North Dakota Law Review

Volume 18 | Number 4 Article 4

1942

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not extended the classes of absolute privilege. But since this statement is in derogation of the general rule, a further examination of such rule is required. It is submitted that a comprehensive search exposes the fact that none of the cases cited by the foregoing authorities in support of the rule that a communication under a legal duty is but qualifiedly privileged, actually involved an explicit duty imposed by law such as in the case at hand. And it is further submitted generally that any cases which purport to lay down such rule, do so by way of dicta or under a distinguishable state of facts.

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OUR SUPREME COURT HOLDS

In the Matter of the Application of Clarence Kist for a Writ of Habeas Corpus, Petr., vs. O. K. Butts as Sheriff of Stutsman County, Respt.

That Section 3604 Compiled Laws 1913, provides alternative methods of commencing actions for the violations of city ordinances; they may be commenced either by the issuance and service of a summons or in a proper case by the issuance of a warrant of arrest.

That the penalty clause of a city ordinance is not wholly void because it authorizes a penalty in excess of that permitted by state statute and a judgment and sentence pronounced under such an ordinance may be enforced to the extent that it is within the statutory limitation.

Appeal from the District Court of Stutsman County, Jansonius, J. Opinion of the Court by Burke, J. WRIT DENIED.

In Horace P. Fish and E. J. Olson, Respts., vs. H. H. France, et al as Board of County Commissioners of Logan County, et al., Applts.

Proceedings under the provisions of chapter 225 of the Session Laws of 1939 are not available to one seeking reduction in assessment and taxation of real estate for years prior to the enactment of the statute. Murray vs. Mutschelknaus, 70 N. D. 1, 291 N. W. 118 followed.

That a delinquent taxpayer may not set up as a defense to proceedings to enforce the payment of taxes that the authorities have failed to take steps to collect taxes from other delinquent taxpayers.

That the fact that a delinquent taxpayer has failed to take steps to have alleged unjustly excessive taxes abated by the county commissioners under the provisions of chapter 276 of the Session Laws of 1931 does not bar an action to have tax deeds cancelled, as the remedy provided by said chapter 276 is not exclusive.

That under the provisions of section 2193 of the Compiled Laws a certificate of tax sale is prima facie evidence that all the requirements of law with respect to the sale have been duly complied with; and unless the defects relied upon are specified in the statute or are beyond the power of the legislature to remedy, they may not be asserted after the certificate has been issued. Anderson vs. Moynier, ante, followed.

That where a delinquent taxpayer commences an action, seeking to have taxes cancelled, and tax certificates set aside, he should do equity by tendering the amount of taxes justly chargeable against the real estate involved.

That where land has been sold to the county at tax sale because of failure to pay the taxes levied for the year 1934, and the county auditor proceeds to give notice of the expiration of the time of redemption, he is required to set forth in the notice the amount necessary to be paid in order to redeem from said tax sale; and in this amount he will include the amount for which the land was sold with penalty and interest, together with the amount of all subsequent taxes due and payable on said land subsequent to the sale, with penalty and interest; and where the county auditor, in addition to said amounts, includes alleged delinquent taxes which accrued prior to the year 1934, together with penalty and interest thereon, and the amount of all taxes is set forth in one sum so that the delinquent taxpayer is not able to determine therefrom the correct amount necessary to redeem, the notice of expiration of the time for redemption is insufficient to support the issuance of a tax deed.

That the evidence is examined, and it is held, that the certificates of sale of the real estate for the 1934 taxes are valid, and in order to redeem from said sale, plaintiffs must pay the amount for which said land was sold at the tax sale of 1935, with penalty and interest, together with all subsequent taxes with penalty and interest, upon proper notice of the expiration of the time of redemptiont but the plaintiffs seeking equity must first do equity, and the tax deeds issued being at least a cloud upon the title, and the plaintiffs seeking to have the cloud removed, the court will not proceed to the determination of the issues raised thereunder until plaintiffs tender the amount of taxes found to be due. Appeal from the District Court of Logan County, Berry, Spec. J. REVERSED AND REMANDED. Opinion by Burr, Ch. J.

In Henry E. Johnson, as Guardian, Pltf. and Respt., vs. Lulu G. Brunner, Ex. of the Estate of A. J. Brunner, Deceased, et al., Defts., and The State of North Dakota, Deft. and Applt.

That an action brought to foreclose a mortgage on real estate in which the State of North Dakota claims an interest as being an owner of a portion thereof, is, so far as the State is concerned, an action respecting title to property, and is such an action as may be brought against the State under the provisions of section 8175, of the Compiled Laws of this State.

That where the complaint in an action to foreclose a mortgage on real estate alleges that the State claims an interest in the land involved, and requires the State to set forth its claim, and the State answers, setting forth that it is the owner of a portion of said land, having purchased said land in its sovereign capacity for the purpose of establishing a highway, a demurrer to said answer on the ground that it does not state facts sufficient to constitute a defense should be overruled, as a court of equity, in the trial of the case, will determine the rights of the respective parties if foreclosure be ordered. Appeal from the District Court of Ward County, Lowe, J. REVERSED. Opinion of the Court by Burr, Ch. J.

In The Dunham Lumber Company, Pltf. and Respt., vs. Anton Gresz, et al., Defts., and The State of North Dakota doing business as State Land Department, Deft. and Applt.

That the law of the land in existence at the time a contract is entered into forms a part of that contract the same as if the provisions of the law were expressly incorporated therein and the obligations of the contract are determined by the law in force at the time of its execution.

That a lien of a mechanic or a materialman is purely statutory and its existence and extent are defined and limited by legislative enactments.

That a mortgage upon real estate in the absence of an agreement to the contrary attaches to all buildings and improvements subsequently annexed to the real estate during the life of the mortgage.

That parties are at liberty to make any agreement or arrangement with regard to their property that they see fit, and to give to fixtures the legal character of realty or personality at their option; and, if the agreement is such a one as will make the property personal property, as between the parties, it is personal property, and may be so treated. (Mathews vs. Hanson, 19 N. D. 692, 124 N. W. 1116.)

That Chapter 155, Session Laws N. D. 1929, gives to one furnishing materials for the erection of a building upon mortgaged land a lien on the building superior to that of a real estate mortgage on such land at the time of the enactment of the statute. Appeal from the District Court of Billings County, Miller, J. AFFIRMED. Opinion of the Court by Morris, J.

In William McKee, Jr., et al., Petrs., Contnts. and Applts., vs. C. J. Buck, Jr., et al., Propnts. and Respts.

That the disposition of the property of a decedent is subject to statutory control and a failure to comply with the statutory mandate as to the execution of a will is fatal to its validity.

That the requirements of section 5649, of Chapter 52, of the Civil Code, 1913 Comp. Laws relating to wills and providing that "Every will * * * must be in writing * * * and must be subscribed at the end thereof by the testator himself, or some person in his presence and by his direction must subscribe his name thereto" are complied with where a testatory who is unable to write his name makes his mark in lieu thereof.

That Section 7309, of Chapted 115 of the Civil Code, 1913 Comp. Laws, providing that " * * 'signature' or 'subscription' includes mark when the person cannot write, his name being written near it and written by a person who writes his own name as a witness * * " is construed, and it is HELD, for reasons stated in the opinion, that its effect is merely to put a signature by mark thus witnessed on the footing of a signature by writing and does not exclude other proof of the signature by mark. Appeal from the District Court of Stutsman County, Englert, J. Proceeding to contest a will after probate. From a decree affirming the decree of the County Court allowing the will, the contestants appeal. AFFIRMED. Opinion of the Court by Nuessle, J.

In State of North Dakota, Pltf., vs. B. E. Robinson, Deft.

That whether a public officer, who is a stockholder and officer of a corporation with which he makes a contract in his official capacity as such public officer, is interested individually, directly or indirectly in the contract within the meaning of section 9829, C. L. 1913, is primarily a question of fact.

That the purchase of commodities or supplies necessary and essential to the operation of vehicles used by employees of the Motor Vehicle Department in traveling, and owned by such department when made by authorized employees in bhalf of the State, comes within the terms of section 9829, C. L. 1913.

That questions 3, 4 and 5, as set out at length in the opinion, are examined and all are answered in the negative for the reason that the venue of the offense charged is held to be in McLean County. Certified Question of Law from District Court of Burleigh County, Grimson, J. Spec. Opinion by Morris, J. Burr, J. dissents in part and concurs in part.

In J. S. Lamb, as State Highway Commissioner, Pltf. and Respt., vs. Northern Improvement Company, Deft. and Applt.

That under the provisions of sec. 6, chap. 160, S. L. 1927, "Providing for the submission of controversies between the State Highway Commission of the

State of North Dakota and parties contracting therewith to arbitration" no arbitration proceedings shall be had unless commenced within six months after the right to arbitration has arisen, except in cases of controversies already existing at the time of the taking effect of the Act; and when no arbitration proceedings are commenced thereunder until after the expiration of the six months' period, such arbitration proceedings undr this chapter are void, and any judgment entered thereon is a nullity.

That by the terms of chap. 72, S. L. 1941, the legislature has not provided for the settlement of the judgment entered in this case, and determined that it shall be paid. The law merely makes provision for the payment of any claim involved herein when such payment is ordered by the courts of this state.

That where an action is brought by a judgment debtor to enjoin the execution of a judgment rendered against him, and the judgment creditor appears in the case and litigates the issues on their merits, without raising the questiton that the proper remedy for the judgment creditor was to move to have the judgment set aside, the judgment creditor can not thereafter, on appeal to this court, be permitted to change the theory of the case, and urge in this court for the first time that the judgment debtor should have appeared in the original case, and moved to vacate the judgment entered therein, and should not have begun an independent action for that purpose. Appeal from the District Court of Ward County, Lowe, J. AFFIRMED. Opinion of the Court by Burr, Ch. J.

In Clara Jacobson, Pltf. and Respt., vs. Mutual Benefit Health and Accident Association, Deft. and Appt.

That when a judgment of a district court has been affirmed by the Supreme Court upon appeal, the duty of the district court to enter judgment upon remittitur is purely ministerial in character and the district court is without power to alter or amend the judgment of the Supreme Court in any matter of substance.

Appeal from the District Court of Burleigh County, Hon. R. G. McFarland Judge. Opinion of the Court by Burke, J. REVERSED.

In the Matter of the Estate of J. Albert McKee. Arne Melby., Adm., Plft. and Respt., vs. John Gray, State Tax commissioner, Deft. and Appt.

That the provisions of section 3, subdivision 2, (B) of chapter 251, Session Laws of 1933, exempting from an estate tax "The amount of all bequests, legacies, devises, or transfers * * * to or for the use of any corporation, institution, society, or association, whose sole object and purpose is to carry on charitable, educational or religious work," apply to bequests, legacies, devises, or transfers to any such corporation, institution, society, or association located without the State as well as to one located within the State.

Appeal from the district court of Dickey County, Hon. W. H. Hutchinson, J. AFFIRMED. Opinion of the Court by Burr, Ch. J.

In Harry Stern, Pltf. and Respt., vs. John Gray, Tax Commissioner, Deft. and Appt.

That Section 2, chapter 241, Session Laws 1937, permits the taxpayers in computing his net income to deduct from his gross income losses resulting from the sale of property acquired or used for profit but if such property consists of capital assets, the deductions may not exceed the aggregate gains reported from the sale or exchange of capital assets in any year.

That losses in capital assets acquired and used for profit and consisting of securities may not be determined on the basis of fluctuating market value.

That the provision contained in section 2, chapter 241, Session Laws 1937, limiting deductions for losses incurred in connection with the sale or exchange of capital assets applies in computing the taxable income of both residents and nonresidents of the state.

That evidence examined and it is held that the loss sought to be deducted by the plaintiff arose from the sale of the property acquired or used for profit; that said property constituted capital assets and deductible losses resulting from such sale are limited to the aggregate gains reported from the sale or exchange of capital assets in the year for which deduction is sought.

Appeal from the District Court of Richland County, Hutchinson, J. REVERSED. Opinion by Morris, J.

In William Arthur Charon, Plt, and Applt., vs. Lawrence Windingland, Deft. and Respt.

That contracts of weak-minded persons, when shown to have been induced by fraud, will be set aside by Courts of Equity.

That a Court of Equity will not cancel a contract upon the ground that its execution was obtained by fraud unless the fraud be clearly established.

In an action to cancel a contract for the sale of land upon the ground that its execution was obtained by fraud, non-expert witnesses may not testify as to opinions concerning the mental capacity of a party to enter into the contract sought to be canceled.

Appeal from the District Court of Walsh County, Hon. W. J. Kneeshaw, Judge. AFFIRMED. Opinion of the Court by Morris, J.

In Amelia Mitchell, widow of Wallace Mitchell, Deceased, Pltf. and Respt., vs. Clara Nicholson, Adam Koestler, et all., Defts. and Applts.

That where an attempt is made to describe land sought to be conveyed by deed, it is the office of such description to furnish the means of identification of the land intended to be conveyed.

That while, generally speaking, the quantity of the land attempted to be conveyed in such deed is not necessarily controlling, yet, where the boundaries of such tract are in doubt, the quantity becomes an important factor.

That in construing a deed, the courts will endeavor to give effect to the intent of the grantor as to the boundaries of the tract sought to be conveyed.

That assuming, though not deciding, that where an attempt is made to convey a tract of land out of a larger portion, the rule is the grantor intends to convey the land in the form of a square, when the only means of identification of the tract is the statement the deed conveys two acres of land located on the northwest corner of the southwest quarter of a named section, such rule is based merely on presumption of intent, and where the undisputed facts show the acts of the grantor and the grantee to be such that the grantor could not have had such intent, then the presumption is destroyed, and the rule fails.

That where, from all of the circumstances in the case, it is impossible to determine the boundaries of a tract of land attempted to be conveyed by deed out of a larger quantity, such deed is so indfinite in its description as to be rendered valueless as a conveyance.

Appeal from the District Court of Kidder County, Hon. John C. Lowe, Spec. Judge. AFFIRMED. Opinion of the Court by Burr, Ch. J.