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Our Supreme Court Holds

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it was decided to have an attorney in each county of the state to give aid to residents of each county in the service of their county.

Under the able leadership of President O. B. Herigstad and Chairmen Burtness this organization has been completed. And while this will make a demand on the time of such attorneys, the high purpose of the work justifies the sacrifice of the required time and necessary work. Nor do I feel that the members of this committee are alone in their willingness to help but rather that every member of the bar in North Dakota stands ready to do a share of this work, and as many allready have done. And the assurance to our men in service that we stand ready to help them in their legal problems without charge can but make them better appreciate this willingness.

BOOKS FOR SALE

A member of our association has an extra set of Mason's U. S. Code with all supplements and phamplets issued to date. If interested write Sec'y.

OUR SUPREME COURT HOLDS

In State of North Dakota, Pltf. and Respt., vs. Walter Schmidt, also known as Waldemar Schmidt, Deft. and Applt.

That for reasons stated in the opinion it is held that the information filed in this case sets forth facts sufficient to constitute embezzlement under section 9930, C. L. 1913.

That it is incumbent upon one who assails the constitutionality of a statute to point out the specific provision of the constitution which is violated.

That the Fifth Amendment to the Constitution of the United States is a limitation only upon the power of the Federal Government; it does not apply to the states.

That a defendant in a criminal action who voluntarily takes the stand as a witness in his ofn behalf is subject to the same rules of cross-examination as any other witness, and he may be examined as to any matter or subject concerning which he testified on his direct examination, which affects his credibility as a witness.

That ordinarily, the admission on cross-examination of the defendant in a criminal action, over timely and appropriate objection on his part of irrelevant testimony tending to prejudice the defendant in the eyes of the jury constitutes prejudicial error.

That for reasons stated in the opinion, it is held that cross-examination of the defendant in this case was improper, and constituted prejudicial error.

That for reasons stated in the opinion it is held that certain instructions to the jury operated to eliminate from the jury's consideration the defense that the defendant in making certain disbursements as county treasurer acted in good faith belief that he was authorized to make such disbursements, that such disbursements constituted a proper use of such funds, and that the persons to whom the payments were made had a legal right to receive them; and that such instructions operated to the prejudice of the substantial rights of the defendant.

Appeal from the District Court of McIntosh County, Berry, Spec. Judge. The defendant Schmidt was convicted of embezzlement and appeals from the judgement of conviction and from an order denying a new trial.

REVERSED and a new trial ordered.

In August Springer, Pltf and Applt. vs. Peter Paulson, Deft. and Respt.

That when the proper county for the trial of a civil action is that of defendant's residence under the provisions of section 7417, Comp. Laws 1913, the right of the defendant to a trial in such county is absolute if asserted within the time and in the manner provided by statute.

That where the county designated in the complaint is not the proper county and the defendant answers without demanding a change of venue the court may in its discretion and upon such terms as may be just permit an application for a change of place of trial to the county of the defendant's residence to be made. The making of such an application is an act contemplated by section 7483, C. L. 1913, and is addressed to the sound judicial discretion of the trial court.

That the record is examined and it is held that under the facts disclosed, the trial court did not abuse his discretion in ordering the place of trial changed to the county of the defendant's residence upon application made after answer.

Appeal from the District Court of Cass County, Swenson, J. AFFIRMED. Opinion of the Court by Morris, Ch. J.

In State of North Dakotas, as owner and trustee of the Permanent School Fund, Platf. and Respt. vs. Griggs County, Deft. and Applt.

That Chapter 254, Sessions Laws 1935 provides an extra-judicial and speedy method of acquiring title without foreclosure to lands mortgaged to the State as security for the investment of the permanent school fund. This statute will be strictly construed and conveyances in order to be effective thereunder must fall squarely within its terms.

That the record is examined and it is held that certain quitclaim deeds received by the State of North Dakota were not executed by the record title owners of the premises therein described and thus failed to comply with Chapter 254, Session Laws 1935.

That a mortgage lien given to the state of North Dakota as security for the investment of the permanent school fund is superior to liens for real esate taxes levied after the recording of the mortgage and a tax deed based on such liens issued to a county conveys to the county a title that is subject to the State's mortgage.

Appeal from the District Court of Griggs County, Englert, J. REVERSED AND REMANDED. Opinion of the court by Morris, Ch. J.

In Sax Motor Company, a corporation, Pltf. and Applt., vs. Paul Mann, Deft. and Respt.

That the record is examined and it is held that the plaintiff is entitled to a new trial for reasons stated in the opinion.

Appeal from the District Court of Stark County, Berry, J. REVERSED and new trial ordered. Opinion of the court by Burr, J. Burke, J. concurring specially.

In Elias Boozenny, Pltf. and Applt. vs. Harry Desenko, et al., Defts. and Respts.

That the sole issue being one of fact, the record is examined, and it is held: the plantiff has failed to prove there is any sum due him from

the defendants, and therefore the judgment of the lower court is affirmed.

Appeal from the district court of Ward County, Hon. John C. Lowe, Judge. AFFIRMED. Opinion of the Court by Burr, J.

In State of North Dakota, Pltf. and Respt., vs. O. G. Cromwell, Deft. and Appt.

That Chapter 188, Session Laws 1939, an act defining and regulating the practice of professional photography, creating a board to issue licenses to such applicants to practice as qualify on examination as to competency, ability and integrity ,and making the practice without a license a misdemeanor, is examined; and it is held for reasons stated in the opinion, that said chapter 188 is not a proper exercise of the police power in that it unreasonably curtails the right to engage in the business of photography and, on that account, is unconstitutional and void as violating sections 1 and 13 of the Constitution of the state of North Dakota.

That due process of law as that term is used in section 13 of the Constitution of the state of North Dakota, providing that "no person shall * * * be deprived of life, liberty or property without due process of law" means the law of the land; that which secures the individual from the arbitrary exercise of the powers of government unrestrained by the established principles of private rights and distributive justice.

That the police power is that power inherent in every sovereignty to govern men and things under which the legislature may within constiutional limitations not only prohibit all things hurtful to the comfort, safety, and welfare of society, but prescribe regulations to promote the public health morals and safety and add to the general public convenience, prosperity and welfare.

That the police power extends to every regulation of any business reasonably required and appropriate for the public protection and is limited only by the requirement that the regulation shall not be unreasonably arbitrary or capricious and that the means of regulation selected shall have a real or substantial relation to the object sought to be attained.

That whether and in what manner a business shall be regulated are matters of policy and for the legislative department of government to determine. But, whether a regulatory statute encroaches upon personal or property rights guaranteed by the constitution are matters for the judicial department to determine.

SYLLABUS: Appeal from the District Court of Mercer County, Berry, J. From an order denying his motion in arrest of judgment and from a judgment of conviction on a charge of attempting to practice photography without a license contrary to the provisions of chapter 188, S. L. 1939, defendant appeals.

REVERSED. Opinion of the court by Nuessle, J.

In Mary Axt, Pltf. and Respt., vs. Bank of America, et al, Applt.

That a tax deed regular on its face is prima facie evidence of the regularity of the proceedings that resulted in its issuance including the service of the notice of expiration of redemption.

Before redemption has been made and before the land has been forfeited to the county, a county auditor may assign all rights of the county acquired at tax sale upon payment of the amount prescribed by statute (chap. 279, S. L. 1935).

That after a tax certificate has been assigned by the county to a private party, the sufficiency of the notice of expiration of redemption and the legality of the service thereof must be determined under the statutes applicable to tax certificates held by private individuals.

That notice of the expiration of the period of redemption from a tax sale must be served upon the persons and in the manner provided by statute. In determining the person in whose name lands described in such notice are assessed, the county auditor may rely on the records of his office and the statute does not place on him the burden of otherwise ascertaining who is the actual owner of the property.

Appeal from the District Court of Sheridan county, Jansonius, J. AFFIRMED. Opinion of the court by Morris, C. J.

Filed July 2.

In J. N. Dockter, Pltf. and Rest., vs Sheridan County, Defts. and Appts.

That Section 2 of chapter 235, S. L. 1939, amending subdivsion 6 of section 1 of chapter 266, S. L. 1927, as amended by chapter 288, S. L. 1931, providing for the sale of property acquired by counties through tax deed, and, among other things, requiring that "If the sale is for part cash, the purchaser shall forthwith pay the amount of the first installment of the bid to the county treasurer" is construed, and HELD for reasons stated in the opinion, that the term "forthwith" as used therein means within a reasonable time after the buyer's bid is accepted and that what constitutes such reasonable time depends upon the circumstances attendant upon the transaction.

That the record is examined and HELD, for reasons stated in the opinion, that in the instant case the payment by the plaintiff as a purchaser of the first instalment of the bid at a sale of tax deed property was not made within a reasonable time and therefore there was no completed sale to him.

That appeal from the District Court of Sheridan County, Jansonius, J. Action to compel the issuance of a contract for deed to the plaintiff and to set aside a like contract executed by the defendant Sheridan County to the defendants Dalos. From a judgment for the plaintiff defendants appeal. REVERSED. Opinion of the Court by Nuessle, J.

In John H. Haslam, Pltf. and Appt., vs Earl J. Babcock, Deft. and Rest.

That whether a new trial shall be granted on the ground of the insuffieciency of the evidence to sustain the verdict lies in the sound judicial discretion of the trial court when there is a stubstantial conflict in the evidence, and unless there is an abuse in the exercise of such discretion the appellate court will not interfere.

That a motion for a new trial on the ground of newly discovered evidence is addressed to the sound judicial discretion of the trial court, and the appellate court will not interfere unless abuse of such discretion is shown.

That appeal from the District Court of Benson County, Hon. G. Grimson, Judge. Action on an account. The defendant having recovered on his counterclaim, plaintiff moved for a new trial. From the judgment and from an order denying his motion for a new trial, plaintiff appeals.

AFFIRMED.

Opinion of the court by Nuessle, J.

In State of North Dakota, Pltf. and Applt., vs. Oscare E. Erickson, Deft. and Respt.

That in construing a statute the court should, if it is reasonably possible, avoid construction which would result in a conflict with other statutes relating to the same subject matter or give rise to doubt as to its constitutionality.

That Chapter 265, Laws of North Dakota 1941 is construed and it is held that this statute does not empower the governor and the examin-

ing commissioner to authorize an attorney, other than the attorney general to represent the state in actions brought pursuant to its provisions. Appeal from the district court of Burleigh County, Jansonius, J. AFFIRMED. Opinion of the court by Burke, J. Morris, Ch. J. concurring specially, Burr, J. dissenting.

In state of North Dakota, Respt., vs. J. D. Brewster, Applt.

That livestock are included in the term "lost property" as used in section 9914, C. L. 1913, which provides:

"One who finds lost property under cricumstances which give him knowledge or means of inquiry as to the true owner, and who appropriates such property to his own use, * * without having first made such effort to find the owner and restore the property to him as the circumstances render reasonable and just is guilty of larceny."

That where one is convicted of violating the provisions of said section 9914, and the lost property is shown to be sheep, it is not necessary for the trial court to charge the jury on the distinction between grand larceny and petit larceny, as under the provisions of section 9918a Supp. where one is convicted of larceny of livestocok the offender may be punished by imprisonment in the penitentiary for a period not exceeding five years, whether the information charges petit larceny or grand larceny.

That under the provisions of section 9914 of the Comp. Laws the obligation which the finder has toward the owner of lost property is to make such effort to find the owner and to restore the property to him as the circumstances render reasonable and just and, therefore, it is error on the part of the trial court to read the jury a portion of the law dealing with the obligations of one who takes up estrays, and to charge the jury that the obligation which the finder of lost property has toward the owner is the same as the obligation which one who takes up estrays has to the owner of the estrays.

That the record is examined and it is held: that such error was prejudicial to the defendant in the light of the record of the case, and that a new trial should be had.

Appeal from the judgment of the district court of Sioux County, and from an order denying a new trial. Hon. Harvey J. Miller, Judge. REVERSED. Opinion of the court by Burr, J.

In Paul Haggard, Pltf., and Applt., vs. First Nat'l. Bank of Mandan, et al., Dtfts., and Respts.

That Section 10567, Comp. Laws 1913, enumerates the instances in which a peace officer may arrtst without a warrant, among them being, when the person arrested has committed a felony, although not in the officer's presence.

That a peace officer may make an arrest without a warrant on a charge made upon reasonable cause, of the commission of a felony by the party arrested. Such charge need not be written but may be made orally and informally, provided that it conveys to the officer information sufficient to constitute a reasonable cause for the charge.

That in order to constitute a crime under section 10248, Supp. to Comp. Laws 1913, the acts complained of must have been done unlawfully and there must be circumstances other than the mere removal of the property to show bad purpose or evil intent.

That when no proof is offered of the law of another state and the court has not been asked to take judicial notice thereof, pursuant to the provisions of chapter 196, S. L. 1937, the law of such state will be presumed to be the same as the law of North Dakota.

That a fugitive from justice who is arrested without a warrant must be taken before a magistrate without unnecessary delay.

That what amounts to reasonable diligence in presenting a prisoner before a magistrate depends upon the peculiar facts in each case. Where there is a conflict in the evidence the question of whether there has been unnecessary delay on the part of the arresting officer is usually one of fact to be determined by the jury.

That when a peace officer presents to the employees of a radio station a state of facts involving the commission of a crime for the purpose of procuring the broadcast of a bulletin for the apprehension of a fugitive and the employees of the radio station interpolate into the broadcasting a charge of crime not involved in the facts submitted neither the officer nor the party who made the charge to him are liable for defamation based on the interpolated matter.

That cross-examination permitted to an unwarranted extent as shown in the opinion is held to constitute a reversible error.

That in an action for false imprisonment based on an arrest without a warrant, it is error for the trial court to instruct the jury that the burden of proof is upon the plaintiff to show by a fair preponderance of the evidence an absence of probable cause.

Appeal from the district court of Morton County, Berry, J. Reversed and new trial granted. Opinion of the Court by Morris, Ch. J.

In State of North Dakota, Pltf. and Respt., vs. Carl M. Ritter, Deft. and Applt.

That in the instant case the defendant was convicted of embezzlement. He moved for a new trial on the ground that the verdict is clearly against the evidence. The motion was denied and he appeals from the judgment of conviction and from the order denying the motion for a new trial. The evidence is examined, and for reasons stated in the opinion it is held that the verdict is not against the evidence, and that the trial court did not err in denying the motion for a new trial.

Appeal from the district court of McIntosh County, Hutchinson, J. Ritter was convicted of the crime of embezzlement and appeals from the judgment and from an order denying his motion for a new trial. AFFIRMED. Opinion of the Court by Christianson, J.

In Grace A. Whittier et al. Pltfs. and Respts. vs. Frank Leifert, Deft. and Applt.

That a variance between pleading and proof in order to be fatal must be material and in a civil action a variance is not material unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits.

That judicial records in existence must be proved by properly authenticated copies in preference to recollection testimony.

That upon appeal from a decision rendered by the court in a trial without a jury, rulings on questions of evidence will be viewed more liberally than would be the case had there been a jury trail.

That where the plantiff and defendant both move for directed verdicts at the close of the taking of all testimony and neither pary requests submission of any issues to the jury until after the court has announced his decision by directing a verdict, it is not error for the court to refuse to withdraw his direction of a verdict and submit the issues to the jury. Appeal from the District Court of Stutsman County, McFarland, J. AFFIRMED. Opinion of the court by Morris, Ch. J.

In State of North Dakota, Pltf. and Applt., vs. George J. Thomas, Deft. and Respt.

That by the law of this state, an information which does not allege the date of the commission of the offense charged, is made sufficient

by virtue of a statutory presumption that the offense was committed within the period limited by statute for the prosecution for such offense. (Section 11, Chapter 132, Laws of North Dakota 1939).

That information may be supplemented by bills of particulars to be furnished at the instance of the court or of the defendant or by the prosecuting attorney of his own motion. (Section 8, Chapter 132, Laws of North Dakota, 1939).

That if it appears from the allegations of an information or from the allegations of the bill of particulars and the information taken together, that the offense charged is barred by the statute of limitations, the information is insufficient and must be quashed upon motion of the defendant subject, however, to the right of the prosecuting attorney to file a supplemental bill of particulars setting forth exceptions or other matters from which it would appear that the prosecution is not so barred. (Section 9, chapter 132, Laws of North Dakota 1939).

That the grounds for demurrer specified by section 10737, Compiled Laws of North Dakota 1913 are exclusive of all other grounds.

That the expiration of the period of limitation fixed by statute for the prosecution for an offense is a legal bar to the prosecution and, where it appears from the information that the bar exists, that fact is a ground for demurrer. (Section 10737, Compiled Laws of North Dakota 1913).

That a demurrer which specifically sets forth a ground for demurrer which is included within the general grounds set forth in the statute is sufficient as to form.

That appeal from the district Court of Grand Forks County, Hon. P. G. Swenson, Judge.

AFFIRMED. Opinion of the court by Burke, J., Christianson, J. dissenting.