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M. L. McBride

BAR BRIEFS

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—BY—

STATE BAR ASSOCIATION OF NORTH DAKOTA

M. L. McBride, Editor

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A WORD TO NEW LAWYERS

Once more the portals of the temple of Law have opened to admit new disciples to the profession.

In this materialistic age it is not disinterested ideals, but the acquisitive instinct that is the mainspring of ambition. Success is measured by the size of accumulations, the incentive might be ambition for power, and in recent days this has assumed additional importance. But the practice of our profession is not just commercial: but has been defined, — "as a calling in life based on specific training and ability, contemplating public service and differentiating from ordinary business vocation by its subordination of pecuniary returns to efficient service."

May you receive inspiration from the foreword of the report of the Committee on the Canon of Ethics of the American Bar Association, — "These Canons and the spirit they breathe serve to convey a message of hope to every lawyer to whom his profession is something more than a resource for making a livelihood and who aspires in the practice of it to play at least a humble role in a great organized movement to promote human welfare and happiness through some approximation to an ideal administration of justice. Like the old Grand Jury oath that inspired the utterance of Mr. Justice Cardozo, in these Canons 'the word has been proclaimed, to steady us when we weaken, to tell us that with all the failings and backslidings, with all the fears and all the prejudices, the spirit is still pure'."

May it be your happy lot to win a professional success that the world will approve by the yardstick of its own standards, but I counsel you never to abandon the higher ideals of your profession.

The opportunities we enjoy here in this country should serve to remind you that beyond the "work for work's sake," to dedicate your efforts also to the social ends to justify life by higher standards. It is a base thing "to receive favors and render none."

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There are few callings more potentially constructive; that offer better opportunities for great social service — and at a time when the world so greatly needs it — than the law.

On the base of the Gambetta monument in Paris is chiseled the legend; "No one can forbid us the future." So the hour is yours to plot the course of the coming years as you wish it to be and, through the possibilities and opportunities of a great profession, to strive to make your ideal an actuality for better or for worse. The wish is the reality; in the thought the whole of your future is latent. Your individual responsibility for results is thus implied. In these times and their hard exactions the currency of materialistic ideas and false standards will impose a heavy tax upon your perservance. But as thoughts triumph over matter, so will the ideals cherished in the center of your hearts triumph in the end over those hours of discouragement and moments of doubt which paralyze effort with whispers of futility.

May you thru your efforts serve your God, your country and your profession.

M. L. McBRIDE
Secretary.

OUR SUPREME COURT HOLDS

In Northern States Power Company, Respt., vs. Board of Railroad Commissioners, et al, Applts.

That the fair value upon which a utility is entitled to earn a return is the reasonable value of its property used and useful for the service of the public at the time it is being so used.

That in determining fair value allowance must be made for the increase or decrease in value of the utility's property from its original cost, unless the allowance of the increase will result in a rate which would be unfair to the public.

That in finding fair value, the weight to be given to evidence of historical cost and reconstruction cost depreciated and other evidence must be determined in the light of the facts of the case under investigation.

That a rule or precedent which requires that evidence of historical cost be given predominating weight in every case is arbitrary.

That where the undisputed evidence of reproduction cost disclosed a substantial increase in the value of the utility's property over its original cost, it was the duty of the Board of Railroad Commissioners to give consideration and effect to that evidence as a major factor in reaching its finding of fair value.

That going concern value is a property right which should be considered in a valuation of a utility's property for rate making purposes.

That going concern value as defined in rate cases does not include either good will or franchise values.

That Section 4609c37, Supplement to the Comp. Laws of N. D. 1913, does not prohibit a consideration and allowance of going concern value in computing a utility's rate base.

That a utility plant which has a history of continuous profitable operation over a long period of years has a going concern value.

That the fact that the depreciation of a utility's property was computed upon the basis of its actual physical condition, rather than upon a salvage basis, may not be construed as an allowance of going concern value.

That where the evidence showed that a utility had a history of continuous profitable operation, it was the Commission's duty to consider and allow going concern value in determining the fair value of the utility's property.

That under the provisions of section 4609c42 Supplement to Comp. Laws 1913, the Board of Railroad Commissioners is required to make a finding of fact setting forth the amount at which going concern value has been allowed.

That in making allowances for operating costs or expenses, it was the duty of the Board of Railroad Commissioners to allow such amounts as in its judgment were necessary, but the judgment which the Commission must

exercise is a judgment based upon the evidence, it may not disregard the undisputed evidence of actual expenditures and substitute therefor its opinion of what the expenditures for any specific purpose ought to be.

That where the undisputed evidence disclosed that a utility had expended $8,476.01 for legal services during the year immediately preceeding the inquiry and there was no evidence tending to show that such expenditures were wasteful or extraordinary or that such services would cost less in the future, an annual allowance of $3,000 for attorney fees was too great a departure from the unchallenged proof to be accounted for as a reasonable exercise of the Commission's judgment.

That where the evidence showed an itemized list of dues and donations totaling $4,638.94 which the utility had paid out during the year immediately preceeding the inquiry, a finding that some but not all of such dues and donations were properly chargeable to operating expenses without specifying which were proper and which were not, and an allowance of $3,000 for all the purposes listed, was, in the absence of any claim of bad faith or that the expenditure for any particular purpose was excessive, an attempt to control the management of the utility and beyond the powers of the Board of Railroad Commissioners.

That in its investigation of a utility for the purpose of establishing a rate base the Board of Railroad Commissioners is required to make findings of fact upon all matters which have a bearing upon the rates which a utility will be permitted to charge.

That the findings of fact of the Commission upon all material matters must be sufficiently definite to enable a reviewing court to determine if such findings were supported by any evidence and afforded a reasonable basis for the decision.

That a "lump sum" allowance for operating costs at a figure substantially less than the amount which the utility claimed and offered evidence to prove was necessary, made upon findings which did not disclose the extent to which the utility's specific claims had been allowed, reduced or rejected was made upon insufficient findings of fact.

Appeal from the District Court of Cass County, Hon. Daniel B. Holt, Judge.

REMANDED WITH INSTRUCTIONS.

Opinion of the Court by Burke, J. Christianson, J. dissenting.

In H. W. Lyons, Pltf. and Respt., vs. Otter Tail Power Company, Deft. and Applt.

That Section 4609c16, Supplement to the Compiled Laws of North Dakota 1913, which provides that no agreement for service made by a public utility with its customers shall be lawful unless and until the same shall be filed with and approved by the Commissioners (Board of Railroad Commissioners now Public Service Commission) applies to agreements with persons who had previously been customers.

That a plaintiff, who innocently entered into and performed an agreement made in violation of a statutory provision which was enacted for the benefit of a class to which plaintiff belonged and for the regulation of a class to which plaintiff belonged, was not in pari delicto with the defendant.

That a cause of action for the rescission of a contract is stated where under the facts alleged in the complaint the contract is unlawful for causes not apparent on its face and plaintiff is not equally in fault with the defendant (Section 7206, Compiled Laws of North Dakota 1913.)

That in an action brought by plaintiff for the rescission of an unlawful contract and for restitution of benefits conferred on defendant in the performance thereof, the fact that plaintiff cannot restore the benefits received by him as a result of defendant's performance will not bar restitution to the extent that the benefits conferred on defendant may exceed those received by plaintiff.

Appeal from the District Court of Stutsman County, Hon. Fred Jansonius, Judge.

AFFIRMED. Opinion of the Court by Burke, J. Burr and Christianson, J. dissenting.

In Thomas Ryan, Petr., vs. O. J. Nygaard, as Warden of the North Dakota State Penitentiary, Respt.

That on habeas corpus the inquiry is limited to questions of jurisdiction. The writ of habeas corpus cannot be used as a substitute for appeal or writ of error to obtain a review of the correctness of the acts of a court that was acting within its jurisdiction.

That jurisdiction is the power to hear and determine. The existence of such power does not depend upon the correctness of the decision made; for a court, having jurisdiction of a cause and of the parties and general power to render the particular order or judgment that is challenged, does not lose jurisdiction because it makes a mistake in determining either the facts or the law, or both.

That a court having jurisdiction of the offense charged, and of the party who is charged with its commission has jurisdiction to determine whether that offense is sufficiently charged in the indictment or information.

That Chapter 126, Laws 1927, which provides for increased punishment for persons convicted of a felony in this state who have been convicted of two or more felonies in this or any other state in the United States, construed, and it is held:

That an information may be filed thereunder "if at any time before judgment and sentence, or at any time after judgment and sentence but before such judgment and sentence is fully executed, it shall appear that one convicted of a felony, has been previously convicted" or two or more felonies that fall within the purview of said Chapter.

That prosecution may be instituted and conducted under said Chapter only after a conviction for a felony. It is not contemplated that the fact of the former convictions shall be set forth in the information charging the commission of the crime for which the increased punishment is sought to be invoked.

That the procedure prescribed by said Chapter 126 is precisely the same where a person previously has been convicted of two felonies and it is sought to subject him to the increased punishment prescribed by Section 1 of the said Chapter, as where a person has been convicted three or more times of felonies and it is sought to subject him to the increased punishment prescribed by Section 2 of said Chapter.

That a District Court has jurisdiction of a prosecution under said Chapter 126, Laws 1927, after a conviction for a felony, (1) either before judgment and sentence, or (2) at any time after judgment and sentence, but before the judgment and sentence is fully executed.

That where an information under said Chapter 126 is presented after judgment and sentence, but before judgment and sentence is fully executed, it is a question for the court to determine whether the information is sufficient, and the court has jurisdiction to determine the questions of law and fact that may arise in the course of the action.

That for reasons stated in the opinion, it is held that the record affirmatively discloses that the petitioner was not deprived of any legal right, either statutory or constitutional, but that he was afforded a fair trial according to the law of the land and that he is legally detained in custody by virtue of a final judgment of a competent court of criminal jurisdiction.

Original application for a Writ of Habeas Corpus by Thomas Ryan. WRIT DENIED. Opinion of the Court by Christianson, J. Burr, Ch. J., concurrs specially.

In Florence Bagg, Pltf. and Respt., vs. Otter Tail Power Company, a corporation, Deft. and Applt.

That under the law of this state, a party to an action has the right to request the court, in writing, to give such instructions to the jury as the party may deem proper and necessary, and these requested instructions should be

given without modification or change when they contain proper statements of the law and deal with the issues before the jury, unless the equivalent to these instructions is fairly and properly stated and given to the jury by the court in its charge.

That it was not error for the trial court to refuse to give the instructions requested by appellant, as the written charge given to the jury covered all of the issues in the case, all proper matter embraced in the requests, and fully and fairly stated the law governing the questions to be determined.

That the defense of contributory negligence is an affirmative defense and presupposes negligence on the part of the defendant.

That even though the defendant is shown to have been guilty of negligence, no recovery can be had by plaintiff when the injury is due to the negligence of both parties.

That negligence, whether contributory or primary, is a question of fact, never of law, unless the established or conceded facts from which the inference must be drawn admit of but one conclusion by reasonable men.

That the standard to be used in determining whether or not plaintiff has been guilty of such contributory negligence as will defeat recovery is whether the actions of the plaintiff were those of an ordinary prudent person under the same circumstances and in the same position.

That record examined and it is held: it was the duty of the court to submit to the jury the question of whether the plaintiff was guilty of contributory negligence, and that there was sufficient evidence from which the jury could find plaintiff was not guilty of such contributory negligence as precluded recovery.

Appeal from the District Court of Richland County, Hon. Wm. H. Hutchinson, Judge. AFFIRMED. Opinion of the Court by Burr, Ch. J.

In the State of North Dakota, Respt., vs. Lois Green, Applt.

That a prostitute who pays over to a third person her proceeds or earnings is not an accomplice of the one who receives such proceeds or earnings in violation of Section 9643; Comp. Laws N. D. 1913.

That one charged with knowingly receiving proceeds or earnings of a woman engaged in prostitution is not engaged in a joint enterprise with the prostitute so as to constitute both parties principals.

That in a prosecution for knowingly accepting or receiving maintenance or revenue from the proceedings or earnings of a woman engaged in prostitution, it is error to admit evidence of the reputation of the defendant's house in which the prostitution was alleged to have been carried on.

That Section 9643, Comp. Laws N. D. 1913, was not repealed by the enactment of Chapter 190, Session Laws N. D. 1919 (Section 9643a1 to 9643a6, Supp. to Comp. Laws).

Appeal from the District Court of Ramsey County, Hon. G. Grimson, Judge. REVERSED AND NEW TRIAL GRANTED. Opinion of the Court by Morris, J. Burr, Ch. J., dissenting.

In Clifton L. Voss, individually and doing business as Voss Studio, Pltf. and Respt., vs.. John Gray, as Tax Commissioner of the State of North Dakota, Deft. and Applt.

That a photographer who for a consideration makes photographs on their order for patrons who sit for them is the owner of and has title to such photographs until they are accepted and delivered.

That photographs are tangible personal property and when made and delivered for a consideration on the order of the person who sits for them, there is a sale subject to the tax imposed by the Sales Tax Act, chapter 249, Session Laws 1937. Appeal from Cass County, Hon. Daniel B. Rolt, J.

REVERSED. Opinion of the Court by Nuessle, J. Christianson, J. dissenting.

In Fred Rott, Pltf. and Respt., vs. Provident Life Insurance Company, Deft. and Applt.

That under the facts in this case it is held that a re-instatement of a life insurance policy in an amount equal to one-half of the original accompanied by a receipt and note regarding premium, does not constitute a new contract—the receipt and note constituting merely evidence bearing on the payment of premiums under the re-instated policy.

That in such case it is not error to admit oral testimony regarding the payments of premiums prior to re-instatement.

That where there is evidence in the record from which reasonable men can draw the inference necessary to support the verdict, especially when three juries and three District Judges have found that same verdict, the Supreme Court will not set aside such verdict on the ground of the insufficiency of the evidence. Appeal from the District Court of Hettinger County, Hon. John Lowe, Spec. Judge. AFFIRMED. Opinion by District Court Judge G. Grimson, sitting for Nuessle, J. disq. Burke, J. concurring specially, Burr. Ch. J. dissenting.

In Village of Dazey, a public corporation, Pltfs. and Applts., vs. Barnes County, a public corporation, et al., Defts. and Respts.

That where real property has been sold to a county at tax sale, the county may, for the sake of economy, expedition and clarity of title, perfect its title to the property by acquiring a quit claim deed from the record owner in lieu of giving the statutory notice of expiration of redemption and securing a tax deed.

That where a county procures the quit claim deed of the record owner to perfect the title to property previously sold to it at tax sale, such property is acquired through tax proceedings and when resold, the statutory method for the sale of property so acquired must be followed.

That property acquired through tax proceedings must be resold according to the provisions of section 2202 Compiled Laws of North Dakota 1913, as amended by chapter 235, Laws of North Dakota 1939, and unless so sold, the sale is void.

That a village has a sufficient interest in property acquired by a county through tax sale proceedings, to maintain an action to set aside a void sale of such property where the amount to be realized from such sale is far less than the property's actual value and greatly inadequate to pay the village's share of delinquent taxes levied against the property.

That where a building in which a village has a special interest, by virtue of village taxes levied against it, is about to be removed from the village by a party who claims ownership through a void sale of a county tax title, injunction is the appropriate remedy to prevent the removal.

Appeal from the District Court of Barnes County, Hon. M. J. Englert, Judge. Opinion of the Court by Burke, J. REVERSED.

In George B. McMillen, Administrator, Pltf., Applt., Respt., vs. Paris E. Chamberland and William B. Chamberland, Defts., Respts., Applts.

That an instrument in writing is presumed to be truly dated, unless contradicted.

That where the certificate of acknowledgment on a deed is regular on its face, such certificate is presumed to state the truth.

That a grant duly executed is presumed to have been delivered at its date.

That the execution of a warranty deed being admitted, delivery thereof can not be made conditionally. If a delivery be shown, such delivery discharges any condition which may have been attached, and the delivery is necessarily absolute.

That the record showing that a duly executed warranty deed, dated and acknowledged October 29, 1921, was handed by the grantor in the presence of witnesses to one of the grantees, who handed it to the other grantee, and the grantees thereafter delivered the deed to a third party, who kept it among

his private papers, but in an envelope endorsed with the names of the grantees, indicating the contents of the envelope to be the property of the grantees, it is held upon all of the evidence in the case that the warranty deed was delivered by the grantor to the grantees on October 29, 1921, even though such deed did not again come into the physical possession of the grantees and was not recorded until after the death of the grantor.

That where, in the trial of an action to quiet title to real estate, the court proceeds to adjudicate and determine the rights of a stranger to the case, to the detriment of the rights of the appellants, such adjudication will be set aside, leaving undetermined any conflicting rights of said stranger and appellants.

Appeal from the District Court of Williams County, Hon. A. J. Gronna, J. MODIFIED AND AFFIRMED. Opinion of the Court by Burr, Ch. J.

In L. E. Boe, et al, Clmts. and Respts., vs. Workmen's Compensation Bureau, Deft. and Applt.

That where the Workmen's Compensation Bureau denies the right of a claimant to share in the compensation fund, and upon appeal to the district court the decision of the bureau is affirmed, the unsuccessful claimant is not entitled to have an attorney's fee taxed as costs against the bureau, even though the proceedings may have been prosecuted in good faith.

Appeal from the District Court of Dunn County, Hon. Harvey J. Miller, J. REVERSED. Opinion of the Court by Burr, Ch. J.

In L. E. O'Connor, Rec., Pltf. and Repst., vs. Allan McManus, Deft. and Applt., and First Nat. Bank, Grand Forks, Applt.

That an execution may be levied on the contents of a safety deposit box.

That a sheriff may forcibly open a safety deposit box of a judgment debtor in order to make a levy of an execution issued upon the judgment.

That an order of a court directing a bank which had leased a safety deposit box to a judgment debtor, to open the box by force in order to enable a sheriff to levy an execution upon the contents thereof, is a proper order in aid of execution. Appeal from the District Court of Grand Forks County, Hon. P. G. Swenson, J. AFFIRMED. Opinion of the Court by Burke, J.

In The Mutual Life Insurance of New York, a corporation, Pltf. and Respt., vs. North Dakota Workmen's Compensation Bureau, Defts. and Applts.

That the relationship of employer and employee must exist in order to make the provisions of the Workmen's Compensation Act, (Article 11a of Chapter 5 of the Political Code, being sections 396a1-396a33, 1925 Supplement to the 1913 Compiled Laws (chapter 162, Session Laws 1919) and acts amendatory thereof) applicable.

That whether the relationship of employer and employee exists so as to make the provisions of the Workmen's Compensation Act applicable, must be determined as in other cases.

That the test in determining whether the relationship of employer and employee exists, is, who has the right of control of the details of the work. If the person for whom the work is being done has the right of control, whether he exercises it or not, and is concerned not only with the result but also with the manner and method of its doing, he is an employer, and the person doing the work his employee; if he is concerned merely with the result of the work and has no control over the details of its doing, the person doing the work is an independent contractor.

That the complaint in the instant case is examined, and it is HELD, for reasons stated in the opinion, that under the facts alleged the relationship between the plaintiff and its agents was that of employer and independen contractors.

(Syllabus by the Court)

Appeal from the District Court of Burleigh County, Honorable Fred Jansonius, Judge. Action to recover money paid under protest to the Workmen's Compensation Bureau. From an order overruling a demurrer to the plaintiff's complaint, the defendants appeal. AFFIRMED.

Opinion of the Court by Nuessle, J.

MEMORIAL SERVICE HELD FOR LATE JUDGE PARSONS

In Wahpeton, N. D., recently memorial services were held at the close of district court for the late Judge A. L. Parsons, a member of the Richland county Bar and former judge of probate for the county. Joseph G. Forbes was chairman for the occasion. Appearing on the program as speakers were: Clifford Schneller, Patrick T. Milloy, Mrs. Vernon Johnson, Max Lauder, Judge W. H. Hutchinson and A. G. Divet, former Wahpeton attorney and now of Fargo. There were also musical numbers.

SPECIAL MESSAGE FOR SOLDIER LAWYERS

Through the courtesy of West Publishing Company, St. Paul, Minnesota, arrangements have been made to forward to each member of the Bar Association of North Dakota serving in the military or naval forces of the United States current advance sheets of the Northwestern Reporter and the Supreme Court Reporter which will contain the current cases of both State and United States Supreme Courts.

This will enable lawyers who are in the service to keep up on developments in the law. Any lawyer now in the service may obtain these advance sheets without cost by forwarding to the Secretary his name and military address. Lawyers who know of members of the Bar who have already left for service and who may not receive notice of this announcement would do them a real favor by either forwarding this announcement to them or sending in their names and addresses to the Secretary.

LAW SCHOOL NOTES

The School of Law of the University of North Dakota completed its forty-second year on June 10, 1941. The graduates of the University of North Dakota School of Law of 1941 are: Arley R. Bjella of Epping; Lysle C. Boostrom of Lakota; John M. Cashel of Grafton; Halvor L. Halvorson, Jr., of Minot; Emil H. Johnejack of Lake Geneva, Wisconsin; Cyrus N. Lyche of Grand Forks; Thomas D. McCarty of Forest River; Ralph N. Molbert of Tappen; Roy A. Neste of Park River; Wilmer D. Newton of Sheldon; Hugo H. Pyes of Grand Forks; Raymond R. Rund of Goodrich; Paul M. Sand of Balta; George E. Sorlie of Buxton and Darrell G. Topp of Grace City.

The three law students having the highest law school average of the class of 1941 were elected to The Order of the Coif. Those honored were: Cyrus N. Lyche, Ralph N. Molbert and Wilmer D. Newton. J. J. Kehoe, Esq., of Cando, N. D., was elected to honorary membership in The Order of the Coif. Raymond R. Rund was given the Phi Delta Phi Achievement Award for the year 1941.

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THE ANNUAL MEETING

The time for the annual meeting of the Bar Association is approaching. The date has been set for September 18th and 19th. The meeting will be held at Bismarck, N. D. The program has not all been arranged but a legal clinic or legal institute will be the major attraction. This will be conducted on the plan used last year. Neither the subjects or the number have been definitely determined at this time but will be in the near future and a program will be set out in full in the August number of Bar Briefs; and be assured the subjects will be of interest to all of us. Plan now to attend.

This is your Association. You are members by virtue of your membership in the profession. If you want things done you must be on hand to help do them. It is very important that the younger members of the Bar decide to become active in the Association in the early years of their professional life. The Association needs their new ideas, their high ideals and their enthusiasm and energy. They need the Association and the contact that it gives them with the older members of the Bar. I am especially anxious to see a large attendance from among the younger men. Now is the time to plan to attend. The institute will be of real service, to both young and old attorneys.

Professional work has not been lucrative. Many factors have entered into and produced this condition. Some of the factors are within our control. Let us get

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together and talk things over. Some of you may think that you cannot afford to come. You cannot afford to stay away. You need the inspiration which this meeting will give. You will go back to your work better equipped to carry on your practice. Let us see you at Bismarck.—Your Secretary.

LAW LISTS

This term has been used to not only cover law lists for the forwarding of commercial claims through the lists and directly by clients; but to include law directories who claim to have contacts by virtue of which other legal business is either forwarded by them or on their recommendation.

So rapidly have such law lists grown in the last twenty years that membership in those that claim to be representative would completely wreck the yearly income of the average country lawyer.

Therefore, it has become a real problem for an attorney to determine which and what lists to subscribe to. Out of the myriad he could not determine with any degree of accuracy; and has been just as liable to fall for the wiles of a pursuasive solicitor as he was to select a good one by a pure guess.

To assist in solving this problem—the expense of which was far beyond the means of many state bar organizations—the American Bar Association some years ago appointed a special committee to investigate the situation and make a report and recommendations to them.

After several reports and recommendations and discussions at the annual meetings of the American Bar Association, such body decided to take the responsibility of recommending selected lists to its members which could be altered and added to on the recommendation of the committee each year.

Some years ago the plan was instituted and has been carried on with good results and while it has been of immeasurable benefit to the profession at large it still does not solve part of the problem for interested attorneys.

The American Bar Association approved list approves only the "bona fides" of the list, their honesty and fair charge for listing; and functions according to certain minimum requirements and does not tell the attorney whether they "deliver the goods" or in other words, whether the list brings business to the attorney that is desirable and remunerative.

Many attorneys have assumed because a certain list is on the approved list of the American Bar Association that it must be a good business getter. But this is a mistake for the reason given above.

However, there is a publication in the field which can aid largely in the solution of this problem: which not only classifies the approved selected lists and legal directories but also the ap-