J.

In Lillian Trihub, Pltf. and App., vs. City of Minot, a Municipal Corporation, Stearns Investment Co., a Corporation, and Quality Lignite Co., a Corporation, Defts. and Resp.

That where, in an action based upon alleged negligence of the defendants, the evidence produced is such that reasonable men may differ as to the issue of negligence, the determination of that issue is a matter for the jury.

That contributory negligence is a matter of defense.

That where, in an action for damages based upon alleged negligence of the defendants causing death, plaintiffs case rests upon circumstantial evidence and a consideration thereof might indicate several other possible causes for the ensuing death, but the evidence as a whole shows much greater probability that the death resulted from the specific causes charged by the plaintiff the issue should be submitted to the jury and it is error for the court to grant a nonsuit on the theory the cause of death is not shown.

Appeal from the judgment of the District Court of Ward County, Hon. W. A. Jacobsen, Judge.

REVERSED. Opinion of the Court by Burr, J.

In Adams County, a Public Corporation of North Dakota, Pltf. and Resp., vs. DeRoy Smith and Dakota Collieries Company, a Private Corporation of North Dakota, Defts. and Apps.

That the term "mineral" as used in Ch. 136, Sess. Laws N. D. 1941, includes coal.

That Ch. 136, Sess. Laws N. D. 1941, impresses upon all transfers of land to which it applies reservations in favor of counties making the transfers, of fifty per cent of coal found on or underlying such land.

That repeals by implication are not favored. It is presumed that laws are passed with deliberation and with full knowledge of previous legislative action and that where a reappeal is intended express terms will be used to accomplish that result.

That although statutes passed at the same legislative session must, if possible, be construed together and effect given to each, nevertheless, if there is an irreconcilable conflict it will be presumed that the legislature intended that the earlier statute should give way to the later.

That where a statute dealing comprehensively and exclusively with a special subject is in irreconcilable conflict with a prior and more general enactment the later and more specific statute prevails.

From a judgment of the District Court of Adams County, Hon. L. C. Broderick, Judge, Defendants appeal.

REVERSED. Opinion of the Court by Morris, J.

In Peter Nagel, Pltf. and Resp., vs. Roy Emch and Alice Emch, Defts. and Apps.

That in an action to recover damages for personal injuries suffered because of the negligence of the defendants, the trial court permitted the plaintiff to show the loss of income in the operation of his farm for the year 1944—the year he was incapacitated—compared with the income for previous years when the plaintiff was uninjured, as indicating the loss plaintiff sustained because of inability to use his own services in managing his farm. Held: error, the testimony being highly speculative and with no substantial foundation for such standard of measurement.

That for reasons stated in the opinion it is held: the record shows plaintiff is entitled to recover damages in the sum of $474.00, and there is no competent testimony to support the remainder of the verdict and judgment. The judgment therefore will be reduced to $474.00 with all costs and interest from the date of the rendition of the verdict and the judgment as so

reduced will be affirmed upon condition that the respondent file a remission of the excess in the district court within thirty days after the remittitur from this court is filed therein. Upon failure of the plaintiff to comply with this condition the judgment will be reversed and a new trial ordered.

Appeal from the judgment and order of the District Court of Grant County, Hon. L. C. Broderick, Judge.

JUDGMENT AFFIRMED ON CODITION. Opinion of the Court by Burr, J.

In P. W. Kilgore, Pltf. and App., vs. The Farmers Union Oil Company of Epping, a corporation, Deft. and Resp.

That a party has a constitutional as well as a statutory right to have a jury decide disputed questions of fact in a case properly triable to a jury, unless he waives such right.

That in an action for damages for the breach of contract the defendant cannot be deprived of a trial by jury because the plaintiff prays that defendant be required to account.

That the jursdiction of a court of equity cannot be predicated upon the prayer for relief but must be based upon the allegations of fact in the complaint.

That where the complaint prays for both legal and equitable relief and the former alone is warranted by the facts pleaded, it is error to deny defendant's demand for a trial by jury.

That where A. was employed by B. to operate a gasoline and oil station, under a contract which provided that A. was to be compensated for his services by the payment to him by B. of a certain sum for each gallon of gasoline and other fuel and lubricating oils sold and A. is discharged during the period for which the contract was to exist, and B. continues to operate the business during a period of the time covered by the contract of employment, and A. brings action to recover damages which he alleges that he sustained by wrongful discharge in violation of the terms of the contract, the action is one at law for the recovery of money, and triable to a jury unless a jury is waived; and such action is not converted into an equitable action, properly triable to the court without a jury because the plaintiff prays that the defendant be required to account for the number of gallons of gasoline and other oils sold during the time the defendant continued to operate the business after the discharge of the plaintiff.

That where the record on appeal shows that an action for damages, properly triable to a jury, was tried by the court without a jury; and such record further shows that the defendant did not waive a trial by jury but demanded that the action be tried to a jury, such record presents a mistrial which requires a reversal of the judgment and a new trial.

From a judgment of the district court of Williams County, Jacobsen, J. plaintiff appeals. REVERSED AND REMANDED. Opinion of the court by Christianson, Ch. J.

In Francis G. Kohler, Pltf. and Resp., vs. Wesley V. Stephens, Deft. and Resp. and George Landgrebe, Deft. and App.

That after hearing an alternative motion by a defendant for a judgment notwithstanding the verdict or for a new trial, the trial court signed and filed with the clerk of the district court an instrument which he designated a memorandum opinion in which he used language appropriate to an order denying the motion for a new trial upon condition that the plaintiff accept a specified reduction of the verdict within a certain time, which instrument further provided that if the plaintiff did not file a consent to the reduction within the time prescribed "* * * an order shall be entered vacating the judgment against said defendant, vacating and setting aside the verdict of the jury, and granting a new trial as against the defendant

Landgrebe." A copy was mailed to plaintiff's attorneys. It also appears from the statement of the court made at a subsequent hearing on the matter that the court did not intend the memorandum to be the final act of the court with respect to the motion but contemplated that a formal order would be made. It is held, that the proceedings thus had did not constitute final action by the trial court on the motion for a new trial so as to terminate the court's jurisdiction with respect thereto and render erroneous the granting of an extension of time for plaintiff's acceptance of the reduction of the verdict and the ultimate denial of appellant's motion.

That granting of a new trial on the ground of insufficiency of the evidence to sustain the verdict lies in the sound judicial discretion of the trial court. When there is a substantial conflict in the evidence and in the absence of a showing of the abuse of such discretion the appellate court will not interfere.

That on a review of the trial court's action with respect to a motion for judgment notwithstanding the verdict the appellate court will construe the evidence most strongly against the party who seeks to have a judgment entered notwithstanding the verdict.

That it is a generally accepted rule in aid of the construction of a statute, that a limiting phrase or clause is to be restrained to the last antecedent unless the subject matter or context indicates a different legislative intent.

That under the provisions of Cg. 158, Sess. Laws N. D. 1931, (Sec. 39-0902, Par. 4, R. C. N. D. 1943) it is prima facie lawful for the driver of a motor vehicle to drive the same at a speed not exceeding twenty miles an hour in traversing or going around curves.

That in action for personal injuries resulting from a collision of motor vehicles it is not error to admit in evidence a sketch or diagram made by a witness, who arrived on the scene shortly after the accident, which tends to visualize and explain the witness's testimony by depicting matters relevant to the issues which he actually saw upon his arrival.

That the erroneous admission of evidence does not constitute reversible error unless it is prejudicial.

That where a sketch or diagram containing conclusions of a witness is erroneously received in evidence as a part of his testimony and the opposing party subsequently introduces in evidence, without limitation as to purpose, a similar exhibit upon which is depicted substantially the same conclusions by the same witness, the prejudicial effect of the erroneous introduction of the first exhibit is mitigated and reversible error may not be predicated thereon.

That under the provisions of Ch. 184, Sess. Laws N. D. 1931, (Ch. 39-15, R. C. N. D. 1943) a guest in a vehicle moving upon a public highway has no right of recovery against the owner, driver or person responsible for the operation of such vehicle for injuries sustained while riding as such guest unless they proximately result from the intoxication, willful misconduct or gross negligence of the owner, driver or person responsible for the operation of the vehicle.

That in an action seeking a joint judgment against two defendants for personal injuries arising out of the concurrent negligence of such defendants, one of the defendants upon appeal from a judgment rendered against him may not predicate error upon the ground of misinstruction too favorable to his co-defendant in whose favor the jury rendered a verdict.

From a judgment of the District Court of Cass County, Hon. Daniel B. Holt, Judge, Defendant Landgrebe appeals.

AFFIRMED. Opinion of the Court by Morris, J.

In C. L. Roe, Pltf. and App. vs. Malcolm Hetherington, Deft. and Resp. and Northern Pacific Railway Company, a corporation, Garn.

That an action in the district court may be dismissed by either party with the written consent of the other; but though the parties so agree in writing the case is not dismissed until an entry of dismissal is made in the clerk's register.

That a stipulation entered into by parties to a pending action, and dealing with important phases of a lawsuit, cannot be treated lightly; but the parties may ignore, rescind or abandon such stipulation.

That where the parties to a stipulation for the dismissal of an action continue to act contrary to its terms such stipulation will be treated as a nullity.

That where a party commences an action to recover on a promissory note, and the defendant in his answer enters a general denial and sets forth a counterclaim, and the plaintiff while the action is still pending commences another action in another state on the same note and obtains judgment, which judgment is paid by the defendant, such judgment does not bar the defendant from proceeding to trial upon his counterclaim.

Appeal from an order of the District Court of Burleigh County, Hon. Fred Jansonius, Judge.

AFFIRMED. Opinion of the Court by Burr, J.

In John Bloomdale, Pltf. and App., vs. Sargent County, North Dakota, a Municipal Corporation, et al., and The Village of Rutland, North Dakota, a Municipal Corporation, Deft. and Resp.

That the legislature has provided three ways by which a county may dispose of property that it has acquired through tax deed proceedings, (1) It may sell the property to the highest bidder at the annual sale as provided by Sec. 14, Ch. 286, Sess. Laws N. D. 1941 . (2) It may sell the property at private sale under Secs. 17 and 18 of the same chapter, in which event the former owner or his successor in interest must be given notice as therein prescribed. (3) It may proceed in the manner set forth in Ch. 118, Sess. Laws N. D. 1935, and set aside and transfer the property for park or recreational purposes or both. When any one of these procedures is followed in the manner prescribed by statute it results in the withdrawal of the land from the list of tax deed property held by the county for sale. The "tax title" no longer remains in the county and the right of the original owner to repurchase is extinguished.

From a judgment of the District Court of Sargent County, Hon. W. H. Hutchinson, Judge.

AFFIRMED. Opinion of the Court by Morris, J.

In Sylvia Milde, Pltf. and App., vs. Ralph E. Leigh, Deft. and Resp.

That an order overruling a demurrer is not an appealable order. (Section 28-2702, R. C. 1943).

Appeal from the District Court of Grand Forks County, Hon. M. J. Englert, Judge.

APPEAL DISMISSED. Per curiam opinion.

In Martha Eberlein, Resp., vs. Ike Bratcher, App.

That an order of the district court refusing to dismiss an appeal from the county court is not an appealable order.

Appeal from the District Court of Hettinger County, Hon. L. C. Broderick, Judge.

APPEAL DISMISSED. Opinion of the Court by Burr, J.